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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES FREDERICK LEE,

Defendant and Appellant.

B225444

(Los Angeles County
Super. Ct. No. TA105907)

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur M. Lew, Judge. Affirmed.

John P. Dwyer, under appointment by the Court of Appeal, and Jin H. Kim for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Eric E. Reynolds and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Charles Frederick Lee appeals from the judgment entered following a jury trial in which he was convicted of first degree murder and willful, deliberate, premeditated attempted murder, with personal gun use and gang findings. Defendant seeks reversal of the attempted murder conviction on the grounds that it is not supported by sufficient evidence of intent to kill and his attorney rendered ineffective assistance by failing to object to portions of the prosecutor's argument reflecting upon an intent to kill. We affirm.

BACKGROUND

In the late afternoon or early evening of December 28, 2007, Robert Pugh visited his father, who lived in Compton within territory claimed by the Tragniew Park Crips gang, to which defendant belonged. Pugh was an "O.G." (original gangster) of a different Compton gang, the Nutty Block Crips gang. Pugh testified he had been an active member of that gang from 1972 through 1992, and that he was known throughout Compton as a member of the Nutty Block Crips gang. The Tragniew Park and Nutty Block Crips gangs were enemies, and Pugh had "gang banged against Tragniew Park Crips" in the past. Pugh had numerous gang tattoos, but the only ones that were not covered by the clothes he was wearing that day were a "CC" on his left hand between the thumb and index finger and "NBC 165" on the knuckles of one of his hands. A sheriff's deputy who attempted to interview Pugh a few hours later testified that Pugh's attire and tattoos gave him the appearance of an "O.G."

About 5:40 p.m., Pugh and his brother, Timothy Crawford, who had no gang ties and no tattoos, decided to drive to a local liquor store in Pugh's 1987 blue Caprice to buy beer. The liquor store was located at the southwest corner of Alondra Boulevard and McKinley Avenue, on the border of Carson and Compton, in territory claimed by the Lantana Block Crips gang, a close ally of the Tragniew Park Crips gang. Pugh backed into a space in the liquor store parking lot, facing the store entrance, and he and Crawford went inside the store. Pugh noticed defendant standing near the potato chips and another young man standing near some magazines, but he did not think they were gang members.

Each was about eight feet from Pugh. Pugh did not think he had ever seen defendant before. Pugh did not say anything to them or make eye contact with them, nor did he have any confrontation with anyone, inside or outside of the store. Neither defendant nor the other young man said anything to Pugh or Crawford. Pugh and Crawford selected their beer, and Pugh stood in line at the counter to pay for all of the beer. Pugh flirted with three women who were ahead of him in line, then after paying, he and Crawford got back in Pugh's car, Pugh in the driver's seat and Crawford in the front passenger's seat.

Pugh started the car, raised the volume of his car stereo, turned left from the lot onto McKinley, drove up to the stop sign at Alondra, and waited for a break in traffic on Alondra so he could make a right turn. Crawford nudged Pugh and said, "'They fixin to blast.'" Pugh looked over his right shoulder and out through the window of the passenger-side rear door. He saw defendant standing behind his car, about two to five feet from the car, on the grass that lay between the sidewalk and the street. Pugh could see there was another person behind defendant. Defendant was pointing a gun at the car window, then fired it. Pugh testified that as soon as he saw "flames" coming from the gun, he ducked or bent forward, pressed the accelerator, and turned right onto Alondra, without regard to oncoming traffic. On the night of the shooting, Pugh told Detective Ty Labbe that "after that, like the fourth shot," he "took off." Pugh testified he heard seven or eight shots fired in rapid succession. Defendant drove back to his father's house, where someone called 911.

Crawford had been struck by six bullets and died from his injuries. He had two entrance wounds on the right side of his upper back, one of them at the shoulder, one on the right side of his lower back, another one on his left forearm, and two on his right side, one at hip level and one at the abdominal level. The trajectories of all these wounds except the arm wound were right to left and back to front. The trajectory of the bullet that struck Crawford's arm was from thumb to pinky. The deputy medical examiner who performed the autopsy recovered five projectiles from Crawford's body.

