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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. SHEDRICK I. LOCKRIDGE, Defendant and Appellant.	B249009 (Los Angeles County Super. Ct. No. BA384928)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jonathan J. Kline and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Shedrick Lockridge of attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664/187, subd. (a)[1]), assault with a firearm (§ 245, subd. (a)(2)), and possession of a firearm by a felon (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)). As to the attempted murder offense, the jury found true the allegations that defendant personally used and personally and intentionally discharged a firearm. (§ 12022.53, subds. (b) & (c).) As to the assault with a firearm offense, the jury found true the allegation that defendant personally used a firearm. (§ 12022.5, subds. (a)/(d).) The trial court found true the allegations as to all offenses that defendant suffered a prior conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i) and 1170.12, subds. (a)-(d)) and a conviction for which he served a prior prison term (§ 667.5, subd. (b)). It further found true the allegation as to the attempted murder and assault with a firearm offenses that defendant suffered a prior serious felony. (§ 667, subd. (a).) The trial court sentenced defendant to 39 years to life in state prison. On appeal, defendant contends that his attempted murder conviction must be reversed because the prosecutor presented the jury with a legally inadequate theory of liability for that offense. We affirm.

BACKGROUND

I. The Prosecution's Case

Demondre Clark testified that around 6:00 p.m. on November 12, 2010, he and three friends, two persons named "Jay" (one of whom apparently was Antonio Houston) and "Boo," went to the Slauson swap meet at the corner of Slauson and Western Avenues.[2] Defendant drove to the swap meet in a black Chevrolet Tahoe he had rented with another friend, Germane Pollard. Clark intended to enter the swap meet and buy a

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[1] All statutory citations are to the Penal Code unless otherwise noted.

[2] The swap meet apparently took place at the Slauson Super Mall.

sweater quickly, so he had Jay drive around while he went in the swap meet with Houston and Boo.

Clark did not want to testify at trial, so much of his version of the events at the swap meet was introduced through testimony by Los Angeles Police Department Officer Kevin Currie who interviewed Clark. Officer Currie testified that Clark said that as he was leaving the swap meet there appeared to be an "exchange of words" between a "group of individuals" behind him and defendant. Clark said that he went to his Tahoe and defendant went to a red Chrysler that was parked in the parking lot.

Clark told Officer Currie that he, Houston, and Boo got into the Tahoe. Clark sat in the driver's seat and Houston and Boo sat in passenger seats.[3] As Clark proceeded towards the exit, he saw the red Chrysler also proceed towards the exit. At some point, the Chrysler stopped and waited. Clark drove past the Chrysler, and the Chrysler followed Clark towards the exit. Clark positioned the Tahoe to make a right turn onto Western Avenue, and the Chrysler pulled up to the right rear side of the Tahoe. Clark told Officer Currie that there was too much traffic to turn right, so he turned left instead.[4] When Clark turned left, defendant shot at the Tahoe and broke the driver's side window.

In a subsequent interview with Officer Currie, Clark was shown a six-pack photographic lineup that contained defendant's photograph as photograph number five. Clark appeared not to want to identify anyone, but pointed to photograph number one, pushed the lineup away, and asked, "[W]ill that do it for you?" Officer Currie told Clark that he was only asking him to be honest. Clark then identified defendant from the lineup as the person who shot at him.

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3 Clark testified that he was in the front passenger seat and Jay was in the driver's seat.

4 Clark testified that they turned left because "somebody started shooting." He heard multiple gunshots and two or three bullets hit the Tahoe. One of the bullets broke the driver's side window.

Officer Currie testified about a surveillance video from the swap meet.[5] The video showed Clark and "the two people behind him" exiting the swap meet as defendant entered. Defendant engaged in "some type of interaction" with "either people in the group or the people behind him, it [was] hard to determine." Clark and the others left the swap meet and another three people exited after them. Defendant then went out of the video frame, but reappeared within 10 or 15 seconds and was shown exiting the swap meet in the same direction as Clark and the others.

