

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES GERMAN VERA,

Defendant and Appellant.

B235152

(Los Angeles County
Super. Ct. No. VA116175)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip H. Hickok, Judge. Affirmed in part and reversed in part.

Alan Stern, 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, Shawn McGahey Webb and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant was charged in a six-count information with three counts of attempted first degree murder arising out of a shooting near a park. (Pen. Code, §§ 664, 187.)¹ Defendant, a passenger in a vehicle, fired shots at two men who were crossing a street adjacent to the park. One of the bullets hit a child bicycle riding in the park with his father, severely injuring the child. The jury convicted defendant of attempted voluntary manslaughter on each of the three counts. Defendant contends that count 1, pertaining to the child victim, should be reversed because insufficient evidence supports the prosecution's theory that the child was in the "kill zone." We reverse count 1, and affirm the judgment in all other respects.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Prosecution Case in Chief

On the evening of July 21, 2010, several friends gathered at Victor David Fanelli's home on Seaforth Avenue near Holifield Park in Norwalk.² Fanelli's uncle Eddie and Fanelli's grandmother were also there. Sometime during the evening, Jessica Martinez, her cousin Valerie Lawson, Jimmy Salcido, defendant and his girlfriend Dalia Rivera arrived in Salcido's Jeep Cherokee. Rivera had asked them to stop and pick up defendant. The group had also picked up some beer on the way over, and everyone was drinking beer. None of Fanelli's friends, who were all Orange Street Locos gang members or associates, knew defendant, who was a member of the Vickie's Town gang.

After about half an hour, at approximately 7:30 p.m. to 7:40 p.m., the group decided to leave, and they got into Salcido's Jeep. Salcido was driving, Martinez was in the passenger seat, defendant was in the rear on the driver's side, Rivera was in the middle, and Lawson was on the rear passenger side. Fanelli rode in the cargo compartment.

¹ Further statutory references are to the Penal Code unless otherwise indicated.

² Holifield Park is bounded by Excelsior Drive on the north and Bloomfield Avenue on the east. Seaforth Avenue dead ends at Excelsior Drive on the north side of the park. Norwalk Boulevard intersects Excelsior Drive west of the park.

As they got in the car, a man walked by, and came back with another man as they were leaving. According to Rivera, the men knew Fanelli, and “obviously knew [everyone in the Jeep was] from Orange Street [gang].” As they were pulling out of the driveway, the two men walked by the car. One of the men threw a gang sign at them. Fanelli stated, “Those guys tried to intimidate me when they pass by my house.” However, at trial Fanelli admitted the men, who were from the Varrio Norwalk gang, had not done anything to him. Rivera said, “it’s the fool from AM/PM [Market], the one I tried to fuck up.” She saw one of the men digging in his pants as if he had a gun.

Salcido drove on Seaforth toward the park, and turned westbound on Excelsior to head towards Norwalk Boulevard. Defendant pulled a gun from his waistband, rolled down his window, and shot at the two men, who were now walking in the middle of the street on a median near the park. Nobody else in the car had a gun.

Martinez heard Lawson say, “What are you doing? What are you doing?” and turned around and saw that Lawson was pulling on defendant’s shirt. Martinez saw that defendant had a gun he was holding out of the window pointed in the direction of the two men, who were now crossing the street. Martinez heard two to three gunshots, and because she did not see defendant fire the gun, she could not be sure which direction defendant pointed the gun. As Salcido pulled away, they asked defendant why he was shooting, but defendant did not respond.

A neighbor of Fanelli who lived across the street told sheriffs that she saw the Jeep parked in front Fanelli’s house. Three male Hispanics and a female Hispanic were standing nearby. After the neighbor turned away from the window, she heard two shots fired. She looked back toward the street and saw the Jeep had left and was going down Excelsior.

Richard Cabrera, one of the victims, was walking with his friend Saul Montes towards the park to play basketball. As they were crossing the street, he heard the first shot, and they were almost to the curb when he heard the second shot. He turned around

when he heard the first shot, but did not see a car, although he heard the car accelerate towards Norwalk Boulevard.

Ubaldo Ortiz, Sr., was with his seven-year-old son Ubaldo Ortiz, Jr. at the park to go for a bike ride. Ortiz had arrived in his truck and unloaded their bikes. They rode their bikes near the restrooms, and the younger Ortiz watched his father ride his bike. Ortiz rode towards his son, and when he was about three to five feet away from his son, Ortiz heard some shots.

