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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAVIONE EUGENE WILEY, Defendant and Appellant.	B288508 (Los Angeles County Super. Ct. No. LA084437)

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin Herscovitz, Judge. Affirmed.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General of California, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Colleen M. Tiedemann, Deputy Attorney General, Michael Katz, Deputy Attorney General, for Plaintiff and Respondent.

While very high, Davione Wiley raised his gun to shoot a rival gang member. As Wiley slowly tried to pull the trigger, his rival pushed the gun aside, and Wiley ended up shooting his best friend to death by accident. A jury convicted Wiley of murder, attempted murder, and other crimes. We affirm.

I

We recount the facts in the light favorable to the side that prevailed at trial.

Wiley was a pimp and a gang member. In August 2016, he hosted a party at his house. Wiley was addicted to "lean," which is prescription cough syrup mixed with juice or soda. The evidence was people drink lean to get high. Wiley was also addicted to Xanax. Wiley added Xanax to the lean and drank enough to get very intoxicated: he slurred his speech, he moved and spoke slowly, he had trouble maintaining his balance, and he was hallucinating.

Wiley began arguing with Unique Peace, who worked for him as a prostitute. Wiley started pistol-whipping her. "He hit her with her flat iron," too.

Peace called her cousin (unnamed in the record) to pick her up. She fled out a window. Peace's cousin arrived at the front gate. Wiley and others went out to him. A group of at least eight people formed. Wiley asked the cousin where he was from. The cousin identified himself as a Crip. Wiley is a Blood. The evidence was Bloods and Crips are rivals.

Wiley went back in the house for his gun. He returned and again asked Peace's cousin where he was from. The cousin repeated he was a Crip. Wiley pointed the gun at the cousin for three to six seconds. Then, Wiley "let off a shot . . . But the cousin pushed [Wiley's] hand and by the time the shot went out,

the bullet hit" Derrick McGee, Wiley's best friend. A witness said "I remember [Wiley] trying to shoot [the gun], [he] pulled the trigger; but by the time he pulled the trigger, it hit" McGee.

McGee died.

Peace's cousin ran down the street, laughing, and Wiley chased him. Wiley aimed at the cousin and tried to shoot but the gum jammed. Peace heard "click, click, click" as Wiley chased the cousin. A semiautomatic like Wiley's makes a clicking sound when one pulls the trigger after the gun has jammed and the hammer falls on an empty cartridge in the chamber.

While driving away from the scene, Wiley told a witness "he didn't mean for that to happen. He killed his homeboy. It happened so fast. And he's saying he should have shot — he was going to shoot the cousin and the bitch, too."

Police located and interviewed three prostitutes who worked for Wiley. During a recorded call from jail, Wiley later said "they found every one of them bitches and every one of them bitches went with the same story. So I went with the same story too. So my life over with." The person on the phone asked, "And what side of the story was that?" Wiley said, "[t]he same story about what really happened."

When Wiley made this call, it was after telling detectives the same day, "I was high. If I wasn't high . . . that nigger would have been dead instead of my homie." Wiley explained, "I whipped out the gun. . . . But I whipped it out so slow because I'm — I'm under the influence. . . . [the cousin] hit it and it went off." Wiley admitted he chased the cousin, trying to shoot him, but the gun jammed.

Before trial, the prosecution produced discovery but redacted potential witnesses' contact information. Wiley moved

for four potential witnesses' contact information. Three of those four were the prostitutes interviewed by police, and they would later testify at trial. The fourth witness never testified at trial. The defense sought the contact information for a "thorough investigation into the background of these witnesses including their reputation for honesty in their community."

The trial court held an in camera hearing and found "there is good cause to not reveal the addresses of each of the four individuals for personal safety issues." The trial court also denied Wiley's request for the witnesses' telephone numbers. However, the trial court ordered the prosecutor to make the four witnesses available for an interview by the defense at a courthouse or police station.

Wiley testified at trial. He admitted to pointing the gun at the cousin but said he did not intend to kill the cousin. Instead, Wiley said he "was trying to scare" the cousin. Wiley also testified, "I thought [the cousin] was going to hurt me." Wiley denied chasing the cousin after he accidently hit McGee.