About 6:00 p.m. on November 12, 2010, Los Angeles Police Department Officers Courtney Pearson and Bryan Espinosa were near the Slauson Super Mall when they observed a traffic collision on Slauson Avenue west of Western Avenue. The officers stopped and attended to the people involved in the accident. As he was investigating the accident, Officer Pearson heard five to six gunshots coming from the direction of the Slauson Super Mall. Officer Pearson saw a red Chrysler traveling north on Western toward Slauson—i.e., in Officer Pearson's direction. Officer Pearson's attention was drawn to the Chrysler as it was traveling faster than other vehicles.

As the Chrysler approached, Officer Pearson went to the rear quarter panel of his vehicle for cover. He drew his gun and yelled at the driver of the Chrysler, "Stop the car." The Chrysler pulled over parallel to Officer Pearson's vehicle. Officer Pearson saw that the Chrysler's front driver's side window was "shattered out." Officer Pearson yelled, "Stop and show me your hands. Everybody in the car, hands out the window." The driver, whom both Officer Pearson and Officer Espinosa identified as defendant, complied and put his hands out of the window. Officer Pearson told defendant to keep his hands out of the window, but defendant drove away.

Officers Pearson and Espinosa got in their vehicle to pursue defendant. Officer Pearson drove. He was not always able to see defendant, so he drove in the direction he last saw defendant travel. After driving for about six blocks, Officer Pearson saw the Chrysler parked on a sidewalk. He stopped about five car lengths behind the Chrysler.

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5 According to the prosecutor, the video tape was grainy.

He could not see in the vehicle and ordered those inside the vehicle to put their hands out of the window. Persons driving past the Chrysler and towards the officers and pedestrians informed the officers that a person had fled from the Chrysler and that there was no one in the Chrysler.

Officer Pearson searched the Chrysler. He found three spent .40 caliber shell casings—two on the floor in the "driver's side compartment" and one on the rear floorboard, a photograph of defendant, a piece of mail "with defendant's name on it," and the Chrysler's registration. Shelley Flagg was the Chrysler's registered owner.[6]

Fire Station 66 was located on Slauson near Western. On November 13, 2010, Los Angeles Firefighter Travis Foellmer walked into the station's kitchen holding a handgun and said, "Look what I found." The handgun was a .40 caliber semiautomatic Springfield Armory Model XD 40. Firefighter Jonathan Stevens took the handgun from Firefighter Foellmer, removed the magazine, and checked the handgun to make sure it was not loaded. The police were notified. Los Angeles Police Department Officer Mauricio Aranda responded to Fire Station 66 and retrieved the handgun and two live .40 caliber rounds that were lying next to the handgun. The handgun had been reported as stolen in 2007. The spent shell casings found in the Chrysler were discharged from the handgun recovered from Fire Station 66.

On November 16, 2010, a detective informed Officer Currie about a call from a rental car agency regarding damage to a vehicle that matched the description of a vehicle that might have been involved in the shooting. Officer Currie went to the rental car agency. There, he saw a black Chevrolet Tahoe with two bullet holes in the driver's side door and a shattered driver's side window. A mechanic removed the interior panel from the driver's door. Officer Currie's partner, Officer Kleiver, recovered two expended bullets from the interior of the driver's door. The expended bullets recovered from the Tahoe were fired from the handgun recovered from Fire Station 66. The rental

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6 In the defense case, defendant testified that Flagg was his wife, but that they were separated.

agreement for the Tahoe identified Pollard as the primary renter and Clark as the secondary renter.

II. Defendant's Case

Defendant testified in his own defense. He admitted that he was previously convicted of assault with a deadly weapon and possession of a firearm.

Defendant testified that he was a rap performer. Prior to 5:00 p.m. on November 12, 2010, his manager picked him up at his mother's house in Eagle Rock and took him to a studio on 73rd Street and Vermont Avenue. He remained at the studio until about 9:00 or 10:00 p.m. From there, he went to his aunt's house and then to a club in Long Beach where he performed.

