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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. HENRY DOMINGUEZ JUAREZ, Defendant and Appellant.	B234578 (Los Angeles County Super. Ct. No. VA112098)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dewey Falcone, Judge. Affirmed as modified.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

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

The jury found defendant and appellant Henry Dominguez Juarez guilty in count 1of second degree murder (Pen. Code, § 187, subd. (a)),[1] attempted willful, deliberate, and premeditated murder in counts 2-5 (§§ 664, 187, subd. (a)), and possession of a firearm by a felon in count 6 (§ 12021, subd. (a)(1)). As to all counts, the jury found true allegations that defendant personally used and intentionally discharged a handgun (§ 12022.53, subds. (b) & (c)) and committed the offenses for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(4)). An allegation that defendant personally and intentionally discharged a handgun causing great bodily injury and death to the victim (§ 12022.53, subd. (d)) was dismissed on the motion of the prosecution.

The trial court denied probation and sentenced defendant to 15 years to life as to count 1, enhanced by a consecutive term of 20 years pursuant to section 12022.53, subdivision (c). Defendant was sentenced to a consecutive sentence of 15 years to life as to count 2, also enhanced by a consecutive term of 20 years pursuant to section 12022.53, subdivision (c); three concurrent terms of 35 years to life as to counts 3-5; and one concurrent term of 2 years as to count 6. The court struck the section 12022.53, subdivision (b) allegations as to counts 1-5 and stayed imposition of the gang enhancement. The total sentence imposed was 70 years to life.

Defendant argues his conviction for the attempted murder in count 5 must be reversed because there was insufficient evidence to support the jury's finding that he possessed the requisite specific intent to kill. Defendant further argues that the attempted murder convictions in counts 2-5 must be reversed because the trial court erred in failing to restrict the use of the transferred intent instruction contained in CALJIC No. 8.65 to the murder charge in count 1.

Our review of the appellate record reveals that an amended abstract of judgment was filed on January 5, 2012, erroneously referring to the firearm use allegations under

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

section 12022.53 as "12011.53." The parties agree the amended abstract of judgment should be corrected to reflect the correct section. In all other respects, we affirm.

FACTS

Stephanie Reyes

On May 27, 2009, Stephanie Reyes, the girlfriend of murder victim Javier Gonzales, drove Gonzales to a "dope spot" where he picked up more than an ounce of crystal methamphetamine, which he and defendant intended to sell. Reyes was a drug addict at the time and had smoked methamphetamine that day. She knew that Gonzales was a member of the Los Nietos Gang.

Once Gonzales had the drugs, Reyes drove him to defendant's house in Whittier, territory partly claimed by the Jim Town gang. Defendant was waiting outside his house. Defendant and Gonzales conversed for about ten minutes. Reyes and Gonzales then drove to Gonzales's brother's house, intending to go from there to Reyes's house.

On the way to Reyes's house, they saw three or four men standing in front of a house at the corner of Bexley Drive and Norwalk Boulevard. Reyes noticed that one of the men was bald. The area was in territory claimed by the Quiet Village gang, a rival to both the Los Nietos and Jim Town gangs. After they passed the men, Gonzales called defendant on his cell phone and asked him if he "wanted to play." Reyes then drove Gonzales back to defendant's house, picked defendant up, and drove Gonzales and defendant to Bexley Drive and Norwalk Boulevard, where the group of men were still standing around.

Gonzales directed Reyes to drive to a street below Bexley Drive. She made a U-turn on a side street and stopped along the curb on Norwalk Boulevard, about 18 feet from Bexley Drive. Gonzales told Reyes he was going to "bang on those fools." He and defendant got out of the car and sprinted to the corner, both facing Bexley Drive and firing guns. Reyes did not see either of the men duck down or move to the ground as

they were shooting. Reyes could not see the men who had been standing in the yard from where the car was parked. When Gonzales and defendant returned to her car, neither man's gun was visible to Reyes, but she had previously seen Gonzales with a .32-caliber handgun.

Reyes quickly drove away from the scene. She heard Gonzales say to defendant, "You fucking shot me, dick." twice. Reyes testified that defendant looked scared and responded, "No, no, no. They shot back. They shot back." Reyes immediately began to drive to Whittier Presbyterian Hospital. Defendant implored her to take him to his "hood" to dispose of the guns first, but she refused. When Reyes slowed down at a freeway off-ramp, defendant ran out of the car.

