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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DERRICK TAYLOR,

Defendant and Appellant.

2d Crim. No. B233797
(Super. Ct. No. NA074807-01)
(Los Angeles County)

Derrick Taylor appeals a judgment following conviction of murder and first degree burglary, with findings of commission of murder during the burglary, commission of the crimes to benefit a criminal street gang, discharge of a firearm by a principal during commission of the crimes causing death, three prior serious felony strike convictions, and service of two prior prison terms. (Pen. Code, §§ 187, subd. (a), 189, 459, 190.2, subd. (a)(17), 186.22, subd. (b)(4), former 12022.53, subds. (c)-(e), 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).)¹ We award Taylor 1,450 days of actual custody credit but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

In the late evening of October 26, 2006, John Ibrahim lost his life during a gun battle inside his San Pedro condominium. Taylor, Vincent Smith, and Jarrett Myers, all members of the "Santana Blocc" criminal street gang, went to Ibrahim's residence to take his marijuana and cash, believing that he was in Hawaii. Ibrahim was home that evening,

¹ All further statutory references are to the Penal Code unless otherwise stated.

however. As Taylor later explained during a police interview, "[I]f you have somebody with you that has a gun and ain't willing to wait, what can I say?"

Ibrahim owned a restaurant in Gardena and sold marijuana from his restaurant as well as from his condominium. His brother Justin stayed at the condominium several nights a week and knew that Ibrahim was dealing drugs. Justin owned a .45 caliber semiautomatic handgun that Ibrahim sometimes kept by his nightstand.

Ibrahim was friendly with Serena Bell and her erstwhile roommate, Tamika Young. They used marijuana together at Bell's residence or at Ibrahim's condominium. Ibrahim provided the marijuana and sometimes gave money to Bell. Ibrahim and Bell had planned to take a Hawaiian vacation on October 29, 2006. Bell informed Young of the vacation and stated that Ibrahim was paying for the trip.

In October 2006, Young saw Taylor, a longtime friend, and invited him to Bell's residence. Ibrahim arrived later with a large amount of marijuana in his backpack, and the group smoked marijuana together. That evening, Taylor informed Young that he needed money and asked if she knew of someone with money or marijuana. He also asked where Ibrahim lived and suggested that he could steal his marijuana. At trial, Young testified that she attempted to discourage Taylor.

Several days before the shooting, Taylor asked Young to drive him to Ibrahim's condominium. She agreed "for no reason at all." Young then drove Taylor to the parking area of the development but testified that she could not identify Ibrahim's condominium.

Taylor informed fellow Santana Blocc gang members Myers and Smith of Ibrahim's marijuana. On October 26, 2006, the three men drove to Ibrahim's condominium, but saw that the patio door was open and that Ibrahim was there. Smith retrieved a firearm from the vehicle to carry out their plan. The men developed a ruse to lure Ibrahim outside by stating that his vehicle had been struck in the parking area. As Ibrahim left the condominium and walked to the parking area with Myers, Smith and Taylor went inside and searched for drugs. Ibrahim returned unexpectedly, however, and a gun battle followed. Ibrahim shot Smith in the neck, but Smith shot Ibrahim several times.

Following the sounds of gunshots, a neighbor investigated and found Ibrahim wounded and lying at the bottom of the condominium stairs. Other neighbors summoned emergency police and medical assistance. Los Angeles Police Officer William Manlove arrived quickly and found Ibrahim unresponsive and moribund; paramedics arrived but were unable to resuscitate him. A Los Angeles County medical examiner later performed an autopsy on Ibrahim's body and concluded that he died from three gunshot wounds, two of which were immediately fatal.

A police search of Ibrahim's condominium revealed a .45 caliber semiautomatic handgun lying on the floor, shell casings and spent bullets throughout the residence, blood stains, 366 grams of marijuana, and \$9,800 cash. A window screen in Ibrahim's bedroom window was broken. The parties stipulated at trial that Smith's blood was in a bloodstain recovered and tested by a police criminalist.

A police criminalist testified that based upon the number and location of bullet holes in Ibrahim's condominium, a gun battle had occurred with two persons shooting in opposite directions. Another criminalist compared the expended bullets and casings recovered from the condominium with the .45 caliber handgun found lying on the floor. He opined that seven bullets had been fired from the handgun and that three bullets had been fired by a .38, .357, or 9-millimeter revolver.