Defendant denied having ever seen Clark, Houston, or Boo before going to court. He also denied being at the Slauson swap meet after 6:00 p.m. on November 12, 2010, or that he was shown on the swap meet surveillance video. He did not "enter" the red Chrysler that day, had only seen the black Tahoe in photographs in court proceedings, and had never held or possessed the handgun recovered from Fire Station 66. He denied firing the shots that struck the Tahoe.

Flagg was defendant's wife. They were separated. While defendant was "away," Flagg had a relationship with Houston, and they had a child together. Flagg informed defendant of her pregnancy in a letter. By the time defendant "came home," the baby had been born. Defendant did not have any animosity towards Houston because he and Flagg were already separated and "that's life." Defendant had a girlfriend as of the summer of 2010.

In November 2010, Mary Suhm lived near the Slauson Super Mall. She had four bank robbery convictions, a grand theft conviction, and a burglary conviction. She testified that she witnessed the shooting and gave her personal identifying information to the police that night. She described the shooter as being 40 or 50 years old. Suhm testified that she was sure that defendant was not the shooter because the shooter was "a lot older." Defendant was 27 years old at the time of the shooting.

DISCUSSION

Defendant contends that his attempted murder conviction must be reversed because the prosecutor relied on a legally inadequate theory of guilt—i.e., the prosecutor argued to the jury that it could find him guilty of the attempted murder of Clark based on his intent to kill Houston. Defendant's contention fails because defendant failed to object to the prosecutor's statement in the trial court and thus forfeited the issue. Even if the issue was not forfeited, it fails because the prosecutor never argued that the jury could find defendant guilty based on his intent to kill Houston.

I. Background

During closing argument, the prosecutor explained Houston's relevance to the case. She stated, "Okay the point of Antonio Houston is this: [¶] I don't have to prove motive to you. [¶] I don't, the law doesn't require it. There are many cases where sometimes you don't have a motive. This particular case is not necessarily one of those. [¶] Because what we remember about Antonio Houston is that he had a relationship with this defendant's wife while the defendant was away. [¶] And that relationship produced a child. [¶] And this defendant learned about the relationship and the child while the defendant was away. [¶] She wrote him a letter. And that's what he testified about. So if you are thinking that you are wondering about why Antonio Houston becomes even relevant in this case, it is because the defendant passes Demondre and Antonio at that Slauson Super Mall, and Antonio gets in to that car with Demondre Clark and this other individual Demondre Clark being the driver."[7] Defense counsel did not object to the

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[7] The trial court instructed the jury on "motive" with CALCRIM No. 370 as follows:

"The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

prosecutor's remarks and request that the trial court admonish the jury to disregard the remarks.

The prosecutor then told the jury that CALCRIM No. 600[8] provided the substantive elements of the crime of attempted murder. The prosecutor explained, "[T]here are two things that I have to prove: [¶] That the defendant took at least one direct but ineffective step towards killing another such as shooting at him. And two, he intended to kill that person like shooting him six times and aiming for that particular person."

II. Forfeiture

Defendant acknowledges that defense counsel did not object in the trial court to the prosecutor's remarks about Houston. He contends, however, that the issue has not been forfeited because a prosecutor's reliance on a legally inadequate theory should be viewed as akin to instructional error and, thus, cognizable on appeal.

"'To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. [Citation.]' [Citation.] A failure to timely object and request an admonition will be excused if doing either would have been futile, or if an

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8 The jury was instructed with CALCRIM No. 600 as follows:

"The defendant is charged in Count 1 with attempted murder.

"To prove that the defendant is 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 that person.