Ortiz turned towards the street because the shots came from that direction, and saw two men running into the park toward him. Ortiz believed the men were being shot at, and threw himself over his son and fell to the ground. Ortiz noticed his hand was “full of blood because that first shot had hit” his son in the back below his armpit. Ortiz called for help, and saw that the two men who had run into the park were near the restroom. Although he could not see the shooter, the shots came from Excelsior Drive.

Cabrera saw the child Ubaldo Ortiz, Jr. get shot, and was the person who called 911.

Ubaldo Ortiz, Jr., was in the hospital for five weeks and underwent surgery on his spine. He used a wheelchair for several months.

Sheriff’s deputies responding to the scene recovered an expended .45-caliber bullet casing near the shooting on Excelsior Drive. Martinez told police she believed the gun was an automatic, and saw defendant stick his hand out the window and fire the gun. Defendant told her, “that’s the way I roll,” “that’s how I do it.”

A search of defendant’s home disclosed five marijuana plants growing in the backyard, 22 individual plastic baggies containing marijuana, a scale, a piece of cardboard containing gang graffiti, and a plastic gun case with live .45-caliber ammunition.

2. Defense Case

Defendant testified that he had known Montes since sixth grade, and had considered him “one of his best friends,” but had not seen him since middle school. A

week before the shooting, Rivera and defendant ran into Montes at an AM/PM market. Montes was laughing at Rivera, and she hit him several times. Montes told defendant to “get your girl,” and defendant grabbed Rivera. Rivera was angry and intoxicated, and she disparaged defendant because he did not “have her back.”

On the night of the shooting, when they left Fanelli’s house in the Jeep, Salcido was driving, Rivera was seated next to defendant, Martinez was in the front seat, and Lawson was seated on the other side of Rivera. Fanelli was in the cargo area. Rivera saw the two men on the street, and mentioned they were from Norwalk, and stated that defendant did not “have her back.” Defendant interpreted her comment to mean a lack of respect. Cabrera walked by, and that was the first time defendant had ever seen him. As Salcido drove towards Norwalk Boulevard on Excelsior, Rivera was complaining to defendant that he did not defend her. Defendant pulled out his gun and shot at the tree and bushes. Defendant saw one of the men reach for something, and he thought it was a gun. Defendant was not trying to shoot anyone, but was just trying to scare them.

Defendant claimed he carried a gun for his protection because a lot of people believed he was a gang member. His “homies” gave him the gun for protection when he got out of jail. He did not carry the gun with him all the time, and he knew it was illegal for him to carry the gun because he was a convicted felon. Defendant admitted that if he shot a gun, the bullet could hit anything that was in its path.

According to Sheriff’s Detective Francis Espeleta, it was about 100 feet from the median of Excelsior Drive to the location in the park where Ubaldo Ortiz, Jr. was shot.

3. Rebuttal

Detective Espeleta testified that defendant told him he was shooting at Montes.

4. Charging Information; Jury Verdict

Defendant was charged with three counts of attempted, willful and deliberate murder (counts 1–3, §§ 664, 187), with allegations as to these counts that defendant personally and intentionally used and discharged a firearm and as to count 1 only, proximately caused great bodily injury (§§ 12022.53, subds. (b), (c), & (d), 12022.7,

subd. (a)). The information further alleged defendant was a felon in possession of a handgun (count 4, former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)), felon in possession of ammunition (count 5, former § 12316, subd. (b)(1), now § 30305, subd. (a)(1)), and that defendant possessed marijuana for sale (count 6, Health & Saf. Code, § 11359). The jury found defendant guilty of the lesser included offense of attempted voluntary manslaughter on counts 1, 2 and 3, and found true firearm enhancements on these counts. The jury found appellant guilty on counts 4, 5 and 6.

DISCUSSION

Defendant argues that insufficient evidence supports his conviction on count 1 based on a kill zone theory of concurrent intent as set forth in *People v. Bland* (2002) 28 Cal.4th 313 because the child victim was not close enough to the intended targets. Instead, he argues, the jury impermissibly applied transferred intent based on defendant's intent to shoot Montes and Cabrera.