Following Ibrahim's death, Young suddenly moved from Bell's residence without explanation. A day or two following Ibrahim's death, Young saw Taylor with a lacerated hand and arm and noticed that he had cut his shoulder-length braids. During their conversation, Taylor denied involvement with Ibrahim's death.

Nine months later, police officers arrested Taylor. Following advisement of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, Taylor waived his rights and spoke with police officers. Initially, he denied knowledge of or involvement with Ibrahim's death. Later, Taylor stated that he merely accompanied Myers and Smith to purchase marijuana from Ibrahim but that "it didn't go right." He explained that Ibrahim drew a firearm on Smith, who drew his own firearm in response. Taylor stated that he was unaware

that Smith was armed. When the two men began shooting at each other, Taylor jumped from the bedroom window.

The day following the first police interview, police officers permitted Taylor's girlfriend to speak with him. Taylor informed her that Smith shot Ibrahim.

Following readvisement of his rights pursuant to *Miranda v. Arizona, supra*, 384 U.S. 436, police officers interviewed Taylor again. This time, Taylor stated that Young showed him where Ibrahim lived and informed him that Ibrahim was leaving for Hawaii soon. Taylor then informed Smith and Myers and the three men planned to break into Ibrahim's condominium while he was away on vacation. When they arrived at Ibrahim's condominium, however, they saw that Ibrahim was home. They devised a plan to lure him outside, but he quickly returned, found the men inside his condominium, and a gun battle ensued.

The police interviews with Taylor and the conversation between Taylor and his girlfriend were recorded. At trial, the prosecutor played the recordings, which were also received into evidence.

Los Angeles County Sheriff's Detective Richard Sanchez testified regarding the criminal activities of the Santana Blocc criminal street gang, including home invasion robberies and transportation of narcotics. Sanchez had known Taylor and Myers for many years, and opined that they, as well as Smith, are members of the Santana Blocc gang. Sanchez opined that the three men committed the crimes against Ibrahim to benefit their gang.

The jury convicted Taylor of murder and first degree burglary, and found that he committed the murder during commission of the burglary. (§§ 187, subd. (a), 189, 459, 190.2, subd. (a)(17).) It also found that Taylor committed the crimes to benefit a criminal street gang, and that a principal discharged a firearm during commission of the crimes causing death. (§§ 186.22, subd. (b)(4), former 12022.53, subds. (c)-(e).) In a separate proceeding, the trial court found that Taylor suffered three prior serious felony convictions and served two prior prison terms. (§§ 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).)

The trial court sentenced Taylor to life without the possibility of parole, plus a consecutive term of 35 years to life pursuant to former section 12022.53, subdivisions (d)-(e) and section 667, subdivision (a)(1). Pursuant to section 654, the court imposed but stayed sentence regarding the burglary conviction and its firearm and gang enhancements. It also imposed a \$10,000 restitution fine, a \$10,000 parole revocation restitution fine (stayed), an \$80 court security fee, and an \$80 criminal conviction assessment and did not award Taylor any presentence custody credit. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a)(1); Gov. Code, § 70373.)

Taylor appeals and contends that: 1) insufficient evidence supports the special circumstance finding of a murder occurring during commission of a burglary; 2) he received the ineffective assistance of counsel because his attorney did not object to the prosecutor's summation regarding the law of special circumstance; and 3) the trial court erred by denying any presentence custody credit.

DISCUSSION

I.

Taylor argues that there is insufficient evidence that he aided and abetted a burglary of Ibrahim's condominium as a "major participant" in the offense with "reckless indifference to human life." (§ 190.2, subd. (d).) To support his contention, he relies upon his police interview statements, stating that he did not want anyone to be killed during the burglary, that he was in another room during the gun battle, and that Smith carried the firearm and shot Ibrahim. (*People v. Proby* (1998) 60 Cal.App.4th 922, 933-934 [a "major participant" is "one of the larger or more important members . . . of a . . . group"].) Taylor adds that there is insufficient evidence that he was "subjectively aware that his . . . participation in the felony involved a grave risk of death." (*People v. Estrada* (1995) 11 Cal.4th 568, 577.)