"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 toward 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."

admonition would not have cured the harm. [Citation.]" (*People v. Linton* (2013) 56 Cal.4th 1146, 1205; *People v. Morales* (2001) 25 Cal.4th 34, 43-44.) Defendant argues, in effect, that the prosecutor told the jury that defendant could be found guilty of attempted murder by transferring defendant's intent to kill Houston to Clark. Because an attempted murder conviction cannot be based on transferred intent (*People v. Perez* (2010) 50 Cal.4th 222, 232 ["'transferred intent' cannot serve as a basis for a finding of attempted murder"]), such a statement to the jury would have been a misstatement of the applicable law and, thus, prosecutorial misconduct (*People v. Boyette* (2002) 29 Cal.4th 381, 435 ["it is misconduct for the prosecutor to misstate the applicable law . . . ."]). Because defense counsel failed to object to the prosecutor's remarks in the trial court, this issue has been forfeited. (*People v. Linton, supra*, 56 Cal.4th at p. 1205; *People v. Morales, supra*, 25 Cal.4th at pp. 43-44.)

Defendant contends that if this issue has been forfeited by defense counsel's failure to object in the trial court, then he received ineffective assistance of counsel. An attorney does not render ineffective assistance by failing to object on prosecutorial misconduct grounds when there was no prosecutorial misconduct. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 119 ["[Defendant] contends . . . that her trial counsel's failure to make appropriate objection constituted ineffective assistance. In any event, as will appear, [defendant]'s contention that the prosecutor engaged in prejudicial misconduct lacks merit, and her claim of ineffective assistance of counsel must fail"]; see *People v. Cudjo* (1993) 6 Cal.4th 585, 616 ["Because there was no sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance"].) Because, as we explain below, the prosecutor did not argue to the jury that it could find defendant guilty of the attempted murder of Clark based on his intent to kill Houston, the prosecutor did not engage in prosecutorial misconduct and

defense counsel thus did not provide ineffective assistance of counsel by failing to object.[9]

III. The Jury's Finding of Attempted Murder Was Based on a Correct Legal Theory

"[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Green* (1980) 27 Cal.3d 1, 69, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239 and *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.)

Defendant argues that this is not an issue of prosecutorial misconduct but reliance upon a legally inadequate theory—shooting at Houston which could be the basis of an attempted murder of Clark. He argues that the prosecutor "essentially" argued that Houston was the intended target of the shooting and that "[s]he relied on the Houston 'motive' as a proxy for the intent to kill [s]he was required to prove in count 1." Even if defendant did not forfeit this issue by failing to object in the trial court or preserved it by raising it in his new trial motion, this argument fails because the only theory the prosecutor presented to the jury was that defendant fired the shots at Clark; she did not argue a legally inadequate theory of guilt to the jury.

In her opening statement, the prosecutor identified Clark as the "victim" of attempted murder and stated that the evidence would show that defendant fired "five to six rounds directly at Demondre Clark and the vehicle." In her closing argument, referring to Clark, the prosecutor said, "The guy got shot at. He is lucky he didn't get killed. He got shot at. [¶] We know there were about six shots fired in his direction. . . .

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9 Because we address and reject this issue on the merits below, we need not decide defendant's claim that he preserved this issue for appeal by raising it in a new trial motion.

Two bullets go right in to the driver's side door, I mean, inches from where Mr. Clark is driving."

The prosecutor did not argue that defendant intended to kill Houston when he fired the shots at the driver's door and window—Clark was sitting in the driver's seat—or that the jury could find defendant guilty of Clark's attempted murder based on defendant's intent to kill Houston. The prosecutor stated that she did not have to prove motive and that Houston's relevance to the case was only marginal—"if you are thinking that you are wondering about why Antonio Houston becomes even relevant in this case it is because" defendant passed Houston and Clark at the mall and Houston got into the car with Clark, with Clark driving. The prosecutor then told the jury that to prove defendant committed attempted murder, she only had to prove that he had taken a direct but ineffective step towards killing someone and that he intended to kill that person. The prosecutor never said that because defendant had a motive to kill Houston, that that motive established defendant's intent to kill Houston, which intent to kill could be transferred to Clark. Because the prosecutor did not rely on "the Houston 'motive' as a proxy for the intent to kill" Clark, there was no prosecutorial misconduct or error.

DISPOSITION

The judgment is affirmed.

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MOSK, Acting P. J.

We concur:

KRIEGLER, J.

GOODMAN, J.*

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