Filed 2/28/17 P. v. Wright CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP JAMES WRIGHT, Defendant and Appellant.	B271742 (Los Angeles County Super. Ct. No. KA108455)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed as modified.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and John Yang, Deputy Attorney General, for Plaintiff and Respondent.

* * * * * *

Over several weeks in November 2014, Phillip James Wright (defendant) shot bullets at two different houses, into a public park, and during a confrontation with his girlfriend. On appeal from his convictions for the resulting crimes, he argues that the trial court erred in giving a "kill zone" instruction with respect to the attempted murder charges vis-à-vis the people he shot at in the park. Because we conclude that any instructional error was not prejudicial and because his other claims of error are without merit, we affirm his convictions but order a correction of his sentencing credits.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In November 2014, there was a rash of shootings in Pomona, California.

A little before 10:00 p.m. on November 2, someone unloaded a dozen bullets into a home on San Bernardino Avenue. Less than an hour later, someone shot at a home on Ashfield Avenue; several of the bullets passed through an occupied bedroom.

Six days later, a little before 8:00 p.m. on November 8, someone fired at least five shots at a group of parkgoers in the northeast quarter of Palomares Park from a car that sped by with its headlights off. Although there may have been 20 or 25 people in that quarter of the park, the hail of bullets was focused on a group of people in close proximity to one another. Five of the people in that group sustained injuries—namely, shrapnel lodged in one victim's spine, three others were shot in the leg, and the last was shot in the foot. A sixth person in the group was uninjured.

Just over two weeks later, a little after 8:00 p.m. on November 22, a man and a woman were arguing in a car parked

on Kingsley Avenue. The man repeatedly punched the woman in the face until she "saw stars"; he also screamed, "I fuckin' hate you, you fuckin' bitch." When a few bystanders tried to intervene, the man pulled out a gun, pointed it at the woman and then took aim at the bystanders and opened fire.

Defendant was subsequently tied to each of the four incidents. Two bystanders and the woman who was beaten positively identified defendant as the assailant, and the woman said he was her boyfriend. Defendant was also on parole during the month of November 2014, and as a condition of parole was required to wear a GPS-enabled bracelet. Data from his bracelet placed him in front of the San Bernardino Avenue and Ashfield Avenue addresses and in the northeast quarter of Palomares Park at the exact date and time of each of the shootings. Defendant also admitted to being at the literacy lab of the Diamond Bar parole office a few days after the last incident; a nine-millimeter Ruger semiautomatic handgun was recovered later that day from a trash can in the lab's restroom. A ballistics expert test fired the gun, and positively identified it as the gun that fired the bullets in all four incidents. What is more, defendant's DNA was found on the trigger guard and magazine of that gun.

II. Procedural Background

In the operative third amended information, the People charged defendant with 16 counts arising out of the four incidents. For each shooting incident on November 2, the People charged defendant with shooting at an inhabited dwelling (Pen. Code, § 246).[1] For the Palomares Park incident on November 8,

---

1 All further statutory references are to the Penal Code unless otherwise indicated.

the People charged six counts of attempted premeditated murder (§§ 187, subd. (a) & 664) and six counts of shooting from a motor vehicle (§ 26100, subd. (c))—one count of each crime for each person who was shot as well as the uninjured person in their group. For the beatings on November 22, the People charged infliction of corporal injury on a spouse, cohabitant or girlfriend (§ 273.5, subd. (a)) and assault with a semiautomatic firearm (§ 245, subd. (b)).[2] The People also alleged, as to the Palomares Park-related counts, that defendant intentionally discharged at firearm causing great bodily injury to the five injured victims (§ 12022.53, subd. (d)) and that he intentionally discharged a firearm as to the sixth victim (§ 12022.53, subd. (c)). The People further alleged, as to the assault with a firearm count, that defendant personally used a firearm (§ 12022.5). The People additionally alleged three of defendant's prior convictions as prior prison terms (§ 667.5, subd. (b)).

The matter proceeded to trial. A jury convicted defendant of all counts, and found all enhancements true.

