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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JHEROME HIGUERA,

Defendant and Appellant.

B268630

(Los Angeles County
Super. Ct. No. BA415335)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Robert Perry, Judge. Affirmed.

Paul Couenhoven, 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, Steven D. Matthews and Ryan M.
Smith, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Following a shooting in which one person died, one sustained severe injuries, and two escaped without injury, a jury convicted Jherome Higuera on one count of murder and three counts of attempted murder. The jury found Higuera committed the offenses for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in the criminal conduct by gang members, within the meaning of Penal Code section 186.22, subdivision (b)(1). The jury also found Higuera personally used, and personally and intentionally discharged, a firearm causing death and great bodily injury, within the meaning of Penal Code section 12022.53, subdivisions (b), (c), and (d).

Higuera argues his trial counsel provided ineffective assistance by failing to seek the exclusion of statements detectives obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. Higuera also contends substantial evidence did not support the attempted murder convictions for the two uninjured victims. We conclude that, because there was a rational tactical reason for not objecting to the admission of the statements, counsel for Higuera did not provide ineffective assistance, and that substantial evidence supported the attempted murder convictions. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Down In Action*

Down In Action (DIA) is a criminal street gang. Its members vandalize property within and outside of the gang's territory and commit assaults with deadly weapons in the name of the gang. Diablo Trece, or Diablos, is a clique of DIA. Higuera

was a member of DIA and the Diablo Trece clique. Higuera had three monikers: Draft, Smiley, and Diablo.

B. *The Shooting*

One evening in August 2012, at approximately 9:00 p.m., four 17-year-olds were socializing on the porch of an apartment building. The group consisted of Jonathan Lopez, Luis Rufino, Edwin Cruz, and Cruz's girlfriend, Kimberly Duarte. The three young men belonged to a tagging crew called SCK, which stood for the "So Crazy Klan."

As the four teenagers sat on the porch, a man a 13-year-old "little kid with glasses" named Art Tobias, whose nickname was Casper, and a 16-year-old named Jorshua Galvez came "out of nowhere" and walked up to them. As they approached, Tobias and Galvez walked towards the alley by the apartment building.

The man asked, "Where you fools from?" The young men on the porch replied, "SCK." The man said he was from "Diablos" and was looking for "Kaos," a 13-year-old member of SCK who had previously "got into it" with Casper. Cruz said, "What's up? That's the little homie."

The man took out a gun and fired numerous shots at the group on the porch. Cruz pushed Duarte to the ground. The man shot Cruz and Rufino, and then pointed his gun at Lopez. Lopez ran through the door of the building to get help. Cruz suffered six gunshot wounds and died. Rufino suffered gunshot wounds to his legs and testicle, but survived. Lopez and Duarte escaped uninjured.

None of the survivors could identify Higuera as the shooter. Although Higuera had DIA gang tattoos all over his body, including his face, head, chest, arms, and legs, none of the survivors saw any tattoos on the shooter. Law enforcement recovered 12 casings from the scene, all of which came from the

same firearm. Video surveillance of the scene depicted an image of a car that matched a car registered to Elda Rocha, Higuera's girlfriend.

At trial, Galvez testified his friend Casper had asked him for some money so he could repay "someone." They went to a house and met someone called Diablo who had two horn tattoos on his head and "DIA" tattooed on the back of his head. Galvez and Casper then got into a car driven by a woman, with Diablo in the front passenger seat. In the car Casper said that the previous week "a group of guys came at him and beat him up." Diablo pulled a gun out of a black box.

When the car stopped, Galvez, Casper, and Diablo got out and started walking. Casper pointed to a group of young men sitting on a porch and told Diablo, "It was them." Galvez heard Diablo say, "I'm from DIA," and someone in the group said, "What the fuck is DIA?" Diablo said, "Well, I'm going to show you what DIA is." Galvez saw Diablo take a gun out and start shooting.

C. *The Interview*

Detectives located Higuera at a detention facility, where he was serving a sentence for an unrelated crime, and interviewed him. In that interview, which the prosecutor played for the jury without objection, Higuera made statements that placed him at the scene of the shooting but that identified Casper as the shooter.