A. Factual Background

During defendant's testimony, the prosecution asked defendant, "You know when you point a gun and you pull the trigger and a bullet comes out of that gun, you know that bullet can go anywhere, right?" Defense counsel objected, and the prosecution responded that his theory was the "kill zone." Defendant counsel objected that an instruction on kill zone was improper because a kill zone involved people in a particular group, not a stray bullet that killed someone in the group: the shooter must specifically intend to kill someone. The prosecution stated that kill zone was not limited to a group. The court overruled the objection.

Before instructions were given, defense counsel moved under section 1118 with respect to count 1, arguing the kill zone did not apply where a stray bullet kills someone who is not near the intended target because it does not demonstrate the concurrent intent to kill. Here, defendant argued, the kill zone was in the street where the two men were walking, it was not the park, and thus the instruction did not apply to count 1. The prosecution argued that the theory applied where defendant had created the kill zone and

it was an issue of fact for the jury to determine whether defendant had created such a zone, and the perimeter of that zone. Defense counsel argued the defendant could create a kill zone only to the extent necessary to get the defendant's primary target.

The jury was instructed with CALJIC 8.66.1, which provided, "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the 'kill zone.' The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a zone of risk is an issue to be decided by you."

The prosecution in closing argument advised the jury, "the issue is did [defendant] have the specific intent to kill Ubaldo Ortiz, [Jr.]? Well, under the law if a defendant creates a zone of harm, also known as a zone of danger, also known as a kill zone, if he creates that kill zone and he intends to kill someone in that kill zone, you can infer that he had the specific intent to kill everyone within that kill zone [¶] Basically, what that requires is two things: The defendant had [the intent] to kill one person, but he also may currently, at the same time, intend to kill other people within that zone of danger that he has created. You may infer that the shooter intend[ed] to kill the primary victim, in this case Mr. Montes, by killing everyone in the victim's vicinity."

The prosecution continued, "the next question you're going to have to ask yourself is with regard to the zone of danger. You're going to have to make a decision as to what was the zone of danger. What are the parameters of that zone, and how far does it extend. Does it extend all the way to the end of the park? Is it limited to just the center median? Does it extend across Excelsior Drive? What was the zone of danger that [defendant] created? And I would submit to you . . . that by firing a gun, the zone of danger extends as far as that bullet travels. You set that bullet in motion, you are responsible for where it goes, wherever it goes. . . . Everything along this line is the zone

of danger, because [defendant] created it.” The prosecution told the jury that although defendant probably did not see Ubaldo Ortiz, Jr. in the zone of danger, because defendant created the zone of danger, he was responsible for whatever happened in it.

B. Analysis

In *People v. Bland*, *supra*, 28 Cal.4th 313, the court concluded that the doctrine of transferred intent applies to unintended killings, but not to persons not killed. “To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant’s mental state must be examined as to each alleged attempted murder victim.” (*Id.* at p. 328.) However, the court in *Bland* observed, “The conclusion that transferred intent does not apply to attempted murder still permits a person who shoots at a group of people to be punished for the actions toward everyone in the group even if that person primarily targeted only one of them. . . . [T]he person might still be guilty of attempted murder of everyone in the group, although not on a transferred intent theory,” but on a theory of “‘concurrent intent,’” not transferred intent. (*Id.* at p. 329.)

Under the concurrent intent doctrine, the requisite mental state for attempted murder can be inferred “‘when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim’s vicinity.’” (*Bland*, *supra*, 28 Cal.4th at p. 329.) For example, the *Bland* court explained, when a defendant who intends to kill A drives by a group consisting of A, B, and C and attacks the group with automatic weapon fire in order to ensure killing A, the defendant “‘has intentionally created a “kill zone” to ensure the death of his primary victim When the defendant escalated his mode attack from a single bullet aimed at A’s head to a hail of bullets . . . , the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A’s immediate vicinity to ensure A’s death. . . . Where the means employed to commit the crime against a primary

victim creates a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.” (*Id.* at p. 330.)

The Supreme Court also explained in *Bland* that this “concurrent intent” or “kill zone” theory “is not a legal doctrine requiring special jury instructions Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.” (*Bland, supra*, 28 Cal.4th at p. 331, fn. 6.) Nevertheless, current pattern jury instructions discuss the kill zone theory. (*People v. Stone* (2009) 46 Cal.4th 131, 137–138.)