The trial court sentenced defendant to six consecutive life terms plus 158 years, 4 months to life. For each of the five attempted premeditated murder counts where the victim was injured, the court imposed a sentence of life with the possibility of parole plus 25 years to life for the firearm enhancement. For the remaining attempted murder count where the victim was uninjured, the court imposed a sentence of life with the possibility of parole plus 20 years for the firearm enhancement. The court ran all six sentences consecutively. For the assault

---

2 The People also initially charged one count of shooting at an inhabited dwelling (§ 246) for defendant's conduct in shooting at a bystander's home, but dismissed that count midtrial.

with a firearm count, the court imposed a consecutive 10-year sentence, comprised of a six-year base term plus four years for the firearm enhancement. For each of the two counts of shooting at an inhabited dwelling, the court imposed consecutive 20-month sentences (corresponding to one third of the midterm 60-month sentence). Pursuant to section 654, the court stayed the sentences for the six counts of shooting from a motor vehicle that corresponded to each of the attempted murder counts; it also stayed the infliction of corporal injury count that corresponded to the assault with a firearm count. The court dismissed the three prison prior enhancements.

Defendant filed this timely appeal.

DISCUSSION

I. Instructional Issues

Defendant argues that the trial court (1) incorrectly gave the jury a kill zone instruction for the attempted murder counts, and (2) improperly modified one phrase of CALJIC No. 17.41, the instruction encouraging jurors not to stake out initial positions too strongly when deliberating. We independently review jury instructions for error. (*People v. Johnson* (2016) 6 Cal.App.5th 505, 509-510.)

A. Kill zone instruction

Defendant levels two challenges at the kill zone jury instruction read to the jury. First, he suggests that the instruction should not have been given in the first place because it is inapplicable to the facts of this case. Second, he contends that the written kill zone instruction provided to the jury contains several mistakes.

1. Propriety of kill zone instruction

A person is guilty of attempted murder only if he (1) commits "'a direct but ineffectual act toward accomplishing [an] intended killing,'" and (2) does so with "'the specific intent to kill.'" (*People v. Stone* (2009) 46 Cal.4th 131, 136 (*Stone*), quoting *People v. Superior Court* (*Decker*) (2007) 41 Cal.4th 1, 7.) The would-be killer can harbor an intent to kill whether or not he intends to kill a specific target; "[a]n indiscriminate would-be killer," our Supreme Court has held, "is just as culpable as one who targets a specific person." (*Stone*, at p. 140 ["a person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind"]; *People v. Perez* (2010) 50 Cal.4th 222, 230 (*Perez*).)

However, where a would-be killer *does* intend to kill a specific target but shoots—and, critically, does not kill—someone else, he is generally not guilty of the attempted murder of the non-targeted person because the intent to kill is not "transferrable" when it comes to the crime of attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 331 (*Bland*) ["the doctrine of transferred intent does not apply to [the crime of] attempted murder"]; cf. *People v. Souza* (2012) 54 Cal.4th 90, 120 [doctrine applies to the crime of murder].) In *Bland*, however, our Supreme Court recognized that this principle does not always preclude a conviction for the attempted murder of non-targeted persons. Recognizing that "a primary intent to kill a specific target does not rule out a concurrent intent to kill others" (*Bland*, at p. 331, fn. 6), *Bland* and its progeny have held that a person who intends to kill a specific target and does so by employing means calculated to kill "'everyone in that [target's] vicinity'"—that is, in a so-called kill zone—may be found guilty of the

attempted murder of everyone in that vicinity, even though those people were not the defendant's specific target. (*Bland*, at p. 329; *Stone*, *supra*, 46 Cal.4th at pp. 137-138; *Perez*, *supra*, 50 Cal.4th at p. 232 [defendant fired single shot at eight people; no kill zone instruction warranted].)