After asking Higuera some preliminary questions about his family and informing him that Rocha was in custody, one of the detectives read Higuera the *Miranda* advisements, obtained confirmation that Higuera understood the advisements, and began asking questions.

Higuera said he was in a tagging crew called DIA and one of his nicknames was Diablo. The detective asked Higuera if he

knew any reason the police would arrest Rocha, and Higuera replied, “No, she’s actually like, like a good girl.” The detective then asked Higuera if he knew a “younger cat, who goes by the name of Casper.” Higuera replied that he knew a “little vato”¹ whose nickname was Ghost and that he and Rocha once dropped him off by a train station. The detective told Higuera he had heard from “other people that were in the car” that in fact they went “somewhere else.” After the detective told Higuera that Rocha was “sitting in jail for murder” and suggested that perhaps Ghost “did some shit and you just happened to be standing there,” Higuera invoked his *Miranda* rights and said he did not want to talk to the detectives anymore. Higuera stated: “The way you guys are talking, it’s like I’m going to get stuck here for the rest of my life, which I’m not looking forward to. So based on that, I’m going to take those rights you said. This is as much as I’m going to talk to you because obviously it’s a big case, whatever it is, ’cause you say you’ve been working on it for a cool minute. And [unintelligible] you said something about murder still. . . .” Higuera said the reason he did not want to talk any further was that he did not have a lawyer.

The detectives nevertheless tried to convince Higuera to keep talking to them. One of the detectives said, “Right now, where we’re at right now at this point, this is about just finding out the truth about what the homie did. . . . You need to think about [Rocha]. Okay? That’s where we’re at.” The other

¹ A “vato” is a Spanish slang term for “dude” or “guy.” (See *People v. Maciel* (2013) 57 Cal.4th 482, 496; *People v. Dement* (2011) 53 Cal.4th 1, 32, fn. 9, overruled in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; Online Spanish English Dictionary, <<http://www.spanishdict.com/dictionary>>.)

detective said, “And do you need, do you need a lawyer to tell you that? That’s not for me to say.”

After voicing additional reasons for not wanting to continue talking to the detectives, Higuera renewed his request for counsel: “So that’s why I want a lawyer.” The detectives acknowledged Higuera’s invocation of his right to counsel, but continued to speak with him. One of the detectives stated, “All right. Well, let me tell you this, man. You know, do this. All right? You want a lawyer. I hear it, okay? But do this. With the information that we . . . gave you, all right, kind of roll it around in your head, okay? If you want to talk to me, there are people here that know how to get ahold of me. I can come back [unintelligible] you can talk with me about it, okay? ’Cause maybe this is . . . some stuff that you know, you weren’t prepared for.” The detective continued: “Okay? Maybe you just weren’t prepared for all this, all these questions right now. All right? But kind of put it in your head, and go around with it in your head. Think about it. Okay? And . . . you know, maybe you might change your mind. Okay? Like my coworker here said, we’re just looking for the truth. That’s all we’re looking for.”

One of the detectives then asked Higuera if he had “any questions,” to which Higuera responded, “How long she [Rocha] been locked up?” The detectives told Higuera they were not going to tell him, and they continued to speak to him. One of the detectives said, “And she is locked up, so anything else? You may . . . want to think about it real hard, ’cause the situation is a little different than a normal situation. You got, you know you got [Rocha] and you got her daughter with her. And she’s got a stepdaughter. I mean . . . she’s in a lot of trouble, man. You know, we think you know why, all right? Um, but this situation is a little different ’cause you know you guys have kids together. Do you understand that?” Higuera said he understood. The

detective continued, “And I need you to think real hard about this, okay, ’cause this is . . . definitely a different situation than a normal, you know, situation where you don’t have kids, you don’t have a girlfriend, you [unintelligible] all you guys think about is yourself. Okay? So kind of think . . . about. I don’t know what your test scores are, but, you know, I think everybody who’s, anybody that’s human, cares about their kids. Right?”

Higuera said, “See, that’s what I don’t understand. What are you trying to say?” The detective answered, “I’m trying . . . to tell you that when you want to tell the, if you’re going to tell the truth about something, if we already know something from [Rocha], all right, you are, if you have something to tell us, it may be different for her. Okay, I can’t, I can’t make you any promises. I don’t promise anything, okay? But for [Rocha], I mean, she’s already in there. She’s already in there.”

