Filed 11/30/12 P. v. Pandy CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>PHILLIP ANTHONY PANDY,<br><br>Defendant and Appellant. | B237996<br><br>(Los Angeles County<br>Super. Ct. No. BA365900) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Bob S. Bowers, Jr., Judge. Affirmed.

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Linn Davis, 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, James William Bilderback II and Mark E. Weber, Deputy Attorneys General, for Plaintiff and Respondent.

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An August 2010 information charged Phillip Anthony Pandy with first degree robbery (Pen. Code, § 211)[1]; attempted murder (§§ 664, subd. (a), 187, subd. (a)); cruelty to an animal (§ 597, subd. (a)); and possession of a firearm by a felon (former § 12021, subd. (a)). As relevant, the information specially alleged: (1) as to the robbery count, the value of the property taken exceeded $65,000 (§ 12022.6, subd. (a)(1)); (2) as to the robbery and attempted murder counts, firearm-use enhancements (§ 12022.53, subds. (b)-(d)); (3) as to the animal cruelty count, a firearm-use enhancement (§ 12022, subd. (b)(1)); and (4) as to Pandy's criminal history, a prior serious or violent felony conviction for assault with a deadly weapon (§ 245, subd. (a)(1)) that qualified as a strike pursuant to the "Three Strikes" law and subjected him to a five-year enhancement under section 667, subdivision (a)(1), and a prior prison term within the meaning of section 667.5, subdivision (b). All counts and special allegations related to the December 16, 2009 robbery of the house where Neil Parek and Nicole McLaughlin lived with their one-year-old son and a dog. During the robbery, in which Pandy and another man entered the home, a third man stood outside as a lookout figure and a woman, a former housekeeper of Parek and McLaughlin, stayed in the getaway car, Parek and the dog were shot.

A jury found Pandy guilty on all four counts. It also found true all special allegations, except that the value of the property taken exceeded $65,000. Pandy admitted that he had a prior serious or violent felony conviction and had served a prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced Pandy to a state prison term of 59 years to life, consisting of (1) the upper term of 9 years for the attempted murder count, doubled pursuant to the Three Strikes law, plus 25 years to life for the firearm-use enhancement under section 12022.53, subdivision (d); (2) a consecutive term of 2 years 8 months for the robbery count, plus 8 years 4 months for the firearm-use enhancement under section 12022.53, subdivision (d); and (3) 5 years under section 667, subdivision (a)(1). The court

[1] Statutory references are to the Penal Code.

imposed a concurrent term of 4 years for the animal cruelty count, plus 1 year for the firearm-use enhancement. Pursuant to section 654, the court stayed imposition of sentence for the count of possession of a firearm by a felon. It dismissed the prior-prison-term special allegation under section 667.5, subdivision (b).

On appeal, Pandy does not deny involvement in the robbery at the Parek/McLaughlin residence but contends that he received ineffective assistance at trial from his defense counsel. Pandy claims that counsel failed to sufficiently discredit Parek's and McLaughlin's identification of him at trial as the perpetrator who shot Parek. According to Pandy, sufficient cross-examination of Parek and McLaughlin, based on their preliminary hearing identifications of someone other than Pandy as the perpetrator who shot Parek, would have created reasonable doubt as to whether Pandy shot Parek. Based on this reasonable doubt, Pandy maintains, the jury would not have found true the special allegations of firearm use under section 12022.53, subdivision (d), attendant to the attempted murder and robbery counts and thus he would not have been punished for those enhancements. We disagree that Pandy has established ineffective assistance of counsel and, in any case, that he suffered prejudice as a result of counsel's performance. We, therefore, affirm the judgment.

**DISCUSSION**

"'"[T]he right to counsel is the right to the effective assistance of counsel."' [Citation.] 'The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' [Citation.] 'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to

deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.' [Citation.]" (*In re Valdez* (2010) 49 Cal.4th 715, 729.)

"To make the required showings, [defendant] must show that his attorney's 'representation fell below an objective standard of reasonableness' 'under prevailing professional norms' [citations] and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome' [citation]. 'This second part of the . . . test "is not solely one of outcome determination. Instead, the question is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.' [Citation.]" [Citation.]' [Citation.]" (*In re Valdez*, *supra*, 49 Cal.4th at p. 729.)

"'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, 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." [Citation.]' [Citation.]" (*In re Valdez*, *supra*, 49 Cal.4th at pp. 729-730.) "[N]ormally the decision to what extent and how to cross-examine witnesses comes within the wide range of tactical decisions competent counsel must make. [Citation.]" (*People v. Cleveland* (2004) 32 Cal.4th 704, 746;

*People v. McDermott* (2002) 28 Cal.4th 946, 993 [manner of cross-examination is within counsel's discretion and rarely implicates ineffective assistance of counsel].)