Because the kill zone theory is based on a *concurrent* intent to kill rather than a *transferred* intent to kill, it is consistent with the general principle requiring the People to prove a defendant's intent to kill his victim(s). Consequently, the kill zone theory "is simply a reasonable inference the jury may draw in a given case." (*Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6.) For this reason, a kill zone jury instruction is optional. (*Stone*, *supra*, 46 Cal.4th at p. 138 ["a special instruction on the point is not required"]; *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1243 (*Falaniko*) [same].) In this respect, it is akin to a pinpoint instruction, albeit one for the prosecution, because it does no more than "'relate[] particular facts to a legal issue in the case . . . .'" (*People v. Ward* (2005) 36 Cal.4th 186, 214-215.) And like a pinpoint instruction, it is appropriate to give "only if it is supported by substantial evidence." (*Ibid.*; *People v. Williams* (2016) 1 Cal.5th 1166, 1193; *Falaniko*, at p. 1244 [error to give kill zone instruction when substantial evidence does not support it].)

This brings us to the instructional question presented here: Is it appropriate to give a kill zone instruction when there is not substantial evidence that the defendant was trying to kill a specific target within the group? In other words, a kill zone instruction may be appropriate when a defendant tries to kill A by shooting at A and everyone standing in A's vicinity (B, C, D and E) with enough bullets to kill them all. But is such an instruction appropriate where there is no specifically targeted A,

and when the defendant instead just opens fire on A, B, C, D and E who are in the same vicinity with enough bullets to kill them all?

So far, the Courts of Appeal have split on this question. In *Falaniko*, *supra*, 1 Cal.App.5th at pages 1234, 1242-1245, the Court of Appeal upheld convictions based upon a kill zone theory as to a defendant who opened fire upon a group of parkgoers without intending to kill a specific person within that group. In so doing, it suggested that a kill zone instruction may be appropriate even without a specific target. The Court of Appeal in *People v. McCloud* (2012) 211 Cal.App.4th 788, 801-802 (*McCloud*) came to precisely the opposite conclusion, holding that a kill zone instruction is appropriate "only if the defendant chooses, as a means of killing the primary target, to kill everyone in the area in which the primary target is located; with no primary target, there can be no area in which the primary target is located and hence no kill zone."

We need not take a position on this question because any error in giving a kill zone instruction was not prejudicial.[3] Because a kill zone instruction is an optional *supplement* to the general principles of law describing the intent to kill required for

---

3 Although our Supreme Court has noted a potential for inadequacy-of-notice problems if the People charge that a defendant intended to shoot a particular victim in the charging document but the evidence later shows that the defendant did not have a specific person in mind (*Stone*, *supra*, 46 Cal.4th at pp. 141-142), defendant did not press that issue in this appeal, and we see no such violation here because the operative information in this case only alleged the names of the persons shot or shot at, but did not allege a kill zone theory with a specific target among the named victims.

attempted murder rather than a displacement of those principles, we ask whether it is reasonably probable that the jury, absent the erroneously given kill zone instruction, would have still convicted defendant of each attempted murder. (*Falaniko*, *supra*, 1 Cal.App.5th at p. 1245, citing *People v. Watson* (1956) 46 Cal.2d 818, 836-837; see also *McCloud*, *supra*, 211 Cal.App.4th at p. 803; *People v. Cardona* (2016) 246 Cal.App.4th 608, 615, rev. granted July 27, 2016, S234660.) Citing *Falaniko*, defendant argues that we must reverse unless the error was harmless beyond a reasonable doubt pursuant to *Chapman v. California* (1967) 386 U.S. 18, 24. We disagree. *Falaniko* involved two distinct instructional errors—namely, the erroneous giving of a "kill zone" instruction and a misstatement of the law (through the use of the phrase "and/or") that made it possible for the jury to convict the defendant of the attempted murder of certain victims without a predicate finding of an intent to kill those victims. (*Falaniko*, at pp. 1245-1246.) *Falaniko* applied *Watson* review to the first error and *Chapman* review to the second. (*Ibid.*) Because this case only involves the first type of error, *Falaniko* points us to the same conclusion as the other cases to consider the issue—namely, that we apply *Watson*'s test for assessing prejudice.