Sheriff's personnel recovered eight expended nine-millimeter casings, all of which had been ejected from the same gun, and one live nine-millimeter cartridge. Four of the projectiles recovered during the autopsy had been fired from a single gun, but no conclusive determination could be made regarding the fifth recovered projectile. Examination of Pugh's car revealed nine bullet trajectories entering through the rear passenger-side window and striking that door, the frame, and the front passenger seat. Five photographs depicting the bullet damage and bullet holes with rods placed through the holes to illustrate the bullet trajectories were admitted in evidence. Four bullet fragments were recovered inside the car.

Pugh was initially reluctant to cooperate with law enforcement, but after Detective Labbe told Pugh that Crawford had died, Pugh began cooperating. Several weeks after the shooting, Pugh selected defendant's photograph in a photographic array, and he identified defendant at trial. At the time of trial Pugh was serving a prison term of 40 years to life for a robbery committed two months after Crawford's death. Pugh acknowledged that his testimony and cooperation with the police made him a "snitch" and placed him in serious danger, but he did not care about the consequences because Crawford was his younger brother.

Javier Ballesteros, Sr., and Javier Ballesteros, Jr., visited the liquor store at about the same time as Pugh and Crawford. Javier, Sr. testified that as his son was about to turn onto McKinley to leave the liquor store parking lot, four gunshots came from the corner where the blue Caprice was stopped. Javier, Sr. saw two people standing at the corner. Javier, Sr. testified both that he saw someone shooting and that he did not see anyone shooting. The blue Caprice turned right on Alondra and drove away fast. The day after the shooting, Javier, Sr. told Sergeant Martin Rodriguez that he saw one of the two men at the corner shoot at the car, and as the car drove east on Alondra, the gunman fired three more shots at it. At trial, Javier, Sr. denied making this statement. Javier, Jr. initially testified he did not see the shooting. After being confronted with his statements to Sergeant Rodriguez the day after the shooting, Javier, Jr. admitted he saw two people

standing on the corner of McKinley and Alondra near the stop sign, and one of them fired a gun at a blue car. Javier, Jr. testified and had told the police that he thought the shooter was part of a group of four or five young men who arrived at the liquor store in a black Buick Regal or Chevrolet Monte Carlo about the same time Javier, Jr. and his father arrived. Several people got out of that car but only one went into the store. Javier, Jr. thought that group was waiting for the victims because when the victims emerged from the store, that group scattered.

Javier, Sr. selected defendant's photograph from a photographic array, saying that it was "close to the one that shot the gun," meaning the person in the photograph resembled the shooter. At trial, Javier, Sr. testified that defendant did not look like the shooter and was taller and darker skinned than the shooter. Javier, Jr. never identified anyone.

The prosecution's gang expert, Detective Eric Arias, opined that at the time of the charged offenses, Pugh remained an active member of the Nutty Block Crips gang. Arias further opined that defendant was a member of the Tragniew Park Crips gang, based in part upon defendant's admission of membership to other gang investigators and his numerous tattoos denoting that gang. In response to a hypothetical question based on the prosecution's evidence at trial, Arias opined that the shooting was committed for the benefit of and in association with the Tragniew Park Crips gang. He explained that the liquor store was located in territory claimed by the Lantana Block Crips gang and across the street from territory claimed by Lantana's close ally, the Tragniew Park Crips; a visit to the store by a member of the Nutty Blocks Crips gang would be deemed an act of disrespect to the Tragniew Park Crips; and the shooting would have elevated the Tragniew Park Crips gang's reputation for violence.

The jury convicted defendant of first degree murder and attempted murder. It found that the attempted murder was willful, deliberate, and premeditated, that defendant personally fired a gun, causing death or great bodily injury (§ 12022.53, subd. (d); undesignated statutory references are to the Penal Code), and the offenses were

committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. Defendant admitted allegations that he had suffered a prior serious or violent felony conviction within the scope of the “Three Strikes” law and had served three prior prison terms within the scope of section 667.5, subdivision (b). The court sentenced defendant to 132 years to life in prison.

