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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,	C063098
Plaintiff and Respondent,	(Super. Ct. No. 08F01220)
v.	
BEN EDWARD LEE,	
Defendant and Appellant.	

A jury found defendant Ben Edward Lee guilty of the premeditated attempted murder of M., rejecting his defense he had nothing to do with the shooting and was at a carnival at the time.

Defendant appeals raising contentions relating to the evidence, instructions, and his counsel's representation. Finding no merit in these contentions, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A

#### *The Prosecution's Case*

M., the victim., was a friend of J. and was staying at J.'s house in North Highlands for a few days in February 2008. J. knew defendant because defendant and J.'s sister had dated for eight years and had a child together. M. had known defendant for about three or four years.

Around 6:30 p.m., J. left M. with J.'s 22-month-old daughter in J.'s house while J. went to the store to get some chicken. There was a knock at the door, and M. asked who it was. The man at the door asked if J. was there. As M. opened the door, she noticed the man had a gun. She had never seen this man before. M. "pushed the door back as hard as [she] could and ran for the baby." As the man followed her, M. said, "'No please. There is a baby in here. Don't do this. There's a baby in here.'" M. hid the baby between the love seat and couch and then ran through the kitchen and back out the front door. She did not realize she had been shot in the arm.

Once outside, M. ran near a neighbor's fence. M. saw defendant standing about five feet from her with a gun in his hand. She turned around and ran the other direction. She looked back at defendant and heard a loud noise and then felt as though somebody had pushed her down on her back. While she was on the ground, defendant came up to her and said, "'God forgive me for my sins'" and "shot [her]." M. summoned the neighbor, who had already called police.

Another one of the neighbors had heard gunshots and saw a dark car with a missing front license plate that looked like a Nissan Maxima or Lexis that was parked (but still running) with a driver inside. Two men jumped in the car -- the bigger one in the front passenger's seat and the other one in back. The car sped off.

Police responded at 7:05 p.m., five minutes after they were dispatched. M. was "very seriously hurt." She could not communicate with police. She had to have immediate surgery to remove part of her kidney and liver because they were "[c]ompletely shattered." Her hand is partially paralyzed.

About 8:15 p.m., J. returned home. J. told police that about two weeks prior to this shooting, defendant had called her and "threatened to shoot her, her baby, [and] [her] house." Defendant thought J. was going to tell his current girlfriend S. about the fact defendant had a baby with J.'s sister and that he had been "sleeping with" other women while dating S. J. threatened to report defendant to police for a fight defendant had had with J.'s sister.

Police pulled over defendant later that evening in South Sacramento. He was driving his girlfriend's black Lexus. The neighbor who saw the shooters and the getaway vehicle was called for an in-field lineup of defendant and the car he was driving. Defendant "definitely fit the description" of the person the neighbor saw jump into the front passenger's seat, down to his "small peanut-shaped head compared to the body." The car

"look[ed] similar . . . in the body shape and its style" to the getaway car and was also missing a front license plate.

Four days after being in the hospital, M. woke up from a coma. According to M., she talked to police before she talked with anybody else and told them defendant was the second person who shot her. According to a sheriff's detective, he spoke to M. only after receiving a call from J. stating J. and M. had spoken and M. had indentified one of the shooters as defendant. According to J., M. told her she (M.) did not know who had shot her, and it was J. who told M. that she (J.) thought defendant was one of the shooters.

Six months after being shot, M. was arrested for having an Ecstasy pill in a purse in a car that she was in. She faced a sentence of six years, but the case was dismissed for lack of sufficient evidence. The dismissal of that case had no effect on her testimony in this case.

Police examined defendant's cell phone records. Defendant called his girlfriend S. at 6:55 p.m. on the night of the shooting from a location 8/10 of a mile from J.'s house. In the 15 minutes prior to that phone call, defendant's cell phone had moved northeasterly toward J.'s house.