When Reyes arrived at the hospital's emergency area, she got Gonzales out of the car with assistance from the hospital staff. After Gonzales was taken into the hospital, Reyes moved her car to a Carl's Jr. across the street from the hospital, because she did not know if the methamphetamine was still in the car. While she was waiting at the hospital, Gonzales was pronounced dead.

Daniel Davidson, Taylor Clark, and Raymond Quevedo

Daniel Davidson, Taylor Clark, Raymond Quevedo, and Richard Guzman[2] were talking in front of Davidson's house at the corner of Bexley Drive and Norwalk Boulevard on the night of May 27, 2009, at about 10:30 p.m. The men were standing between Clark's white Nissan and Quevedo's maroon Mercury, which were parked in the driveway.

Gonzales and defendant came up to the group from behind some dense shrubbery at the corner of the yard. They both pointed handguns at the group, and either Gonzales or defendant challenged, "Where you from?" They then quickly fired multiple shots at the group. No one in the group was hit with a bullet or injured.

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[2] Guzman did not testify.

Clark testified he dropped to the ground and took cover behind his car when he saw muzzle flash. He heard eight or more gunshots and could also hear bullets striking the cars and breaking glass. During the shooting, he saw Guzman duck and run toward the house and Davidson and Quevedo run to the front of Quevedo's car.

Quevedo testified he heard the man who challenged the group and saw the shooters come out from behind the bushes in the corner of the yard. He heard gunshots within "half a second" and ducked. Quevedo heard 6 to 12 gunshots over a period of 6 to 10 seconds. He and Davidson ran for cover behind Quevedo's parked car. According to Quevedo, Davidson got down on his stomach to see if anyone was walking toward them after the gunfire ceased. Davidson did not see anyone, so he and Quevedo jumped over the fence into Davidson's back yard and encountered Guzman, who looked frightened.

Davidson testified he saw the two men come out from behind the bushes and heard one of them challenge the group. No one responded, and within less than five seconds, the two men began shooting at the group. Davidson turned around when he heard the challenge, but when he saw muzzle flash, he ducked. He heard many shots fired in quick succession and also heard the whistling sounds of bullets flying past him. While staying low, Davidson scrambled to the front of Quevedo's car. He got down and looked under the car to see if the two men were pursuing him. He then saw car wheels driving toward the highway. At some point during the shooting, Davidson saw Guzman jump the fence and run into the back yard.

Maria Soto and Roberto Robles

Maria Soto's house was on the same side of the street as Davidson's. The night of the shooting, she heard two to four gunshots. The shots were fired in quick succession, but the last gunshot may have been fired a few seconds after the others. All of the gunshots were loud, but the final shot was not as loud as the others. She looked out her window and saw three men running into Davidson's back yard. None of the men was holding or shooting guns.

Roberto Robles lived directly across the street from Davidson. On the night of the shooting, he heard three gunshots fired in quick succession. The shots sounded equally loud. He looked out his window and saw three men hiding behind a car. The men got up, walked to the front of the house, and started talking to one another. He did not see any of the men holding, firing, or disposing of a gun. He recognized two of the three men as his neighbors.

Police Investigation

Deputy Ryan Malone responded to the crime scene first. There were four men, none of whom was injured, in front of Davidson's house. None of the four men carried or disposed a gun. There were casings to the side of the residence, and cars at the scene appeared to have been damaged by gunfire.

Detective Robert John Gray responded to the scene after the four men voluntarily went to the Pico Rivera Sheriff's Station for questioning. He noted the lighting conditions were good. There were dense bushes and a fence made of wrought-iron posts and brick around Davidson's house. There were four bullet strikes on the side of the fence that faced out toward the street.

A bullet had shattered the rear window of Quevedo's car and hit one of the rear side windows. One bullet was recovered from the interior of Quevedo's car. There was a bullet strike on the window and passenger side door of Clark's white car, and an expended bullet was recovered inside the passenger door. Two more expended bullets were recovered at the scene, one of which was recovered on Norwalk Boulevard. Ten casings were found at the scene—one was recovered on the sidewalk in front of Davidson's house, two were found on the east curb of Norwalk Boulevard, and the remainder were found on Norwalk Boulevard.