A jury convicted Wiley of first degree murder, attempted premeditated murder, and other crimes. The jury also found true the allegation under Penal Code section 12022.53, subdivision (d), that Wiley intentionally discharged a firearm.

The trial court sentenced Wiley to 99 years to life. It ordered Wiley pay a $5,000 victim restitution fine, a stayed $5,000 parole revocation fine, direct victim retribution of $12,000, $160 in court security fees, and a $120 conviction assessment.

II

The trial court properly denied Wiley's pretrial request for the contact information of four prosecution witnesses.

Wiley asks us to review the sealed transcript of the proceeding where the trial court heard the prosecution's basis for withholding the witnesses' contact information. The prosecution does not object.

The parties agree we review the trial court's ruling for abuse of discretion. (Cf. *People v. Avila* (2006) 38 Cal.4th 491, 607 [reviewing for abuse of discretion a trial court's denial of discovery of a witness's juvenile and parole records].) We have reviewed the in camera hearing and find no abuse of discretion.

Wiley erroneously suggests the trial court violated his constitutional due process rights by allowing the prosecution to withhold the witnesses' contact information. There was no constitutional violation.

Trial courts properly deny pretrial requests for disclosure of witnesses' identity if disclosure may endanger the witnesses' safety. (See *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1135.) When it comes to ruling on such pretrial requests, California's Supreme Court has described trial court's discretion as "considerable." (*Ibid*.) That is for good reason. Justice requires live and willing witnesses.

In this case, the prosecution offered substantial evidence at the in camera hearing showing disclosure of the witnesses' contact information would risk their safety. And the trial court balanced witness safety against Wiley's need to prepare for trial, ordering the prosecutor to make the witnesses available for interviews by the defense. The trial court then went further, telling the prosecutor it "would not accept . . . hearsay testimony that [the witnesses] tell the police that they don't want to be interviewed. . . . [T]he [witnesses] must be available to be interviewed." The trial court also correctly foresaw that, despite

its order, the "women's admitted occupation and history of committing crimes and being prostitutes" would come out at trial.

Wiley cites inapposite cases. In *Miller v. Superior Court* (1979) 99 Cal.App.3d 381, 386, the court denied the disclosure of a witness's address "for no reason." Similarly, in *United States v. Fischel* (5th Cir. 1982) 686 F.2d 1082, 1092, the prosecution "failed to allege any reason for withholding" an informant's address. And in *Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, 1336, there was "no real issue of threats or dangers to the safety of [the witnesses]." Unlike each of these cases, the prosecution here showed disclosure of the witnesses' contact information would place them in danger.

Wiley cites irrelevant language from *Alvarado v. Superior Court*, *supra*, 23 Cal.4th at page 1146, which broadly describes a defendant's right under the confrontation clause to cross-examine witnesses on their addresses. Wiley also quotes other cases that involve defendants' right to cross-examination. This authority is not pertinent for two reasons.

First, Wiley did not raise the confrontation clause to the trial court and thus has forfeited arguments based on it. (See *People v. Redd* (2010) 48 Cal.4th 691, 730.) Second, even if Wiley had raised the confrontation clause, it is inapplicable because it confers a *trial* right, not pretrial discovery rights. (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 52–53 (plur. opn. of Powell, J.); *People v. Caro* (2019) 7 Cal.5th 463, 501.)

Wiley also suggests the discovery ruling violated his right to effective representation of counsel. He implies his counsel could not effectively represent him because his counsel could not investigate the witnesses' reputations in their neighborhoods. This argument fails.

Ineffective assistance of counsel claims turn on errors of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Wiley's complaint is not with the performance of his trial counsel. Indeed, Wiley's counsel championed his interests by seeking the contact information. Wiley's complaint is with the trial court's ruling blocking his counsel's diligent efforts. Wiley cannot repackage this complaint as an ineffective assistance of counsel claim.

The trial court properly denied Wiley's pretrial request for the four potential witnesses' contact information.