At this point Higuera decided to talk to the detectives. Higuera said, “Man, I’m going to get fucking fucked for the rest of my life. Look, check it out. I know I’m going to fucking regret this. Fuck. Shit always happens to me. Open your little book up.” The detective said, “Now listen, before we go, you said you wanted your lawyer. Do you want your lawyer, or do you want to talk to us without your lawyer? I need you to be very clear on that.” Higuera responded, “Well, I’m not going to tell you nothing incriminating. I was going to tell you what fucking happened that day.” The detective said, “Okay, and do you want to talk to us without your lawyer?” Higuera said, “Yeah.”

Higuera proceeded to give the detectives an account of what happened the day of the shooting. According to Higuera, he met someone named Ghost, who wanted to join DIA. Ghost told Higuera that he “got fucked up by some black guy from some other crew.” Higuera said, “Let’s roll over there and fuck those fools up.” Ghost wanted a gun, and he got one from an “older

homie” who told him to use it to “threaten” his assailants but not to “dump,” or kill, them. Ghost told Higuera he wanted to “scare these fuckers,” and Higuera told Rocha that, if the people whom Ghost wanted to scare tried to take the gun, Higuera would “sock these fools out too.” Higuera and Ghost went to the location, exchanged threats with the “four or five of those vatos” there, and then Ghost “fucking dumped.” Higuera “took off running” and saw Ghost behind him. They got in the car and left. Higuera “didn’t think that fool [Ghost] was going to fucking dump like that.”

D. *The Verdict and Sentence*

The jury found Higuera guilty of the murder of Cruz and the attempted murders of Rufino, Duarte, and Lopez. The jury also found true the gang and firearm allegations. In a bifurcated court trial, the court found Higuera had suffered a prior conviction in juvenile court for attempted murder.

The trial court sentenced Higuera on the murder conviction to a prison term of 75 years to life (25 years to life, doubled under the three strikes law, plus 25 to life for the firearm enhancement) and on the attempted murder convictions to consecutive terms of life with the possibility of parole after 30 years pursuant to Penal Code section 186.22, subdivision (b)(5), plus 25 years to life for the firearm enhancements. Higuera timely appealed.

DISCUSSION

A. *Higuera Was Not Denied Effective Assistance of Counsel*

Higuera contends his trial counsel “provided ineffective assistance when he failed to seek the exclusion of [his] statement to police on the basis it was obtained in violation of *Miranda*.”

Specifically, Higuera argues that, after he invoked his right to counsel, “[r]ather than stop, the detectives flouted [his] constitutional rights by urging him to reconsider. . . .” Higuera contends that his question about “how long Rocha had been locked up . . . did not open the door to further interrogation” because it was invited by the detectives’ inquiry whether Higuera had any questions.

The officers may have violated Higuera’s rights under *Miranda* by continuing to question Higuera after he had unequivocally invoked his rights to remain silent and to counsel. (See *Edwards v. Arizona* (1981) 451 U.S. 477, 484 [“when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights”]; *People v. Thomas* (2012) 54 Cal.4th 908, 926 [“[i]f further conversations are initiated by the police when there has not been a break in custody, the defendant’s statements are presumed involuntary and inadmissible as substantive evidence at trial,” even “when the defendant again waives his *Miranda* rights and his statements are voluntary under traditional standards”]; accord, *People v. Bridgeford* (2015) 241 Cal.App.4th 887, 900.) Instead of ceasing the interrogation at that point, the detectives used a variety of tactics, including making an implied promise of leniency for Rocha, to elicit an incriminating statement from Higuera.² (See *People v. Trout* (1960) 54 Cal.2d

² Higuera’s question about how long Rocha had been “locked up” did not authorize reinitiating the interrogation. (See *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045 [“inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally

576, 585 [implication by police that the defendant's wife would remain in custody until he confessed was "improper pressure"], overruled on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17.)

As noted, however, counsel for Higuera did not object to the admission of Higuera's statements to the detectives. Thus, the issue is whether counsel for Higuera's failure to object was ineffective assistance under *Strickland v. Washington* (1984) 466 U.S. 668. In this case, it was not.