DISCUSSION

Sufficiency of Evidence

Defendant argues his conviction for attempted murder in count 5 must be reversed because there was insufficient evidence to support the jury's finding that he possessed the requisite specific intent to kill Guzman. Defendant asserts the prosecution failed to produce "solid" evidence that Guzman was visible to defendant and in his "line of fire" under the "kill zone" theory of intent articulated in *People v. Bland* (2002) 28 Cal.4th 313, 328-330 (*Bland*). Defendant is incorrect.

The Fifth and Sixth Amendments, which apply to the states through the Fourteenth Amendment, require the prosecution to prove all elements of a crime beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) A conviction supported by insufficient evidence violates the Due Process Clause of the Fourteenth Amendment and must be reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317.) "'In reviewing the sufficiency of evidence . . . the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' [Citations.] . . . 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must . . . presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.] The same standard also applies in cases in which the prosecution relies primarily on circumstantial evidence. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1175 (*Young*).)

We review the record in the light most favorable to the prosecution to determine whether the challenged conviction is supported by substantial evidence, meaning "evidence which is reasonable, credible, and of solid value . . . ." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "[M]ere speculation cannot support a conviction. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 35.) Nor does a finding that "the

circumstances also might reasonably be reconciled with a contrary finding . . . warrant reversal of the judgment." (*People v. Proctor* (1992) 4 Cal.4th 499, 528-529.) The reviewing court does not reweigh the evidence, evaluate the credibility of witnesses, or decide factual conflicts, as these are the province of the trier of fact. (*People v. Culver* (1973) 10 Cal.3d 542, 548; *In re Frederick G.* (1979) 96 Cal.App.3d 353, 367.) "Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*Young*, *supra*, 34 Cal.4th at p. 1181.)

The jury convicted defendant of attempted willful, deliberate, and premeditated murder pursuant to sections 664 and 187, subdivision (a). "'[A]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).) The burden is on the prosecution to prove the defendant acted with the specific intent to kill the individual victim. (*Id.* at pp. 751-752.)

Where multiple counts of attempted murder are charged, the trier of fact must evaluate the intent to kill independently as to each victim. (*Bland*, *supra*, 28 Cal.4th at pp. 327-328.) Transferred intent—the transfer of intent to kill from an intended target to an unintended murder victim—does not apply to attempted murder. (*Ibid.*) However, under the concurrent theory of intent, "a shooter may be convicted of multiple counts of attempted murder on a 'kill zone' theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm. [Citation.]" (*Smith*, *supra*, 37 Cal.4th at pp. 745-746.)

Defendant argues that under *Smith*, there is insufficient evidence to prove he intended to kill Guzman because the record does not contain evidence that Guzman was visible to defendant or in his line of fire. He contends the prosecution presented no solid evidence that Guzman was within the "kill zone" at the time the shooting started, rather

than in the safety of Davidson's back yard. Defendant asserts that because the evidence does not place Guzman within the "kill zone," defendant could not have attempted to kill Guzman.

Defendant's reliance on *Smith* for the proposition that the concurrent or "kill zone" theory of intent requires the victim be visible to the perpetrator and in his line of fire is misplaced. In *Smith*, the defendant was charged with the attempted murder of a woman and her child. The woman was sitting in the driver's seat of a car directly in front of her infant, who was in a car seat in the back. The defendant conceded he saw both the mother and the child in the car when he approached it. As the woman began to drive away, the defendant fired a single bullet at the rear window, narrowly missing both the woman and her child. (*Smith*, *supra*, 37 Cal.4th at pp. 736-737.) The *Smith* court concluded the evidence was sufficient to support both attempted murder convictions based on the firing of a single bullet. (*Id*. at p. 746.) In so doing, it rejected utilization of the concurrent intent or "kill zone" theory under the facts presented. (*Ibid*.) *Smith* held that two attempted murder convictions may be sustained where there is evidence the perpetrator fired a single bullet at two victims who were one behind the other in his line of sight. (*Id*. at p. 748.) The *Smith* court expressly stated it had "no occasion here to decide under what factual circumstances, if any, the firing of a single bullet might give rise to multiple convictions of attempted murder under *Bland's* kill zone rationale." (*Id*. at p. 746, fn. 3.) Because *Smith* presented a very different factual scenario than the case at bar—a single shot at two victims lined up in the shooter's line of sight, as opposed to ten shots at four victims in proximity of two cars in a driveway—and because the *Smith* court did not analyze the case under a "kill zone" theory, we do not apply its reasoning here.

