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

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE ELLIS WALLACE,

Defendant and Appellant.

C066938

(Super. Ct. No.
09F09095)

Defendant George Ellis Wallace argues on appeal that the circumstantial evidence of motive, identity, opportunity, and gunshot residue is insufficient evidence to sustain jury verdicts of first degree murder with special circumstances. His briefing reads like a closing argument to the jury and is dismissive of the exacting scope of appellate review. There is, quite simply, ample evidence to support the verdicts, and we reject his evidentiary and instructional objections as well. We accept the Attorney General's concession to award additional

presentence custody credits and to eliminate the stayed/suspended restitution fine. In all other respects, we affirm the judgment.

FACTS

A man with a shotgun shot and killed James Turner and Clifford Brown at very close range in their apartment sometime after midnight on December 15, 2009. The prosecution relied on a mountain of circumstantial evidence that defendant was the shooter.

Motive. In November 2009 defendant lived with his girlfriend, Bryanna Warren, her four-year-old son, and their nine-month-old son. Clifford Brown lived with his girlfriend, Lawanda Shoals, and James Turner. Shoals, angry with Brown, had moved home with her mother for a few days but brought him food on Thanksgiving Day, November 26. She was surprised to encounter Warren at their apartment. A physical altercation between the two women ensued, with Warren coming out on the losing end. Shoals moved back in with Brown on November 27.

Shoals testified that at 6:00 o'clock the following morning, Warren returned to the apartment and shot both Brown and Shoals. Turner was at the apartment when the shooting occurred. Warren was subsequently arrested and charged with two counts of attempted murder.

Defendant lied to the police that he had not seen Warren after the shooting. One of the investigating police officers showed him pictures of the victims. Defendant sought out Brown's mother, who called Brown and allowed defendant to talk

to him. She heard defendant say they should "squash this," but Brown hung up on him.

Defendant told another resident of his apartment complex, Antonio Meneses, that his girlfriend was in jail for the shooting and asked him what he should do about it. At the end of the conversation, he told Meneses he would "kill a nigga." Meneses, a hostile witness, testified he thought defendant was joking and that the comment did not relate to defendant's girlfriend's problem.

Identity. There were no witnesses who identified defendant as the shooter. There were many, however, who testified that he had the same ethnicity and physique as the shooter. In short, the shooter was an overweight African American male dressed in all black clothing, including a black beanie.

On the night of December 14 and the early morning hours of December 15, George Clark was visiting Brown, Shoals, and Turner at their apartment. Sometime after midnight, Clark was in the living room when a "real heavysset" African American, "dressed all in black," including a black vest, pointed a shotgun at him but did not shoot him. He ran out of the house. Clark testified that the person with the gun was the same size as defendant as he appeared in a photograph Clark viewed.

A neighbor testified that he saw a "big guy," weighing at least 200 pounds, peering into the windows of the victims' apartment. According to the neighbor, defendant fit the description of the man he saw. He was wearing a heavy jacket with a hood.

Brown, who had been in the bedroom with Shoals, walked into the hallway, hollered, "oh, shit," and ran back into the bedroom. He pulled Shoals off the bed and onto the floor out of defendant's sight. As she was being pulled off the bed, Shoals caught a brief glimpse of the shooter. She testified he wore a black sweat suit with long pants and a ski mask. He was very bulky in the chest. She estimated that the shooter was between five feet nine inches and five feet eleven inches tall and weighed approximately 210 pounds. She testified that defendant looked like he was the same size as the man with the shotgun.

Detective Zachary Bales of the Sacramento Police Department was assigned to do a follow-up investigation of the shooting. On December 15 he estimated that defendant was approximately five feet nine inches tall and weighed about 300 pounds. Another officer did a search for a physical description of defendant, which revealed that he was six feet one inch tall and weighed 280 pounds.

Defendant appeared on a video surveillance tape at Walmart on December 14, 2009, arriving at about 11:24 p.m. and leaving around 11:50 p.m. He was dressed in all black.