A defendant contending on appeal that he received ineffective assistance of counsel "bears the burden of showing by a preponderance of the evidence that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice." (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (*Strickland, supra*, 466 U.S. at p. 689; see *Centeno*, at pp. 674-675.)

The decision whether to object to the admission of evidence is "inherently tactical,' and a failure to object will rarely reflect deficient performance by counsel." (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1335; see *People v. Centeno, supra*, 60 Cal.4th at p. 675.) "Tactical errors are generally not deemed reversible,

'initiate' a conversation"]; *People v. Sims* (1993) 5 Cal.4th 405, 437, 441 [defendant's question about "what was going to happen from this point on" did not "open the door to interrogation after previously having invoked his *Miranda* rights"].)

and counsel's decisionmaking must be evaluated in the context of the available facts.”” (*People v. Stanley* (2006) 39 Cal.4th 913, 954.) “On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009; see *People v. Mickel* (2016) 2 Cal.5th 181, 198 [reversal is warranted on direct appeal only if there is “affirmative evidence that counsel had ‘no rational tactical purpose’ for an action or omission”].) “The merits of such claims are more appropriately resolved, not on the basis of the appellate record, but rather by way of a petition for writ of habeas corpus.” (*People v. Johnson* (2016) 62 Cal.4th 600, 653; see *People v. Leonard* (2014) 228 Cal.App.4th 465, 484.)

Higuera argues: “There was no possible tactical reason for arguing no one had identified [him] as the shooter, but failing to seek the exclusion of [his] own admission he was at the scene of the shooting and his description of the events that proved he had personal knowledge about the shooting.” There were, however, rational tactical purposes for not objecting to the statement: Higuera’s statement named someone else as the shooter. It was, at least in part, exculpatory. There was evidence, independent of Higuera’s statement to the detectives, that Higuera was present at the scene of the shooting. Prior to invoking his *Miranda* rights, Higuera had admitted to the detectives that he was part of a DIA tagging crew and had a moniker of Diablo because of the horns tattooed on his head.³ A gang expert testified Higuera was

³ The detectives did not violate *Miranda* in obtaining these admissions because Higuera made the statements after he had initially waived, and before he subsequently invoked, his

a member of DIA and the Diablo Trece clique, and one of his monikers was Diablo. Galvez testified that a man named Diablo from DIA who had tattoos of horns on his head shot at the people on a porch. Galvez also testified that a woman drove him, Casper, and Diablo to the scene of the shooting, and a video showed a car at the scene that matched Rocha's car. In light of this evidence placing Higuera at the scene, it was a rational tactical decision to allow the jury to hear Higuera's post-*Miranda*-invocation statement to the detectives that tended to deflect blame from him to Ghost/Casper and to create doubt about the shooter's identity.

Moreover, allowing the jury to hear Higuera's statement to the detectives that someone else was the shooter allowed Higuera to raise a reasonable doubt about the prosecution's case, without subjecting Higuera to cross-examination. (See *People v. Kelly* (1992) 1 Cal.4th 495, 521 [not objecting to the admission of a taped confession "was an opportunity for the jury to hear defendant testify without being subjected to cross-examination"].) In closing argument, counsel for Higuera focused on the question of the shooter's identity and argued "the biggest question in this case" was whether Higuera was the shooter. Counsel for Higuera pointed out that one of the victims testified that he saw the arm and stomach of the shooter but did not observe any tattoos. Counsel for Higuera also questioned the veracity of Galvez's testimony and his motive to "keep himself and Casper . . . from getting in trouble." The admission of Higuera's statement that Ghost/Casper was the shooter bolstered the defense theory that

Miranda rights. (See *People v. Smith* (2007) 40 Cal.4th 483, 503 [trial court properly admitted statement by the defendant made after a knowing and voluntary waiver].)

the evidence did not establish identity beyond a reasonable doubt.