Additionally, we agree with the Attorney General that the existence of evidence unfavorable to the prosecution is irrelevant. Our task is not to reweigh the evidence but rather to determine whether there is substantial evidence to support the verdict irrespective of any contrary evidence. Viewing the evidence in the light most favorable to the prosecution, we hold there is sufficient evidence to sustain defendant's conviction

for attempted murder in count 5. Clark, Quevedo, and Davidson testified that all four men were standing together between Clark and Quevedo's cars when the shooters came out of the bushes. They also testified that the shooting began within seconds of the shooters coming out and issuing their challenge. The evidence shows that multiple shots were fired in the direction of the group, with several shots causing damage to the cars where Guzman and the other victims were standing. Substantial evidence therefore supports the jury's conclusion that Guzman was in the "kill zone" at the time the shooting began.

Transferred Intent Instruction

Defendant contends the attempted murder convictions must be reversed because the trial court erred in failing to restrict the use of the transferred intent instruction contained in CALJIC No. 8.65 to the murder allegation. This argument is without merit.

We review a claim of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) "In conducting this review, we first ascertain the relevant law and then 'determine the meaning of the instructions in this regard.' [Citation.] [¶] The proper test for judging the adequacy of instructions is to decide whether the trial court 'fully and fairly instructed on the applicable law . . . .' [Citation.] '"In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]"' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.)

Preliminarily, we reject the prosecution's contention that defendant forfeited his claim by failing to object to the instruction at trial, because defendant claims the instruction stated the law incorrectly, which would have affected his substantial rights. (§ 1259; *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087.) However, defendant's

argument fails because the trial court did not err in instructing the jury pursuant to CALJIC No. 8.65.

Under the doctrine of transferred intent, "'a defendant who shoots with the intent to kill a certain person and hits a bystander instead is subject to the same criminal liability that would have been imposed had "'the fatal blow reached the person for whom intended.'" [Citation.] . . .'" (*Bland*, *supra*, 28 Cal.4th at pp. 320-321.) Transferred intent applies to murder, but not attempted murder. (*Id.* at p. 331.) In determining whether an attempted murder conviction should be sustained, the court must analyze the defendant's intent as to each alleged victim and evaluate whether the defendant intended to kill that person rather than another. (*Id.* at p. 328.)

The jury was instructed under CALJIC No. 8.65, which accurately states the law: "When one attempts to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed, had been killed." The instruction refers to the situation in which the perpetrator *kills* a person other than the intended victim. It relates to murder and does not mention attempted murder or refer to a situation in which the victim is not, in fact, killed. Because the instruction correctly states the law with respect to transferred intent, the trial court did not err in instructing the jury.

Moreover, it is not reasonably likely that the jury misunderstood the instruction or mistakenly applied it to the attempted murder charges. (See *Young*, *supra*, 34 Cal.4th at p. 1202 ["'If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction.' [Citations.]"].) We reiterate that the plain language of CALJIC No. 8.65 makes clear that transferred intent applies to murder, rather than attempted murder. Additionally, as the Attorney General argues, CALJIC No. 8.65 was given in conjunction with other instructions relating to Gonzales's murder and was only discussed by the prosecution in conjunction with the murder charge. There is no reason to believe the jury misunderstood or misapplied the instruction.

Contrary to defendant's contention, *People v. Czahara* (1988) 203 Cal.App.3d 1468 (*Czahara*) is inapposite. *Czahara* held that it was error for the trial court to instruct the jury as to transferred intent where there are multiple attempted murders arising from the same act. (*Id*. at p. 1471.) None of the victims in *Czahara* had been killed, thus there was no justification for instructing the jury on transferred intent. In the instant case, defendant was charged with murder to which transferred intent properly applies. We therefore hold the trial court did not err in not further emphasizing the application of CALJIC No. 8.65 was restricted to the murder allegation.

DISPOSITION

The trial court is instructed to correct the amended abstract of judgment to properly reflect that sentencing enhancements were imposed pursuant to 12022.53, subdivision (c). The clerk of the superior court shall send a copy of the corrected abstract of judgment and minute order to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.