Opportunity. Defendant did not have an alibi. He told the police he had been in his apartment on the night of the shooting. He denied going to Walmart. He claimed the only time he left the apartment was to drive around the apartment complex for a short while at about two or three in the morning.

Forensic Evidence. The assailant kicked in the kitchen door to gain access. There was a footprint left on the door. A shoe matching that footprint was never found.

Defendants' clothes, however, contained gunshot residue. Police officers found a black hooded sweatshirt, black pants, and a black vest in defendant's apartment. There was gunshot residue on the black hooded sweatshirt on the lower front panel and lower right sleeve. There was gunshot residue on the black vest. There was gunshot residue on a Dickies jacket on the bottom of the left sleeve, bottom of the right sleeve, bottom of the right front, top of the right front shoulder area, and bottom of the left front. The gunshot residue was consistent with firing a gun. There was no blood found on the clothing.

Nor was there any blood found in any of defendant's vehicles, including his pickup truck, a pink Honda, or a silver Pontiac. A small amount of gunshot residue was found on the pickup truck's exterior driver's door handle. There was no residue on the Honda or the Pontiac.

Evidence Found in Defendant's Apartment. The police found in defendant's apartment a police report on the Warren shooting prepared for the district attorney's office, including the statements of Brown, Shoals, and Turner, as well as their address and contact information. An examination of defendant's computer revealed a search for "Clifford Brown" on November 28, a Mapquest search for a route from defendant's apartment to the victims' apartment on December 9, and also searches for news reports about the Warren shooting.

No Evidence of Robbery or Revenge. Shoals testified that none of the jewelry, including a ring valued at \$40,000, electronics, or cash she had in the house was taken at the time of the shooting. She insisted neither she nor Brown nor Turner sold drugs, and they did not owe anyone any money. She claimed they owned a cleaning and hauling business.

Defense. Defendant did not testify at trial. His lawyer argued that the inferences the prosecutor urged the jury to make were either unreasonable or pointed to both guilt and innocence, and therefore they were required to accept the inference that favored innocence. In particular, he insisted that the gunshot residue could have gotten on defendant's clothes from his contact with Warren after she shot Shoals and Brown. Cross-contamination, in his view, was the likely explanation. He emphasized that liars are not necessarily murderers. Although he had been seen with two pistols, defendant had not been seen at the apartment complex with a shotgun.

DISCUSSION

I

Sufficiency of the Evidence

There is no dispute about the scope of appellate review of a challenge to the sufficiency of the evidence. A challenger faces an extraordinary burden on appeal to demonstrate that "no rational trier of fact could have agreed with the jury." (*Cavazos v. Smith* (2011) ___ U.S. ___, ___ [181 L.Ed.2d 311, 313].) We must ""review the whole record in the light most favorable to the judgment below to determine whether it

discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

Because the prosecution's case rests entirely on circumstantial evidence, defendant reminds us that a reasonable inference "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'" [Citation.]" (*People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) He dissects each piece of evidence in a futile attempt to expose fatal weaknesses in the inferences the jury was asked to, and presumably did, draw from the evidence.

We need not determine whether any of the evidence independently would be sufficient to support the judgment. Defendant argues, for example, that the "clothes were not substantial evidence, and the Walmart recordings that [defendant] wore black clothing at 11:30 p.m. also do not constitute substantial evidence." The question is not whether the clothes or the Walmart tapes or the gunshot residue or the directions to the victims' house or the computer searches constitute substantial evidence, but whether cumulatively all the evidence is sufficient to support the judgment. Defendant

posits that innocent circumstances were made to look incriminating by piling one conjecture upon another conjecture. (*People v. Flores* (1943) 58 Cal.App.2d 764, 769-770.) We disagree. This case was not built on conjecture, but on abundant circumstantial evidence that, when viewed as a whole, gave rise to the reasonable inference that defendant was the shooter and he killed two potential witnesses in his girlfriend's upcoming trial.