Thus, even though Higuera's statement to the detectives placed him at the scene of the shooting, it also placed the gun in someone else's hands. Because there was a potential rational tactical purpose for not objecting to the admission of the statement, this record does not establish that counsel for Higuera provided ineffective assistance by failing to object. (See *People v. Stewart* (2004) 33 Cal.4th 425, 482-483 [record did "not preclude a satisfactory explanation for counsel's actions" where the failure to object to the admission of letters written by the defendant "failed to establish deficient performance under an objective standard of professional reasonableness" because "much of the material in the letters . . . served to humanize defendant"]; *People v. Kelly, supra*, 1 Cal.4th at p. 520 [failure to object was not ineffective assistance because, "[a]lthough the confession was harmful in some respects, competent counsel could reasonably believe it helped the defense in other respects"]; see also *People v. Myers* (2007) 148 Cal.App.4th 546, 552 ["[a] reviewing court will not second-guess trial counsel's reasonable tactical decisions"].)

B. *There Was Substantial Evidence To Support All the Attempted Murder Convictions*

Higuera argues substantial evidence does not support his convictions for the attempted murders of Duarte and Lopez, the two uninjured teenagers on the porch of the apartment building. Higuera contends "[t]he evidence was insufficient to convict [him] of attempted murder involving two victims where he specifically aimed at two other victims and fired no shots in the direction of the other two."

To assess sufficiency of the evidence we “review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.” (*People v. Sandoval* (2015) 62 Cal.4th 394, 423.) “Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.” (*People v. Jackson* (2014) 58 Cal.4th 724, 749.) “A reversal for insufficient evidence is unwarranted unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the jury’s verdict.” (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

“Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.” (*People v. Smith* (2005) 37 Cal.4th 733, 739; see Pen. Code, §§ 187, 664.) The trial court instructed the jury that, to prove Higuera was guilty of attempted murder, “the People must prove that: 1. The defendant took at least one direct but ineffective step toward killing another person; and 2. The defendant intended to kill a

person.”⁴ The People may prove the defendant had the intent to kill by circumstantial evidence. (*People v. Thomas* (2011) 52 Cal.4th 336, 355; see *People v. Beeman* (1984) 35 Cal.3d 547, 558-559 “[d]irect evidence of the mental state of the accused is rarely available except through his or her testimony”; *People v. Carr* (2010) 190 Cal.App.4th 475, 488 [same]; *People v. Margarejo* (2008) 162 Cal.App.4th 102, 110 [“we routinely draw inferences about intent from the predictable results of action”].)

Here, substantial evidence supported the jury’s findings that Higuera had the specific intent to kill Duarte and Lopez and that he took a direct but ineffectual act toward killing them. Duarte had been sitting on Cruz’s lap when Higuera began firing. (See *People v. Smith, supra*, 37 Cal.4th at p. 741 [“[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””].) Higuera fired multiple shots at Cruz at close range. Duarte was in the line of fire and only escaped without injury because Cruz pushed her out of harm’s way when Higuera started shooting. (See *id.* at p. 743 [“evidence that defendant purposefully discharged a lethal firearm at the victims, both of

⁴ The trial court further instructed the jury: “A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.”

whom were seated in the vehicle, one behind the other, with each directly in his line of fire, can support an inference that he acted with intent to kill both”].)

There was also substantial evidence to support the jury’s finding that Higuera intended to kill Lopez. Lopez testified that the shooter “pointed the gun” at him, and that he was only able to escape by throwing himself “towards the door,” which “luckily” was open. Moreover, although Higuera asserts “[t]he bullets fired struck only” Cruz and Rufino, the police recovered 12 casings from the scene, six of which struck Cruz and two of which struck Rufino. The jury reasonably could have inferred that Higuera intended to kill Lopez with one or more of the other bullets when he aimed the gun at Lopez. (See *People v. Sanchez* (2016) 63 Cal.4th 411, 457 [evidence the defendant pointed a gun at the victim and placed his finger on the trigger supported a finding of intent to kill].) Thus, even though Lopez did not suffer any gunshot wounds, the evidence that Higuera pointed the gun at him after having shot at Rufino was substantial evidence that Higuera intended to kill Lopez. (See *People v. Bland* (2002) 28 Cal.4th 313, 328-329 [“the crime of attempted murder requires no physical injury to the victim”]; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552 [“that [the defendant] missed [the victim’s] heart and lungs was fortuitous rather than indicative of the absence of an intent to kill”]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 945 [that “the victim may have escaped death” because of the defendant’s “poor marksmanship” does not “necessarily establish a less culpable state of mind”].)

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

SMALL, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.