III

Sufficient evidence supports the jury's (1) first degree murder conviction and (2) finding that Wiley intentionally discharged a firearm, as the prosecution alleged under Penal Code section 12022.53, subdivision (d).

We review the record in the light most favorable to the prosecution to determine whether a rational trier of fact could find the elements of first degree murder and the firearm allegation beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 324; *People v. Virgil* (2011) 51 Cal.4th 1210, 1263.)

A

Wiley attacks his first degree murder conviction on a single ground: he claims the prosecution did not present sufficient evidence of express malice. Express malice is the intent to kill unlawfully. (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

The prosecution did not attempt to prove Wiley intended to kill McGee, who was Wiley's best friend. Instead, it relied on the doctrine of transferred intent. Under this doctrine, if a defendant means to kill one person but mistakenly kills a second one, the

defendant is guilty of murdering the second person because the intent to kill the first person transfers to the killing of the second. (*People v. Bland* (2002) 28 Cal.4th 313, 317, 321–322.) Here, the prosecution's theory was Wiley meant to kill the cousin but mistakenly killed McGee. Thus, to prove express malice the prosecution had to prove Wiley intended to kill the cousin.

There was sufficient evidence Wiley intended to kill the cousin, who was a rival gang member. The jury could reasonably interpret Wiley's own statements as admissions he intended to kill the cousin. Wiley told detectives, "I was high. If I wasn't high . . . that nigger would have been dead instead of my homie." And a prostitute who worked for Wiley testified that, as Wiley drove away from the scene of the shooting, he told her, "he didn't mean for that to happen. He killed his homeboy. It happened so fast. And he's saying he should have shot — he was going to shoot the cousin and the bitch, too."

The jury could infer Wiley wanted to pull the trigger when he aimed the gun at the cousin but was addled by drugs, giving the cousin time to push the gun aside. Wiley told detectives, "I whipped out the gun. . . . But I whipped it out so slow because I'm — I'm under the influence. . . . [The cousin] hit it and it went off." Wiley also said, "I wanted to protect my homie. So when I ran out there, you know what I'm saying, I say where you from? But see when you on Xanax — okay, it's like this. If I — if I think I'm running 50 miles per hour I'm really running 10 miles per hour on Xanax." A detective testified the type of gun used by Wiley can only fire if two safety mechanisms are disengaged. It was logical for the jury to infer Wiley intended to shoot the cousin, and was just slow to pull the trigger. We accept this logical inference. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Wiley offers other inferences the jury might have made: Wiley's delay in shooting the gun showed he did not want to kill the cousin, Wiley's failure to threaten the cousin showed he did not want to kill the cousin, and Wiley's comment that "he was going to shoot the cousin and the bitch, too" referred to Wiley's chase of the cousin not Wiley's pointing of the gun before shooting McGee. Wiley analogizes at length to implied malice cases, arguing this case is one of implied malice not express malice. These points can be made to a jury. But they do not support an appellate claim of insufficient evidence. That the evidence may be reconciled with a finding contrary to the jury's is irrelevant where, as here, the verdict was reasonably justified by evidence. (See *People v. Zamudio*, *supra*, 43 Cal.4th at p. 358.)

Wiley mentions in passing the evidence "was not sufficient to show that he premeditated a killing." Whether Wiley premeditated the murder is different than whether he intended to kill the cousin. (*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 822–823.) And Wiley fails to support his bare assertion with argument, legal authority, or citations to the record. Therefore, Wiley has forfeited this claim. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [explaining forfeiture principles have extra force when an appellant makes an unsupported assertion about sufficiency of the evidence].)

B

There was sufficient evidence Wiley intentionally discharged a firearm for the same reason there was sufficient evidence to support the jury's finding of express malice. Wiley "grabbed [his] gun" to "protect [his] homie," pointed it at a rival gang member with two safety mechanisms disabled, and the gun fired. Wiley argues "This act by John Doe is what caused the gun

to misfire, or [to] force [the] appellant's hand to press the trigger." To repeat, evidence that can be reconciled with a contrary finding to the jury's is sufficient when it can also be reconciled with the verdict. (See *People v. Zamudio*, *supra*, 43 Cal.4th at p. 358.) This evidence sufficed.