The claimed deficiencies in counsel's cross-examination of Parek and McLaughlin do not establish ineffective assistance of counsel. At trial, both Parek and McLaughlin identified Pandy as the perpetrator who shot Parek. During cross-examination, defense counsel elicited testimony from Parek that at the preliminary hearing he initially identified another man as the perpetrator who had shot him. When cross-examining Parek, defense counsel asked him, "And at that hearing do you remember or isn't it true that you testified under oath that it was someone other than Mr. Pandy that shot you that night?" Parek, responded, "Yes." A similar scenario played out with cross-examination of McLaughlin. Defense counsel elicited testimony that McLaughlin too at the preliminary hearing initially identified another man as the perpetrator with a gun. During her cross-examination, defense counsel asked McLaughlin, "And do you remember at that previous hearing, under direct examination, that you identified someone other than Mr. Pandy as the person with the gun in his hand?" McLaughlin responded, "Yes." Defense counsel used these discrepancies in identification to argue to the jury that Pandy was not the perpetrator who had shot Parek. Counsel argued, "The two most important witnesses we heard from in this case were Neil Parek and Nicole McLaughlin. These two very important and crucial witnesses both changed their identification during the preliminary hearing, as you heard from both of them. The identification by both of these crucial witnesses is therefore seriously flawed . . . . [A]n abundance of reasonable[] doubt does exit as to whether or not Mr. Pandy committed the alleged charge or special allegations in this case. If you have reasonable doubt about the charges or allegations, it is your duty to acquit Mr. Pandy. There was no evidence at all linking the gun to Mr. Pandy. . . . Remember, ladies and gentlemen, all the elements necessary for each charge must be established beyond a reasonable doubt. Inconsistent testimony, ladies and gentlemen." This cross-examination and argument to the jury was well within

counsel's discretion on how to cross-examine Parek and McLaughlin and discredit their identification at trial of Pandy as the man who shot Parek.[2]

Pandy contends that counsel should have done more extensive cross-examination of Parek and McLaughlin and established a defense, in an attempt to create reasonable doubt as to which perpetrator shot Parek, that he and the other perpetrator both carried guns. Counsel, however, argued in defense that Pandy did not have a gun and bolstered that defense with Parek's and McLaughlin's preliminary hearing identifications of another man as the shooter. Despite Pandy's claim that using a defense that both men carried a gun would have been superior to the defense proffered, counsel's choice of defense and his means of cross-examination in support of that defense do not render his performance ineffective. Moreover, although Pandy argues that Parek's testimony that he was shot twice, even though he was hit only once, supported a defense that both perpetrators carried a gun, other evidence reinforced the theory that only one perpetrator had a gun. And, to the extent Parek's testimony that he was fired at twice suggested both perpetrators carried a gun, the jury had that information to evaluate when deciding the case. Contrary to Pandy's contention, therefore, counsel was not ineffective based on his decision on how to cross-examine Parek and McLaughlin as a means to support the defense that Pandy did not carry a gun during the robbery and thus did not shoot Parek.

In any case, additional cross-examination of Parek and McLaughlin to support a defense that both perpetrators carried a gun would not have enhanced Pandy's chances of a not true finding on the special allegations of firearm use as to the robbery and attempted murder counts. Parek's and McLaughlin's physical description of the shooter, given to officers shortly after the shooting, matched Pandy's characteristics, not those of the other man who had entered their house. Later in the day of the robbery Parek and McLaughlin both identified Pandy as the perpetrator who had shot Parek. Testing of a bandana

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[2] In response to a new trial motion, filed by Pandy in pro. per., counsel submitted a declaration in which he stated that he had "adequately confronted the eyewitnesses against [Pandy], pointing out to the jury the discrepancies in their respective identifications."

recovered by police in the getaway car matching the description of the bandana worn by Parek's shooter did not exclude Pandy as the source of DNA on the bandana—only one in twelve million people would exhibit the genetic markers so as not to be excluded as contributing DNA to the tested sample. Yet, the DNA profile of the other man who entered the Parek/McLaughlin residence was excluded from the DNA recovered from the bandana. Although Parek and McLaughlin both identified the other perpetrator as Parek's shooter at the preliminary hearing, they each changed their identification during the hearing when both that man and Pandy stood up next to each other and explained that they had been confused and intimidated when making their earlier identification. Parek and McLaughlin then identified Pandy as Parek's shooter at trial. Based on this evidence, it is not reasonably probable Pandy would have received a more favorable outcome at trial had his counsel more extensively cross-examined Parek and McLaughlin and presented a defense that both perpetrators carried guns.[3]

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J. JOHNSON, J.

[3] To the extent Pandy argues that his counsel was not prepared for trial, any lack of preparation is not apparent from the appellate record and thus is not a cognizable basis on direct appeal to establish ineffective assistance of counsel. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [ineffective assistance of counsel claim is generally more appropriately addressed in habeas corpus proceeding].)