B

#### *The Defense*

Defendant was at a carnival with his girlfriend S., her friend, and six children on the night of the shooting. They were there from 7 p.m. to 9:00 or 10:00 p.m.

## DISCUSSION

### I

#### *The Court Did Not Err In Refusing To Allow Defendant To Cross-Examine M. On Her Potential Three Strikes Exposure*

Defendant contends the court violated his federal and state constitutional rights when it refused to allow him to cross-examine M. on her "three strikes exposure." Defendant is wrong because the record makes clear M. was not facing a three strikes exposure and because the court reasonably limited cross-examination to the exposure M. faced.

### A

#### *Factual And Procedural Background*

The People's trial brief noted the following: After defendant was charged with murder, M. was arrested for possessing one ecstasy pill. The People filed a felony complaint against M. charging her with drug possession and alleging she had suffered a prior strike conviction. The complaint was "ultimately dismissed so [M.] would continue to cooperate with the prosecution in the case against [defendant.]" Before trial, defense counsel expressed her understanding that M. actually had two potential prior strikes, so she wanted to question M. as to "what [M.] believed she was facing." On this issue, defense counsel and the trial court had the following exchange:

"[DEFENSE COUNSEL]: The only concern I have is . . . [M.] potentially had two strikes going into that case, which would put her at a life exposure. Even though the DA's office did not

intend to prosecute it as a three strikes case, I think I should be able to at least inquire as to what she believed she was facing.

"THE COURT: Well, it is my understanding that the district attorney's office has already made the decision to only go forward as a second-strike case on this. So I think it would be reasonable for you to be permitted to question her about the fact that she would be facing six years . . . ."

At trial, defense counsel asked M. if she "got some help from the district attorney's office on your case that came up?" M. testified she "d[id]n't think [she] really needed any help" because her "case was dismissed for lack of sufficient evidence." She acknowledged she was facing "a term that carried six years, yes, but because of the minuteness of the case and it was an E pill found in a vehicle with three other people in it, it was basically cut and dry." She "kn[ew] for a fact, even if [she] went to prison for that case, [she] would have come back to testify." "[W]hat happened to [her] [wa]s not right by any means" and she "would have been here" regardless.

B

*There Was No Error In The Court's Ruling*

The right to confrontation is designed to ensure a defendant has the right to cross-examine a witness. (*Del. v. Van Arsdall* (1986) 475 U.S. 673, 678 [89 L.Ed.2d 674, 682-683].) However, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other

things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed . . . 'the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (*Id.* at p. 679 [89 L.Ed.2d at p. 683].)

The court's ruling here allowed for effective cross-examination. M. was not facing a three strikes exposure, but rather, only six years in prison. Defendant's argument the jury should have been made aware the People "could charge her with a three strikes offense" falls flat, where the record demonstrates the People had already decided not to do so.

To the extent defendant's argument can be understood to be that the trial court should have allowed defendant to question M. in a way that informed the jury she *could have been* (although she was not) charged in a way that subjected her to a life sentence, it fails as well. Defendant claims the court's ruling "entirely prevented the jury from making any genuine assessment of [M.]'s credibility" thereby violating his constitutional rights. He is wrong because the trial court allowed defendant to question M. on whether she was testifying favorably to the People because they had dismissed a case against her. The court reasonably limited the extent of the questions to the events as they had transpired (meaning, that the case carried a six-year term), excluding questions on what were only possibilities (meaning, that the case M. could have been charged with carried

upward of a life sentence). In this way, the court preserved defendant's right to cross-examine M. without delving into speculative matters that had not come to pass. There was no error in the court's ruling, constitutional or otherwise.

## II

*CALCRIM No. 359, Which Instructed The Identity  
Of The Shooter Could Be Proved By Defendant's Statements  
Alone, Did Not Affect Defendant's Substantial Rights*

Defendant contends CALCRIM No. 359, which told the jury "[t]he identity of the person who committed the crime . . . may be proved by the defendant's statements alone" "undercut the [People]'s burden of proof beyond a reasonable doubt." The out-of-court statements defendant focuses on were that weeks before the shooting, defendant told J. he was going "to shoot her, her baby, [and] [her] house." We reach the issue although defendant did not object because he claims his substantial rights were affected. (Pen. Code, § 1259.)