Although *Bland* did not precisely define the scope of the kill zone, subsequent cases are instructive. *Bland* was distinguished in *People v. Leon* (2010) 181 Cal.App.4th 452, where defendant was convicted two counts of attempted murder. Defendant, a gang member, was in the passenger seat of a vehicle following another vehicle that was occupied by a rival gang member, and two men associated with that rival gang. Defendant fired a single shot into the right taillight of the vehicle. The bullet went through the light and the right backseat before striking and killing the rival gang member, who was on the right passenger side of the vehicle. The other two men, the driver and front passenger, were unharmed. (*Id.* at pp. 457–458.) *Leon* concluded the kill zone only extended to the bullet’s line of fire, and encompassed the victim and the person in the front passenger seat, but not the driver. (*Id.* at p. 466.) “The situation would have been different had appellant fired more than one shot at the [vehicle] or had he used a shotgun. In *Bland* our Supreme Court concluded that the jury could have reasonably found that the defendant had intended to kill a car’s passengers, even though his primary target was the driver, because the ‘defendant and his cohort fired a flurry of bullets at the fleeing car and thereby created a kill zone.’” (*Ibid.*)

In *People v. Perez* (2010) 50 Cal.4th 222, the court concluded that the kill zone theory did not apply to a case where a defendant fired a single shot from a moving car at a distance of 60 feet at a group of eight individuals who were standing near each other.

The court found “the indiscriminate firing of a single shot at a group of persons, without more, does not amount to an attempted murder of everyone in the group.” (*Id.* at p. 232.)

Nonetheless, in *People v. Vang* (2001) 87 Cal.App.4th 554 (*Vang*), two codefendants drove up to a duplex where the mother of a rival gang member lived, and the husband opened the unit’s door to look outside. As he stood in the open doorway with one of his daughters at his side, the defendants sprayed bullets at the building. A majority of the bullets struck the unit, causing extensive interior damage. (*Vang, supra*, at pp. 557–558.) The woman suffered gunshot wounds requiring that she terminate a pregnancy, and the daughter at her door was fatally wounded. The woman’s husband and two of her other children present inside the residence during the shooting were not hurt. (*Ibid.*) After the shooting, there were at least 50 bullet holes dotting the front of the duplex, and there was extensive damage from gunfire throughout the unit. A few minutes later, blocks away, there was another shooting where the same high-powered rifle was used to spray bullets at an apartment occupied by another family of five persons. The mother and one of the children inside that residence were shot and seriously injured. (*Id.* at p. 558.) The court in *Vang* explained that “[t]he jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that the defendants harbored a specific intent to kill every living being within the residences they shot up.” (*Id.* at pp. 563–564.)

In summary, kill zone analysis requires us to determine whether (1) the jury could “rationally infer from the type and extent of force employed in the defendant’s attack on the primary target that the defendant intentionally created a zone of fatal harm,” and “(2) the nontargeted alleged attempted murder victim inhabited that zone of harm.” (*People v. Adams* (2008) 169 Cal.App.4th 1009, 1022.)

Here, defendant argues that these cases require that the victim be in close proximity to the intended target.³ We agree. Although the trajectory of a bullet can define the scope of the kill zone, as in *People v. Leon*, *supra*, 181 Cal.App.4th 452, where the kill zone was limited to the passenger side of the car, the scope of the kill zone, being a doctrine of concurrent intent, is also limited by the defendant's intent. Thus, in some cases, as in *People v. Vang*, *supra*, 87 Cal.App.4th 554, where the defendant shot up a duplex, it can extend to those the defendant does not know are on the scene. However, the doctrine is not meant to extend to every conceivable person who might be in the vicinity—even if they are hit by defendant's bullet—but only to those, as *Bland*, *supra*, 28 Cal.4th 313 explained, who are in the victim's vicinity. (*Id.* at p. 329.) Thus, although here defendant's bullet unfortunately found an innocent victim, Ubaldo Ortiz, Jr., that victim was not in the kill zone because the zone was the locale of the two victims who were in the middle of the road: the persons defendant intended to harm.

DISPOSITION

Defendant's conviction on count 1 is reversed; in all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

³ Like attempted murder, attempted voluntary manslaughter requires the specific intent to kill. (*People v. Montes* (2003) 112 Cal.App.4th 1543, 1546–1547.) Thus, the kill zone theory applies equally to attempted voluntary manslaughter.