IV

Wiley argues the trial court should have instructed the jury to agree unanimously on which of Wiley's acts formed the basis for its attempted murder conviction. We do not decide whether the trial court erred because, even if it did, any error was harmless.

Verdicts must be unanimous in a criminal cases. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) When the evidence shows a defendant committed several acts, any one of which might constitute the crime charged, the prosecution must elect which act it relies on for its allegation. (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) When the prosecution does not elect a specific act, the trial court has a sua sponte duty to instruct the jury to agree unanimously on which act is the basis for its guilty verdict. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.)

At trial, Wiley argued two acts could be the basis for an attempted murder conviction: his pointing the gun at the cousin and his chasing the cousin down the street while trying to shoot. The trial court ruled the two acts were a continuous course of conduct, so there was no need for the prosecutor to elect an act. The trial court did not instruct the jury to agree unanimously on which act was the basis for its attempted murder conviction.

Although Wiley faults the trial court for both instructional error and for failing to require the prosecution to elect a single act, he develops only his instructional error argument. We thus

address only instructional error. We need not decide whether the trial court erred because any error is harmless.

Courts split on the standard for determining if the failure to give a unanimity instruction is harmless. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 576.) We find any error harmless under both the *Chapman* and *Watson* standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Wiley's defense to the murder and attempted murder charge was twofold. His first and most important defense was that he intended to scare, not kill, the cousin. In closing, defense counsel argued Wiley "pointed a gun in a perhaps negligent manner. It was deflected and killed his best friend. That evidences that it was an accident, plain and simple." Wiley's second defense, also argued by counsel in closing, was that "even if Mr. Wiley intended for this man to die . . . that's not attempted murder. That's not murder. That's attempted voluntary manslaughter and voluntary manslaughter. Why? It's mitigated. It's mitigated" because "Mr. Wiley believes that this man was going to harm him, cause death."

The jury did not believe either of these stories, as shown by the jury's unanimous conviction of first degree murder. To convict Wiley for first degree murder, the jury must have rejected both defenses. It must have determined Wiley was not credible and defense counsel's arguments were unpersuasive. That left no basis for a juror to believe Wiley (1) did not attempt murder by pointing the gun but did attempt murder by chasing the cousin while trying to shoot him or (2) did attempt murder by pointing the gun but did not attempt murder by chasing the cousin while trying to shoot him. The jury's rejection of Wiley's story was

wholesale. Any error in the trial court's failure to give a unanimity instruction was harmless.

V

The trial court did not err by refusing to stay Wiley's attempted murder sentence.

Wiley argues his attempted murder sentence should be stayed under Penal Code section 654 (section 654). That section prohibits multiple punishments for a single act. (Pen. Code, § 654, subd. (a).) Wiley contends the murder and attempted murder are a single act, so he cannot be punished for both.

Section 654 does not apply to crimes of violence against multiple victims. (*People v. Oates* (2004) 32 Cal.4th 1048, 1063 (*Oates*).) Section 654 aims to match punishment with culpability. A defendant who chooses a means of murder that places a group in danger is properly subject to greater punishment than a defendant who chooses a means that harms only a single person. (*Ibid.* ["For example, a defendant who chooses a means of murder that places a planeload of passengers in danger . . . is properly subject to greater punishment than a defendant who chooses a means that harms only a single person."].)

When an intoxicated person struggling to maintain his balance prepares to fire his loaded gun in the midst of eight people, he endangers the group. A defendant like Wiley is more culpable than someone who endangers but one person. Multiple punishments are appropriate under *Oates*.

VI

Wiley requests we stay court fines, fees, and assessments in light of *People v. Dueñas* (2019) 30 Cal.App.5th 1157.

Wiley concedes he did not object to the fees or fines at the trial court. Thus, Wiley has forfeited this argument. (*People v.*

Frandsen (2019) 33 Cal.App.5th 1126, 1153–1155; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464.)

DISPOSITION

The judgment is affirmed.

WILEY, J.

We concur:

BIGELOW, P. J.

STRATTON, J.