Filed 5/16/12 P. v. Portis CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DERRICK ANTOINE PORTIS, JR., Defendant and Appellant.	2d Crim. No. B233197 (Super. Ct. No. 1324744) (Santa Barbara County)

Derrick Antoine Portis, Jr. appeals his conviction by jury for willful, deliberate and premeditated attempted murder of a rival gang member (Pen. Code, §§ 644/187, subd. (a))[1] with special findings that he intentionally and personally discharged a firearm causing great bodily injury (§§ 12022.7, subd. (a); 12022.5, subd. (a)(1); 12022.53, subds. (d) & (e)(1)), and shot the victim for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)). The trial court sentenced appellant to 40 years to life. We affirm.

Facts and Procedural History

On the evening of November 20, 2008, Miguel "Blackie" Hernandez, Frankie Lopez, and Alexis Barcelona left a party at the Arbor Square apartments in

[1] All statutory references are to the Penal Code unless otherwise stated.

Lompoc. As Hernandez walked to the sister's car, appellant and two black men came out of the apartment alley (PA Alley) near the corner of G Street and East Oak Street.

Appellant and his companions wore black hoodies and had bandanas over their faces. Appellant was wearing a gray plaid shirt. Frankie feared that something was going to happen and shouted, "Blackie, watch out."

Hernandez belonged to the VLP gang. The men yelled "soo whooop," signifying that they were the 6 Deuce Brims (Bloods), a rival gang. Hernandez yelled back, "fuck Bloods, fuck soo whoop. VLP, Westside VLP Locs, you fucking niggers."

Hernandez was unarmed but was ready to fight. Frankie's mom yelled out, "No, Blackie stop." Appellant was 20 feet away from Hernandez. He cocked a chrome revolver. Hernandez said, "If you pull it out, you better pull the trigger" and turned to see if anyone was behind him. Appellant's companion said, "Shoot 'em, nigga."

Appellant raised the revolver and shot Hernandez in the lower back. The bullet shattered Hernandez's kidney and spleen and damaged his liver, pancreas, and lung. Appellant and his two companions fled. Witnesses saw a man run toward the church and two black men run toward PA alley.[2]

On November 22, 2008, the church caretaker found a chrome .357 Ruger revolver in a fenced garden area. Police officers recovered the revolver and found a black sweatshirt and flannel shirt in a bush.[3] The .357 Ruger revolver had one expended shell and five hollow point bullets. Appellant's fingerprint was on the gun

---

[2]Genearo Navarro, who lived in the apartments, saw three black men walk out of the alley, pull up their hoodies and approach Hernandez. Words were exchanged, a shot fired, and Navarro saw two run "down the alley and one went up North" towards the church parking lot.

[3] Three hours before the shooting, appellant and Bloods gang member Jevon Collins entered a mini market a block from the church parking lot. Appellant wore a gray and black shirt, similar to the Pendleton shirt found in the church garden.

barrel. DNA testing detected appellant's alleles on the sweatshirt but the test was inconclusive.

Hernandez looked at a series of photos and said, "That's the one fool, Derrick Portis." In March 2009, Hernandez told an officer that he "heard" that appellant was the gunman. After Hernandez dropped out of the VLP gang, he told the police that appellant was the shooter.

Lompoc Police Detective Sergio Arias testified that appellant went by the moniker "Banless" and was an active member of the Bloods gang. The VLP and Bloods were engaged in a heated rivalry that included shootings, stabbings and beatings. Each gang had an "on sight" rule to confront or assault rival gang members. Detective Arias opined that Hernandez was shot to promote the Bloods gang and the shooting was for the benefit of and in association with appellant's gang.

Appellant had prior gang encounters with Hernandez. A few months before the shooting, appellant and Hernandez exchanged gang insults and appellant raised a skateboard in a threatening manner. Earlier that summer, the VLP and Bloods fought one another. During the fight, Hernandez hit appellant with a stick. On another occasion, the VLP and Bloods fought in an alley. Appellant and Hernandez were present but did not fight each other. In a letter to an older gang member, appellant stated that he would keep "gang banging" and put pressure on the Hispanic gangs.

Specific Intent to Kill

Appellant argues that the evidence does not establish specific intent to kill which is a requisite element of attempted murder. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) On a claim of insufficiency evidence, we presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*Id.*, at pp. 738-739.) "[I]t is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant's acts and the circumstances of the crime. [Citation.]" (*Id.*, at p. 741.)

This is such a case. It is uncontroverted that appellant armed himself with a .357 Ruger, confronted Hernandez, and shot Hernandez who was unarmed. The .357 Ruger was loaded with hollow-point bullets to maximize the injury. (See e.g., *People v. Mayfield* (1997) 14 Cal.4th 668, 769 [intent to kill inferred based on gunshot to victim victim's thigh].)

Citing *People v. Ratliff* (1986) 41 Cal.3d 675 (*Ratliff*), appellant argues that intent to shoot and injure someone is not the same as pre-existing intent to kill. In *Ratliff*, the trial court failed to instruct that attempted murder required specific intent to kill. (*Id*., at p. 695.) Our Supreme Court concluded that the instructional error was prejudicial because the evidence was unclear whether Ratcliff intended to kill the victims or only wound them during the robbery. (*Ibid.*) Ratliff was an instruction error case, not a substantial evidence case. (See *People v. Avila* (2009) 46 Cal.4th 680, 702, fn. 7; *People v. Arias* (1996) 13 Cal.4th 92, 129-130, fn. 10.)