Under the corpus delicti rule explained in CALCRIM No. 359, "the jury is informed that a defendant cannot be convicted of a crime unless there is proof as to each element of the offense independent of his extrajudicial confession or admission. Once the prosecution has proved the corpus delicti of murder, however, the prosecution may use evidence of a confession or admission to establish identity." (*People v. Frye* (1998) 18 Cal.4th 894, 959-960, overruled in part on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

In *Frye*, the Supreme Court rejected the argument defendant makes here that the corpus delicti instruction relieved the People from proving beyond a reasonable doubt that the defendant committed the charged crimes. (*People v. Frye, supra*, 18 Cal.4th at p. 960.) The instruction "provided only that the prosecution could rely on extrajudicial admissions to prove identity once the corpus delicti had been established. [Citation.] In light of the parties' steadfast focus on the issue of identity at trial, including the consistent position by the defense that defendant did not kill [the victims] and the extensive evidence presented by the People connecting him to the crimes, we conclude there is no reasonable likelihood the jury would have understood the prosecution had no obligation to prove defendant was the person who committed the offenses." (*People v. Frye, supra*, 18 Cal.4th at p. 960.)

There is no cogent basis on which to distinguish *Frye*. Similar to the instruction in *Frye*, the jury here was told, "The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime . . . was committed." Also similar to *Frye*, the focus of the case was identity, with the People arguing defendant was the second shooter, based on the extensive evidence connecting him to the shooting in addition to defendant's out-of-court statements, including eyewitness identification by the victim and the neighbor and the cell phone records placing defendant near the

shooting. *Frye* controls here. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

### III

#### *CALCRIM No. 373 On Unjoined Perpetrators*

#### *Did Not Affect Defendant's Substantial Rights*

Defendant contends CALCRIM No. 373, which told the jury it "must not speculate about whether" "other persons [who] may have been involved in the commission of the crime charged against the defendant" "have been or will be prosecuted," "undercut the entire theory of the defense." He reasons this is so because the People never found the other gunman and "the fact that no-one connected to [defendant] had been prosecuted as the first shooter undercut[] the [People]'s theory [that] [defendant] had arranged for someone to do the shooting." We reach the issue although defendant did not object because he claims his substantial rights were affected. (Pen. Code, § 1259.)

There is no merit to defendant's contention because the instruction did not prohibit the jury from considering that the People never found the other shooter and therefore, that there was no connection between defendant and the first shooter. Rather, the purpose of the instruction was ""to discourage the jury from irrelevant speculation about the prosecution's reasons for not jointly prosecuting all those shown by the evidence to have participated in the perpetration of the charged offenses . . . ." (People v. Lawley (2002) 27 Cal.4th 102, 162.) Defendant was not precluded from introducing evidence the People failed to identify or find the first shooter and he was

not precluded from arguing to the jury the People's failure to do so supported his defense of alibi. The trial court's giving of CALCRIM No. 373 did not affect defendant's substantial rights.

IV

*CALCRIM No. 224 On Circumstantial Evidence*

*Did Not Affect Defendant's Substantial Rights*

Defendant contends the court erred by instructing the jury regarding circumstantial evidence pursuant to CALCRIM No. 224.<sup>1</sup> Specifically, he claims the instruction "effectively" told jurors that direct evidence did not have to be proven beyond a reasonable doubt and that direct evidence could support a finding of guilt even if it was consistent with an innocent explanation. We reach the issue although defendant did not

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<sup>1</sup> CALCRIM No. 224 as given here read as follows:

"Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

"Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

object because he claims his substantial rights were affected.  
(Pen. Code, § 1259.)