Our recitation of the facts presents a compelling distillation of the evidence that defendant had the motive to kill Turner and Brown, two witnesses to his girlfriend's attempted murders; that he had the same body type and ethnicity as the shooter; that he was wearing the same kind of clothes as the shooter a short time before the murders; that gunshot residue was found on his clothes; that he had no alibi during the time the murders occurred; that he lied to the police; that he had obtained a police report on his girlfriend's shootings and knew who the witnesses were and where they lived; and that he had contacted Brown and told him of his desire to "squash" the case. Defendant argues on appeal, as he did in closing argument before the jury, weaknesses in the evidence and why the inferences the prosecution urged the jury to make should be rejected. It was the jury's prerogative, however, and not ours to accept or reject defendant's arguments and determine whether the inferences were indeed reasonable.

Although defendant recites the appropriate standard of review, he fails to apply it. We acknowledge any number of

weaknesses in the evidence, including the lack of blood on defendant's clothes, the somewhat improbable possibility the gunshot residue was transferred to defendant's clothes, the fact that there are other African American males who are overweight and wear black clothing, and that a protective lover might lie, investigate, or cover up for his girl without being willing to kill witnesses against her, but we do not agree that the jury's verdict is irrational or premised on mere conjecture and speculation. To the contrary, the evidence is circumstantial, but it is compelling. It is neither physically impossible nor inherently improbable. Rather, defendant fit the physical description of the assailant, he had the opportunity and the means to commit the shooting, and he certainly had the motive to eliminate the witnesses to his girlfriend's shootings. Indeed, he chose not to shoot George Clark, a guest at Brown's house who was not a witness to the earlier shootings, and proceeded to shoot both Turner and Brown, both of whom had been witnesses, twice at very close range. Fortunately for Shoals, the only remaining witness, Brown successfully hid her from defendant before Brown himself was shot and killed. All said, there is ample evidence to support the jury verdicts.

II

Evidentiary Ruling

Defendant makes much ado about two routine rulings on the admissibility of two questions of a witness particularly hostile to the prosecution. Antonio Meneses, a resident at defendant's apartment complex, knew defendant as a casual acquaintance for

about a month. To understand defendant's objection to the trial court's rulings, we must put the questions in context. In the context of the entire examination of this witness, let alone in the context of all the evidence presented at trial, any theoretical prejudice from the rulings vanishes.

The prosecutor sought to establish that defendant had sought Meneses' advice after defendant's girlfriend was arrested and Meneses had seen defendant with guns. During direct examination, Meneses testified defendant told him that his girlfriend had been "jumped," that "she went back and shot them," and that she was in jail. The prosecutor asked, "Did he ask you, should I do something about it or what?" Meneses responded, "I said, I would leave it alone."

During an effective cross-examination, defense counsel provided a broader context for the conversation Meneses had reported. Defense counsel inquired: "And the context of the conversation was that he wanted to get an attorney for her, right?" Meneses responded affirmatively. Defense counsel elicited greater clarification in the following exchange:

"[Defense Counsel:] And the problem was attorneys costing a lot of money, right?

"[Meneses:] Yes.

"[Defense Counsel:] And things being as they are, money was a little tight, and he was worried about if he had enough and if he could afford an attorney, right?

"[Meneses:] Yes.

"[Defense Counsel:] And so when he says if he should do something about it or what, that was in the context about his girlfriend in jail and needing a lawyer, right?

"[Meneses:] Yes."

Defense counsel also solicited more information about the guns he had seen defendant carry. Meneses, during cross-examination, also revealed that he had seen defendant carrying two guns during Halloween. He had never seen defendant with a shotgun.

The issue arises during the prosecutor's redirect and defense counsel's recross-examination. The prosecutor probed deeper into defendant's inquiry as to whether he should do something about his girlfriend's situation. During cross, Meneses' responses would have led the jury to believe that defendant's dilemma related exclusively to whether he should hire a lawyer.