Unlike *Ratliff, the* jury was instructed on intent to kill (CALCRIM 600) and the evidence clearly showed that appellant harbored the specific intent to kill. (See *People v. Brady* (2010) 50 Cal.4th 547, 555 [distinguishing *Ratliff*; mental state clearly established by the evidence; *People v. Avila, supra,* 46 Cal.4th at p. 702, fn. 2 [same].) Before the shooting, appellant armed himself with a .357 revolver, donned a bandana mask and black hoodie, and confronted Hernandez. "Firing a gun toward a victim at a close range in a manner that could have inflicted a mortal wound had the bullet been on target supports an inference of intent to kill. [Citation.]" (*People v. Ramos* (2011) 193 Cal.App.4th 43, 48.)

Appellant asserts there was no intent to kill because Hernandez was shot in the lower back rather than a more vulnerable part of the body. It was a heated confrontation between rival gang members.

The same argument was rejected by the jury. The jury not only convicted appellant of attempted murder but found that appellant acted with deliberation and premeditation. "[A]ttempted murder requires intent to kill [citation] but does not require premeditation." (*People v. Parks* (2004) 118 Cal.App.4th 1, 4, fn.

3.) The deliberation and premeditation findings undermine the argument that appellant did not harbor the specific intent to kill. (See *People v. Collie* (1981) 30 Cal.3d 43, 62 [deliberation and premeditation "entail a specific intent to kill"].) A verdict deliberate and premeditated attempted "murder *requires more than a showing of intent to kill*. [Citation.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080, emphasis added.)

Appellant claims that he acted with implied malice but implied malice "'cannot coexist with a specific intent to kill.'" (*People v. Visciotti* (1992) 2 Cal.4th 1, 58.) Nor is intent to kill measured by the accuracy of the shot, the time of day, or how many shots were fired. (See e.g., *People v. Ramos, supra,* 193 Cal.App.4th at pp. 47-48.) "The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945.)

Pre-Shooting Statement

Over defense objection, Alejandro Moreno testified that he heard and saw three black men in PA alley before the shooting . One of them kept saying, "You're a pussy, fool, you won't do it. "

Moreno went inside and heard a gunshot. "[N]ot even 30 seconds later I saw two guys running[,] coming from the PA [Alley] where I heard the shot." The men wore black hooded sweatshirts and dark clothes, the same clothing the men in the alley were wearing.

Appellant moved to strike Moreno's testimony because it was hearsay and the identity of the male speaker was unknown.[4] The trial court overruled the

---

[4] Appellant argued: "The district attorney I think wants to offer this as some pre-offense statement of intent that one or more of these men were talking about 'do it, you're a pussy if you don't,' suggesting it means shooting somebody. [¶] So my argument is, one, that the speaker has not been identified; two, that the conversation is entirely speculative that this conversation had anything to do with the shooting or that these men were involved in the shooting. [¶] . . . [¶] [W]hatever probative value is

objection because it was circumstantial evidence of motive and pre-existing intent. "[A] lot of it . . . go[es] to the weight of the evidence in terms of whether or not these are the three men and everything else."

Appellant asserts that the alley statement was hearsay but it was not offered for the truth of the matter stated, i.e., that appellant was a "pussy" or lacked the courage "to do it." (Evid. Code, § 1200, subd. (a); see e.g., *People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.) The alley statement was offered to show that certain information was imparted to the hearer (i.e., appellant] and "the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement.' [Citation.]" (*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907; see also *People v. Duran* (1976) 16 Cal.3d 282, 295.)

The alley statement was relevant to show deliberation, pre-existing intent, intent to kill, and motive to shoot a gang rival. Appellant was "egged-on" and taunted by his companions "to do it" for the Bloods gang. When appellant confronted Hernandez and drew the revolver, appellant's companion said "Shoot 'em, Nigga."

Appellant asserts that it is unknown whether the men in the alley had anything to do with the shooting. Appellant, in essence, asks us to reweigh the evidence and substitute our evaluation of the evidence for the jury's. That we cannot do. (*People v. Bolin* (1998) 18 Cal.4th 297, 331-333.) "The [pre-shooting alley] statements were made under circumstances indicating their trustworthiness. While obviously prejudicial to appellant (in the sense contemplated by [Evidence Code] section 352), this evidence was also highly probative . . . . On the balance, we cannot say the trial court abused its discretion in allowing these statements into evidence." (*People v. Ortiz, supra,* 38 Cal.App.4th at p. 394; see e.g., *People v. Fudge* (1994) 7

---

far outweighed by the prejudice that the jury infers my client was the speaker of these words and is therefore planning to shoot somebody based on this snippet of conversation prior to the shooting."

Cal.4th 1075, 1102-1103 [application of ordinary rules of evidence to admit or exclude evidence does not infringe on defendant's due process right to fair trial].)[5]

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

[5] Appellant offered to draft a limiting instruction, changed his mind, and elected not to submit an instruction. The trial court had no sua sponte duty to give a limiting instruction (see *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051) but did instruct that certain evidence was admitted for a limited purpose and could be considered for that purpose only. (CALCRIM 303 [limited purpose evidence in general]; CALCRIM 1403 [limited purpose of evidence of gang activity].)

Kay Kuns, Judge

Superior Court County of Santa Barbara

_____

Gilbert W. Lentz, under appointment by the Court of Appeal, fr Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Corey L. Robins, Deputy Attorney General, for Plaintiff and Respondent.