Defendant argues as follows: while CALCRIM No. 224 correctly instructed on circumstantial evidence when it cautioned the jury that such evidence must prove guilt beyond a reasonable doubt and that it must acquit if there was a reasonable interpretation of the evidence that pointed to innocence, the instruction was deficient because it failed to direct the same caution to direct evidence. Defendant reasons the jury might have found him guilty only on the direct evidence provided by M. that defendant was one of the shooters -- testimony that defendant asserts was insufficient to establish guilt beyond a reasonable doubt because the testimony could have been based on J.'s statement to M. that defendant was the shooter.

We have rejected this instructional argument in *People v. Anderson* (2007) 152 Cal.App.4th 919. "CALCRIM No. 224 does not set out basic reasonable doubt and burden of proof principles; these are described elsewhere. Although the instruction reiterates that each fact necessary for conviction must be proved beyond a reasonable doubt, the obvious purpose of the instruction is to limit the use of circumstantial evidence in establishing such proof. It cautions the jury not to rely on circumstantial evidence to find the defendant guilty unless the only reasonable conclusion to be drawn from it points to the defendant's guilt. In other words, in determining whether a fact necessary for conviction has been proved beyond a

reasonable doubt, circumstantial evidence may be relied on only if the only reasonable inference that may be drawn from it points to the defendant's guilt." (*People v. Anderson, supra*, 152 Cal.App.4th at p. 931.) "The same limitation does not apply to direct evidence. Circumstantial evidence involves a two-step process: presentation of the evidence followed by a determination of what reasonable inference or inferences may be drawn from it. By contrast, direct evidence stands on its own. It is evidence that does not require an inference. Thus, as to direct evidence, there is no need to decide whether there is an opposing inference that suggests innocence." (*Ibid.*) Our reasoning in *Anderson* is sound.

Finally, contrary to defendant's argument, *Anderson* does not run afoul of the California Supreme Court's conclusion in *People v. Vann* (1974) 12 Cal.3d 220, "that the trial court prejudicially erred when it failed to instruct the jury on the prosecution's burden to prove guilt beyond a reasonable doubt." (*Vann*, at pp. 222-223.) In contrast to *Vann* where the jury received no instruction defining the prosecution's burden to prove guilt beyond a reasonable doubt, the jury here and in *Anderson* received such instruction. (Compare *Vann*, at pp. 222-223, 227-228 with *People v. Anderson, supra*, 152 Cal.App.4th at p. 931.)

*Trial Counsel Was Not Ineffective For Failing  
To Request CALCRIM No. 522 On Provocation*

Defendant contends his counsel was ineffective for failing to request CALCRIM No. 522 on provocation.<sup>2</sup> He notes the court had sua sponte instructed on attempted voluntary manslaughter based on sudden quarrel or heat of passion as a lesser included offense and the same evidence that supported the attempted voluntary manslaughter instruction also would have supported CALCRIM No. 522.

Counsel was not ineffective because there was no evidence to support this instruction (or the voluntary manslaughter instruction for that matter). The evidence to which defendant points was that about two weeks prior to this shooting, J. threatened to report defendant to police for a fight defendant had had with J.'s sister and defendant thought J. was also going to tell his current girlfriend S. about the fact defendant had a baby with J.'s sister and had been "sleeping with" other women.

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<sup>2</sup> CALCRIM No. 522 provides, "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide.

"If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter].

"[Provocation does not apply to a prosecution under a theory of felony murder.]"

It was then defendant "threatened to shoot [J.], [J.'s] baby, [and] [J.'s] house." However, "[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim." (People v. Verdugo (2010) 50 Cal.4th 263, 294.) Here, defendant does not assert M. provoked defendant or that defendant reasonably believed she did. Counsel therefore was not ineffective for, in effect, failing to ask the trial court to compound its error in instructing on voluntary manslaughter and instruct on provocation pursuant to CALCRIM No. 522 as well.

DISPOSITION

The judgment is affirmed.

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ROBIE, Acting P. J.

We concur:

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MAURO, J.

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MURRAY, J.