In reviewing the sufficiency of evidence to support a conviction, we examine the entire record and draw all reasonable inferences therefrom in favor of the judgment to determine whether there is reasonable and credible evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Streeter*

(2012) 54 Cal.4th 205, 241.) Our review is the same in prosecutions primarily resting upon circumstantial evidence. (*Ibid.*) "An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise." (*Ibid.*) Our review does not redetermine the weight of the evidence or the credibility of witnesses. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, overruled on other grounds by *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Section 190.2, subdivision (d) provides: "[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person . . . , and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole"

Sufficient evidence and reasonable inferences therefrom support the special circumstance finding. Taylor, Myers, and Smith were members of Santana Blocc, a criminal street gang noted for committing violent crimes, including home invasion robberies and murders. Taylor bore a gang tattoo stating, "No warning shots." He decided to steal Ibrahim's marijuana after meeting him at Bell's residence, and he asked Young to show him where Ibrahim lived. After she did so, Taylor recruited fellow gang members to assist him. When the three men arrived at Ibrahim's development, Smith stated that he had a firearm and wanted to continue with the planned crime despite Ibrahim's presence. Following the gun battle, Taylor fled through the bedroom window and did not assist the victim. Taylor knowingly participated in the crime even after learning that Ibrahim was present and that Smith was armed. This evidence establishes that Taylor was a major participant in the burglary and that he acted with reckless indifference to human life. (*People v. Hodgson* (2003) 111 Cal.App.4th 566, 579-580 [defendant a major participant in robbery acting with reckless indifference to human life where he held open electric gate to facilitate codefendant's escape following murder of robbery victim].)

II.

Taylor argues that he did not receive the effective assistance of counsel because his attorney did not object to the prosecutor's summation regarding the special circumstance allegation. (§ 190.2, subd. (a)(17)(G).) He asserts that the prosecutor suggested that proof that Ibrahim had been killed during a burglary was sufficient, without more, to find the special circumstance true. Taylor points out that the special circumstance allegation requires proof that he acted with "reckless indifference to human life" while a "major participant" in the burglary. (*Id.*, subd. (d).)

The Sixth Amendment to the United States Constitution and article 1, section 15 of the California Constitution guarantee a criminal defendant the right to the assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685; *People v. Mitchell* (2008) 164 Cal.App.4th 442, 466.) This right entitles the defendant not to bare assistance, but to "effective assistance." (*Mitchell*, at p. 466.) In order to establish the ineffective assistance of counsel, a defendant must show that counsel's performance was deficient because his representation fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland*, at pp. 687-688; *Mitchell*, at p. 466.) Defendant must also show prejudice from counsel's performance or lack thereof. (*Mitchell*, at pp. 466-467.) "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." (*Strickland*, at p. 686.)

Counsel's failure to object rarely constitutes constitutionally ineffective legal representation. (*People v. Boyette* (2002) 29 Cal.4th 381, 424; *People v. Mitchell*, *supra*, 164 Cal.App.4th 442, 467.) Moreover, counsel is not ineffective for failing to make frivolous or futile motions. (*People v. Thompson* (2010) 49 Cal.4th 79, 122.)

Counsel's failure to object here did not fall below an objective standard of reasonableness because the prosecutor correctly stated the law regarding the special circumstance of murder committed during a burglary. (§ 190.2, subd. (a)(17)(G); CALJIC Nos. 8.80.1, 8.81.17.) The trial court properly instructed with CALJIC Nos. 8.80.1 ("Special Circumstances-Introductory") and 8.81.17 ("Special Circumstances-Murder in

Commission of [Burglary]"). During summation, the prosecutor and defense counsel discussed application of the special circumstance instructions to the evidence presented at trial, including whether Taylor acted with "reckless indifference" and whether he was a "major participant" in the burglary. (CALJIC No. 8.80.1.) Taylor's argument here rests upon the prosecutor's limited discussion of CALJIC No. 8.81.17, concerning whether the burglary was merely incidental to the murder. That instruction was proper and the prosecutor did not misstate the law. The jury received full and proper instruction regarding the elements of the special circumstance of murder committed during a burglary. We presume the jury understands and follows the court's instructions. (*People v. Myles* (2012) 53 Cal.4th 1181, 1212.)

III.

Taylor contends that the trial court erred by denying him presentence custody credit for his confinement between the date of his arrest and the date of his sentence. (§ 2900.5, subd. (a) [defendants shall receive credit for "all days of custody"].) The Attorney General properly concedes that Taylor is entitled to 1,450 days of actual custody credit. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 645-647 [defendant convicted of murder nevertheless entitled to actual custody credit].)

We order the trial court to amend the abstract of judgment to reflect 1,450 days of actual custody credit, and to forward the amended abstract to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Joan Comparet-Cassini, Judge
Superior Court County of Los Angeles

Jeralyn Keller, 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, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Noah P. Hill, Deputy Attorney General, for Plaintiff and Respondent.