The prosecutor sought to impeach Meneses with a statement he had made to a detective during the investigation of the case. The following exchange occurred:

"[Prosecutor:] Do you remember telling the detective that [defendant] told you that his girl went back and popped two people that had jumped him. And he said he was like, quote, should I do something about it or what? He asked me if I was in this situation, what would I do? Do you remember telling the detective that?

"[Meneses:] Yes."

"[Prosecutor:] Do you remember telling the detective that you thought he was asking you about whether or not he should kill some people?"

Defense counsel objected to the question, claiming it called for speculation. The trial court overruled the objection because defense counsel had "asked about what the context was and -- [¶] . . . [¶] -- this may be consistent or inconsistent with his estimation of context." Defendant argues the trial court abused its discretion because what Meneses thought defendant was asking was irrelevant.

But that was not the end of the examination of the same subject. During recross-examination, defense counsel broached the subject again. He asked Meneses if defendant ever threatened anyone or said he was going to kill anyone. Meneses responded, "He didn't threaten nobody, no." Again, defense counsel probed: "At the time that [defendant] is saying should he do something about it, at the time of that conversation, are you thinking that he's going to kill somebody, or are you thinking at the time that you are being questioned, hey, now, it makes sense. I should have been thinking he was killing somebody?" Meneses answered: "I mean, I didn't think he was going to do that. We was talking about, you know, his girlfriend problem, the issue." Meneses insisted he was referring to paying the lawyers some more money when defendant asked if he should do something about it.

Defense counsel continued to probe even further. Meneses acknowledged that in talking to the detective he added something

like "probably talking about killing them, I guess," and that he was just guessing. But he was adamant that he never told the detective that defendant had said anything about killing anyone.

This line of inquiry led to further redirect examination by the prosecutor and the second evidentiary ruling defendant challenges. Meneses admitted he had told the detective that he heard defendant say, "I will kill a nigga." But again, defense counsel was able to elicit from Meneses the broader context and meaning of the slang defendant had used. Meneses testified that defendant's comment, "I will kill a nigga," was said in an entirely different conversation when the two of them were laughing and talking about problems Meneses was having with his wife. According to Meneses, defendant was joking when he made the statement. He explained that "kill a nigga" is common slang in rap songs, but when defense counsel asked him if the slang was used to actually mean to kill somebody, the trial court sustained the prosecutor's objection that the question was irrelevant and speculative. Defendant contends the trial court again abused its discretion by disallowing relevant evidence necessary to educate the jury on an alternative usage of the phrase.

We conclude that if the court made any errors in ruling on the propriety of either the prosecutor's question during redirect examination or defense counsel's question during recross-examination, the errors were harmless. Simply put, defendant could have suffered no prejudice from the innocuous rulings when the topic was thoroughly explored through effective

cross- and recross-examination and the information defense counsel sought to elicit eventually was put before the jury.

Defendant's first complaint is to the prosecutor's question about whether Meneses had told the detective what he thought defendant meant when he asked if he should do something. Through apt recross-examination, defense counsel gave Meneses the opportunity to explain that he was simply guessing what defendant meant and that defendant had never said he was planning to kill someone. As the court anticipated, Meneses was able to expand upon the context of his statements by explaining that he was only guessing what defendant meant and that he did not take him seriously or believe he was threatening anyone.

Similarly, Meneses was able to explain that "kill a nigga" was slang popularized in rap songs, with the obvious inference that the words were not to be taken literally. Meneses' subjective interpretation of the language would not have added much, if anything, to the jurors' further understanding that the phrase was not a serious threat. Indeed, during further recross-examination, Meneses was able to explain that defendant made the statement while they were laughing and talking about an entirely different topic having nothing to do with his girlfriend and her predicament. Again, Meneses told the jury that he did not consider the statement a threat; rather, it was a joke he discounted immediately.