We conclude that a different result was not reasonably probable in this case. To begin, the jury was instructed to disregard any instructions that did not, on their own terms, apply to the facts as the jury found them. Because the kill zone instruction was premised on a finding that defendant had one or more "primary targets," the jury may well have disregarded the kill zone instruction given the absence of any evidence of such targets. (Accord, *People v. Von Villas* (1992) 11 Cal.App.4th 175, 238 [instruction telling jury to disregard inapplicable instructions

counsels against a finding of prejudice].) Further, the prosecutor did not strongly *argue* the kill zone theory to the jury; he mentioned the theory by name, but explained that "what [it] simply requires is that the way [the defendant] shot, [he] intended to kill all in that area" and went on to argue that "the fact that [defendant] shot at that group that many times . . . demonstrate[s] [an] intent to kill individuals in that group." The gist of his argument was that defendant's acts in shooting at the six victims demonstrated an intent to kill them; this argument is valid with or without a kill zone instruction.

More to the point, it is not reasonably probable that the kill zone instruction had any effect on the jury's finding that defendant acted with the intent to kill each of the six persons in Palomares Park. This is certainly true as to the five people defendant actually hit with bullets because "'"[t]he 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.' [Citation.]"'" (*Perez*, *supra*, 50 Cal.4th at p. 230.) Although defendant argues that he did not intend to inflict mortal wounds on them because he ended up hitting four of the five in the leg or foot, the witnesses testified that bullets whizzed overhead as well; the fact that defendant was not a good shot from a speeding car does not establish a "'"less culpable state of mind."'" (*People v. Smith* (2005) 37 Cal.4th 733, 741.) The kill zone instruction was also harmless as to the sixth uninjured victim for the same reasons: Defendant was targeting several people, the sixth victim was alongside the victims who *were* hit, defendant's bad aim does not negate his intent, and the prosecutor argued that he had established an intent to kill even apart from the kill zone

instruction. Defendant argues there was weak evidence that defendant intended to kill any of the people at Palomares Park because he had no motive to shoot them; however, "[m]otive is not an element of a crime" (*People v. Thompson* (2016) 1 Cal.5th 1043, 1123) and its absence does not undermine the otherwise compelling evidence of defendant's intent to kill.

2. Mistakes in written kill zone instruction

The trial court provided the jury with the following written kill zone instruction:

"A person who primarily intends to kill one person, or persons, known as the primary targets, may—at the same time—attempt to kill all people persons [*sic*]—in the immediate vicinity of the primary targets. This area is known as the 'kill zone.' A kill zone is created when a perpetrator specifically intending to kill the primary target by lethal means also attempts to kill *anyone everyone* [*sic*] in the immediate vicinity of the primary targets. If the perpetrator has this specific intent, and employs the means sufficient to kill the primary targets and all others in the kill zone, the perpetrator is guilty of the crimes of attempted murder of the other persons anyone [*sic*] in the kill zone.

"Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a *'kill zone' zone of risk* [*sic*] is an issue to be decided by you."

Defendant argues that the italicized portions of this instruction incorrectly describe the kill zone theory. Although, as noted above, we assume for purposes of our analysis that the trial court erred in instructing on this theory in the first place, we address defendant's specific claims that the instruction given was erroneous in the event those errors might have added to the prejudice from the giving of the instruction. They did not.

Defendant assigns two errors. First, he argues that the instruction is wrong because it permits a jury to rely on the kill zone theory when the defendant merely attempts to kill "anyone" in the kill zone rather than to kill "everyone" in the kill zone. This was not error. The trial court used the word "everyone" when it instructed the jury orally, and although appellate courts follow the general rule that written instructions trump oral, the *jury* was not informed of that rule. (*People v. Wilson* (2008) 44 Cal.4th 758, 804.) More importantly, our Supreme Court has held that the use of the world "anyone" instead of "everyone" in a kill zone instruction, while not preferable, is not error because "a jury hearing about the intent to kill *anyone* within the kill zone would probably interpret it as meaning the intent to kill . . . *everyone* in the kill zone." (*Stone*, *supra*, 46 Cal.4th at p. 138, fn. 3.) Second, defendant contends that the instruction erroneously uses the phrase "'kill zone' zone of risk." Defendant argues that this implies that the People need only prove that he put the persons in the kill zone *at risk*, instead of at risk *of death*. We disagree. In evaluating instructional errors, we do not "focus solely on [a] single word" and instead examine a claimed error "'"in the context of the instructions as a whole."' [Citation.]" (*People v. Landry* (2016) 2 Cal.5th 52, 95 (*Landry*).) We ask whether "'"there is a reasonable likelihood that the jury was misled."' [Citation.]" (*Ibid.*) Because the written instruction elsewhere required the jury to find that the defendant "by lethal means . . . attempt[ed] to kill everyone in the immediate vicinity" of a "primary target," there is no reasonable likelihood that the jury read the instruction as defendant suggests because the instruction as a whole conveyed that the People had to prove that the persons in the kill zone were at risk of death.