DISCUSSION

1. Sufficiency of evidence

Defendant contends that the evidence was insufficient to establish the specific intent to kill necessary to support his attempted murder conviction. He argues that all of the shots were directed at Campbell, and no evidence established that defendant actually knew Pugh belonged to a rival gang.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) We presume the existence of every fact supporting the judgment that the jury could reasonably deduce from the evidence and make all reasonable inferences that support the judgment. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Catlin* (2001) 26 Cal.4th 81, 139.) Where substantial evidence supports the verdict, we must affirm, even though the evidence would also reasonably support acquittal. (*People v. Towler* (1982) 31 Cal.3d 105, 118.)

Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Because there is rarely direct evidence of such intent, it must usually be shown from the circumstances of the attempt. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945–946.) “‘The act of firing toward a victim at a close, but not point blank, range “in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill”’” (*People v. Smith*

(2005) 37 Cal.4th 733, 741.)

The shooting here was an unprovoked attack on Pugh and Crawford as they were about to leave the area. Crawford had no ties to any gang, but Pugh was a venerable, well-known member of the Nutty Block Crips gang who had a tattoo on his knuckles that identified him as a member of the Nutty Block Crips gang. According to one deputy, Pugh's attire and tattoos made him appear to be what he was: a Nutty Block Crips gang "O.G." Pugh's gang was an enemy of defendant's gang, and Pugh had shown disrespect to defendant's gang by going to a store located inside territory claimed by a gang closely allied to defendant's gang and across the street from territory claimed by defendant's gang. As shown by the expended casings and Pugh's testimony, defendant fired eight shots into Pugh's car. Deputy Falicon's undisputed analysis of the bullet trajectories, as shown by his testimony and the photographs depicting the bullet trajectories admitted at trial, supported a reasonable inference that defendant was standing near the rear, passenger-side door of Pugh's car when he started firing at both Pugh and Crawford, who were seated side by side in the front seat of the car. The deputy medical examiner's undisputed testimony provided further support for this inference, as at least five of the six shots that struck Crawford had a right to left trajectory. Pugh's testimony, his statement to Detective Labbe, and Javier Ballesteros Sr.'s statement to Sergeant Rodriguez supported a reasonable inference that Pugh began driving away after no more than four shots had been fired, meaning that defendant necessarily fired the remaining four shots at Pugh's car as he was driving away. Collectively, the strong evidence of defendant's gang-based motive to shoot Pugh and the physical and testimonial evidence regarding the circumstances of the shooting constituted substantial evidence upon which a reasonable jury could find beyond a reasonable doubt that defendant specifically intended to kill Pugh.

2. Ineffective assistance of counsel

Defendant's principal theory of defense was misidentification, but he also briefly argued that the attempted murder charge should be "thrown out" because whoever the

shooter may have been, Crawford was the sole target, not Pugh. Defendant contends that his trial attorney was ineffective for failing to object to the following portion of the prosecutor's closing argument responding to the defense argument: "It's a kill zone there. It's like shooting fish in a barrel. People are moving. The car is moving. [¶] If you recall, there's six bullets, six bullets that made it into the body of Timothy Crawford. And he moved as much as he could inside that car. [¶] And [Pugh] told you he sped away after the first few shots. But there's eight casings. There's eight casings. [¶] And Javier Ballesteros . . . Senior told police that as the car left, the gunman continued to fire. That in itself is attempted murder." Defendant contends the prosecutor misstated both Pugh's testimony and the law.