Thus, in the context of the entire examination of Meneses, the two challenged rulings, sustaining one objection and overruling the other, did nothing to limit the exploration of

the topics before the jury in any meaningful way. They were but minuscule blips in an exhaustive examination of two finer points with little potential to influence the jury on the important and dispositive questions before it. Given the abundance of circumstantial evidence we chronicle above, it is simply not reasonably probable that these rulings would have impacted the outcome of the deliberations. Because defendant suffered no prejudice, there is no reversible error.

III

Special Circumstance

Although defendant does not challenge the multiple victim special circumstance, he does challenge the special circumstance imposed because he intended to kill two witnesses who would have testified in his girlfriend's trial for attempted murder. We will address the merits of his challenge. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1139.)

It is generally accepted that motive is not an element of a crime. Indeed, CALCRIM No. 370 instructs the jury that the prosecution is not required to prove motive. Motive, intent, and malice are separate mental states, and while intent remains paramount, the reason for forming that intent does not. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) Defendant insists, however, that in this special case the lines between motive and intent were erroneously blurred and the jury was hopelessly misled. He cites no cases in which a California court has vacated a special circumstance because the motive

instruction was at odds with the mental state necessary to find true the special circumstance. He urges us to be the first.

The problem, in defendant's view, is that the motive instruction was modified to include "or allegations" charged or, in other words, the special circumstance. Thus the court instructed the jury: "The People are not required to prove the defendant had a motive to commit the crimes or allegations charged. In reaching your verdict, you may, however, consider the defendant had a motive. Having a motive may be a factor tending to show the defendant is guilty. And not having a motive may be a factor tending to show the defendant is not guilty."

Yet the jury was also instructed in the language of CALCRIM No. 725 that the prosecution must prove the victims were witnesses, that the killings were intentional, that the killings were not committed during the crime to which they were witnesses, and that "[t]he defendant intended that James Turner or Clifford Brown be killed to prevent him from testifying in a criminal proceeding." Defendant maintains that the language of the last part of the preceding sentence, "to prevent him from testifying," was tantamount to motive. As a result, defendant argues the modified CALCRIM No. 370 told the jurors they did not have to find motive, whereas CALCRIM No. 725 told them effectively that they did.

The Attorney General maintains there is no reason to upset established precedent. Simply put, motive is not an element of the special circumstance finding. A fitting example, argues the

Attorney General, is *People v. Fuentes* (2009) 171 Cal.App.4th 1133, 1139-1140 (*Fuentes*). In *Fuentes*, the defendant argued, as here, that the motive instruction was inconsistent with the instruction on the special circumstance of committing a murder “to further the activity of the criminal street gang.” (*Id.* at p. 1139.) The court explained that the instructions were not inconsistent, confusing, or misleading.

“An intent to further criminal gang activity is no more a ‘motive’ in legal terms than is any other specific intent. We do not call a premeditated murderer’s intent to kill a ‘motive,’ though his action is motivated by a desire to cause the victim’s death. Combined, the instructions here told the jury the prosecution must prove that Fuentes intended to further gang activity but need not show what motivated his wish to do so. This was not ambiguous and there is no reason to think the jury could not understand it. Fuentes claims the intent to further criminal gang activity should be deemed a motive, but he cites no authority for this position. There was no error.” (*Fuentes, supra*, 171 Cal.App.4th at pp. 1139-1140.)