B. Deliberation instruction

Defendant argues that the trial court improperly coerced a verdict, in violation of *People v. Gainer* (1977) 19 Cal.3d 835, when it instructed the jury: "It is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination *to hold out* for a certain verdict." The standard jury instruction is identical, except that it admonishes jurors not to "announce a determination *to stand* for a certain verdict." (CALJIC No. 17.41, italics added.) *Gainer* found fault with a jury instruction that informed jurors, after they had reached a deadlock, to "consider" whether their view was "a reasonable one" in light of the votes of other jurors to the contrary when those other jurors were "equally honest," "equally intelligent" and equally attentive. (*Gainer*, at pp. 841, 848-849.) The instruction, our Supreme Court ruled, was "manifestly incompatible with the requirement of independently achieved jury unanimity." (*Id.* at p. 849.) Unlike the instruction decried in *Gainer*, the instruction here did not coerce any juror to change his or her vote. Instead, it encouraged each juror—when *starting* deliberations—not to be too forceful in announcing his or her initial impression of the law and the evidence. In this fuller context, which must be our focus (*People v. Grimes* (2016) 1 Cal.5th 698, 729), there is no reasonable likelihood that the jury read this instruction as a directive to abandon their ultimate conclusion on the question of guilt because other jurors disagreed with them. (*Landry*, *supra*, 2 Cal.5th at p. 95.) The instruction was not erroneous.

II. Sufficiency of the Evidence

Defendant argues that there is insufficient evidence to support his conviction for shooting from a motor vehicle against

Pernell Bates (count 17) because that crime does not apply to victims who are "occupant[s] of a motor vehicle" (§ 26100, subd. (c)), and there was evidence that Bates was sitting in the back of his truck when defendant opened fire. We disagree.

To be sure, a defendant is only guilty of shooting from a motor vehicle if he (1) "willfully and maliciously discharges a firearm" (2) "from a motor vehicle" (3) "at another person *other than an occupant of a motor vehicle*." (§ 26100, subd. (c), italics added; see also *People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1500 [listing elements of predecessor statute to section 26100, subdivision (c)].) And Bates did testify that he "was sitting in the back of [his] truck." However, Bates *also* testified that he was "standing near" two of the other victims "at the time the shots went off." And, in reviewing a conviction for substantial evidence, we must "'resolve[] [all] conflicting inferences'" in favor of the verdict and ask only whether there is "'"'substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" [Citation.]" (*People v. Casares* (2016) 62 Cal.4th 808, 823.) Defendant argues that we must disregard Bates's testimony that he was "standing near" two of the other victims because that language was supplied by the prosecutor during questioning. Although "[c]ounsel's questions themselves are not evidence, . . . [a] question's wording typically is relevant to a reasonable interpretation of the witness's answer." (*People v. Margarejo* (2008) 162 Cal.App.4th 102, 107.) Because Bates responded to the prosecutor's question "Who were you standing near at the time the shots went off?" with the names of two other victims, Bates's answer is reasonably interpreted as affirming that he was

standing near those victims. There was a conflict in the evidence, and we must defer to the jury's resolution of that conflict.

III. Sentencing

Defendant lastly contends that the trial court erred by not awarding him any good conduct credits. A defendant with a prior serious felony accrues good conduct time credits equal to 15 percent of his actual days in custody. (§§ 2900.5, 2933.1 & 4019.) It is undisputed that defendant had 515 days of actual custody credit on the day he was sentenced; this entitles him to 78 days of good conduct credit.

DISPOSITION

The abstract of judgment is ordered amended to reflect that defendant has 593 days of custody credit, comprised of 515 days of actual credit plus 78 days of good conduct credit. The clerk of the Superior Court is ordered to forward the amended abstract of judgment to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