A claim that counsel was ineffective requires a showing, by a preponderance of the evidence, of objectively unreasonable performance by counsel and a reasonable probability that, but for counsel's errors, the defendant would have obtained a more favorable result. (*In re Jones* (1996) 13 Cal.4th 552, 561.) Defendant must overcome presumptions that counsel was effective and that the challenged action might be considered sound trial strategy. (*Ibid.*) In order to prevail on an ineffective assistance of counsel claim on appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. (*People v. Majors* (1998) 18 Cal.4th 385, 403.) Deciding whether to object to allegedly improper argument is inherently tactical, and the failure to object will seldom constitute defective performance. (*People v. Salcido* (2008) 44 Cal.4th 93, 172.)

Defendant's claim that the prosecutor mischaracterized Pugh's testimony is premised on an incomplete and erroneous view of Pugh's testimony. Although Pugh did not state, "I sped away after the first few shots," he testified that as soon as he saw defendant fire, he "ducked down low" or put his head down, stepped on the accelerator, and made the right turn. On cross-examination, in an apparent attempt to establish that Pugh did not get a good look at defendant's face, defense counsel elicited testimony from Pugh that he put his head down "[a]fter I saw who was shooting. Immediately when it

said pow, that's when I—his hand was up. He sent a blast. [¶] I looked. Boom.” Pugh agreed with counsel's assertions that Pugh immediately put his head down, stepped on the gas, and “basically hauled out of there, ducked down without seeing where” he was going. In addition, defense counsel asked Detective Labbe whether Pugh made the following statement: ““And after—after I seen this, I don't know. I felt the panic for a minute, I'm saying, fuck, we're both going to die. And after that, like the fourth shot, I just started—start going willy-nilly and I took off.”” Labbe agreed Pugh had said that. Thus, the prosecutor's statement in argument regarding Pugh's testimony was a fair characterization of the combination of Pugh's testimony and his statement to Labbe. A prosecutor may fairly comment on and argue any reasonable inferences from the evidence. (*People v. Dennis* (1998) 17 Cal.4th 468, 522 (*Dennis*).) Defense counsel's failure to make a futile or unmeritorious objection is not ineffective assistance (*People v. Price* (1991) 1 Cal.4th 324, 387), and the record fails to demonstrate affirmatively that counsel's omissions were not based upon a rational tactical basis, such as the reasonable assumption that such an objection would be overruled (*People v. Samayoa* (1997) 15 Cal.4th 795, 848). The prosecutor's minor inaccuracy in failing to distinguish between Pugh's testimony and his statement to the police cannot support defendant's ineffective assistance claim because he cannot show he was prejudiced. For example, if counsel had successfully objected, the prosecutor could simply have revised and clarified his argument by stating, “Pugh's testimony and statement to Labbe show that he sped away after the first few shots.” There is no reasonable probability defendant would have obtained a more favorable outcome had the prosecutor been forced to refine his argument.

Defendant's claim that the prosecutor misstated the law is based upon two statements: the reference to “a kill zone” and stating that continuing to fire at the car as it drove away “in itself is attempted murder.” We must consider how a reasonable juror would have understood the phrase in the context of the entire argument. (*Dennis, supra*, 17 Cal.4th at p. 522; *People v. Benson* (1990) 52 Cal.3d 754, 793.) A reasonable juror

would likely construe the prosecutor's reference to "a kill zone," especially when viewed in the context of his ensuing statements, as meaning that both Pugh and Crawford were at risk of being shot. This was a fair inference from the record and was not objectionable. Nor can defendant demonstrate a reasonable likelihood that he would have obtained a more favorable outcome if defense counsel had objected and the court had sustained his objection and admonished the jury to disregard the reference to "a kill zone." We must presume that the jury followed the trial court's instructions directing the jury to follow the law as stated by the court and to disregard any attorney's comment on the law that conflicted with the instructions. (CALCRIM No. 200; *People v. Williams* (2010) 49 Cal.4th 405, 469.)

Similarly, defendant cannot show that he was prejudiced by his attorney's failure to object to the prosecutor's argument that shooting at the car as it drove away "in itself is attempted murder." The court instructed the jury on the elements of attempted murder (CALCRIM No. 600), and we presume the jury followed the court's instructions, including the instruction to disregard any attorney's comment on the law that conflicted with the instructions.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.