The problem, as the court so astutely observed in *Fuentes*, is that the lay meaning of “motive” is at odds with the legal nuances of motive and intent. Thus the court in *Fuentes* explained at some length: “If Fuentes’s argument has a superficial attractiveness, it is because of the commonsense concept of a motive. Any reason for doing something can rightly be called a motive in common language, including—but not limited to—reasons that stand behind other reasons. For example, we

could say that when A shot B, A was motivated by a wish to kill B, which in turn was motivated by a desire to receive an inheritance, which in turn was motivated by a plan to pay off a debt, which in turn was motivated by a plan to avoid the wrath of a creditor. That is why there is some plausibility in saying the intent to further gang activity is a motive for committing a murder: A wish to kill the victim was a reason for the shooting, and a wish to further gang activity stood behind that reason. The jury instructions given here, however, were well adapted to cope with the situation. By listing the various 'intentions' the prosecution was required to prove (the intent to kill, the intent to further gang activity), while also saying the prosecution did not have to prove a motive, the instructions told the jury where to cut off the chain of reasons. This was done without saying anything that would confuse a reasonable juror." (*Fuentes, supra*, 171 Cal.App.4th at p. 1140.)

In considering the sufficiency of the evidence that defendant shot and killed Turner and Brown, we discussed the inferences that reasonably could be drawn about defendant's motive. Nevertheless, the jury was properly instructed that the prosecution was not required to prove motive. The jury was at liberty to accept or reject the prosecution's theory that "the reason behind" the shooting was defendant's desire to eliminate two witnesses who would testify in his girlfriend's trial.

To find the special circumstance true, however, the jury was required to find true that the victims were witnesses to a crime and that they were "intentionally killed for the purpose

of preventing [their] testimony in a criminal proceeding.” We do agree with defendant that there is a very thin, somewhat nebulous, line between intent and motive when a jury is instructed to determine the “purpose” behind the intentional killing. We do not agree, however, that there is a reasonable likelihood the jurors understood motive and intent to be synonymous, that the prosecution’s burden of proof was in any way diluted or diminished, or that the jurors would have been impermissibly confused. The instructions as a whole did not use the terms “motive” and “intent” interchangeably, nor did they misstate the elements of the special circumstance finding.

Defendant asserts that *People v. Heishman* (1988) 45 Cal.3d 147 (*Heishman*) is the gold standard for clarity and the trial court, having modified the motive instruction, deviated from the *Heishman* standard. In *Heishman*, the court in fact rejected the defendant’s contention that the motive instruction conflicted with the special circumstance instruction on preventing a witness from testifying at trial. The court explained: “The instructions, however, made a clear distinction between the crime of murder, of which the jury was directed to find defendant guilty or not guilty, and the special circumstance, which the jury was directed to find true or not true. The motive instruction, CALJIC No. 2.51, focused on guilt. The special circumstance instruction told the jury that *if* they found defendant guilty of murder, *then* they should decide whether the special circumstance was true or not true in accordance with criteria dealing with the purpose of the

killing. There was no reasonable basis for the jury to think that CALJIC No. 2.51 modified the special circumstance instruction." (*Heishman*, at p. 178.)

We do not think that the mere addition of the two words "or allegations" in the motive instruction materially changes the calculus. It remains true, however fine the distinction, that the prosecution does not bear the burden of proving motive, but it does bear the burden of proving that defendant intended to murder the victims to prevent them from testifying. As the courts in *Fuentes* and *Heishman* found, there is no reasonable basis for the jurors to think they need not find all the elements of the special circumstance because they were instructed they did not need to find a motive. For the same reasons articulated in both cases, we do not believe the instructions confused a reasonable juror.

IV

The Attorney General concedes that defendant is entitled to an additional 42 days of custody credit to represent the time he served between the initial sentencing date of October 29, 2010, and the actual sentencing date of December 10, 2010. We accept the concession and order the superior court to correct the actual time credits to show 361 days of presentence custody.

Similarly, the clerical error in the abstract of judgment containing a stayed/suspended restitution fine of \$10,000 must be corrected. The trial judge correctly did not impose a fine pursuant to Penal Code section 1202.45.

DISPOSITION

The trial court is directed to prepare a corrected abstract of judgment to reflect a total of 361 days of presentence custody credit and to eliminate reference to a stayed/suspended restitution fine, and to forward a certified copy thereof to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

_____ RAYE _____, P. J.

We concur:

_____ BUTZ _____, J.

_____ MURRAY _____, J.