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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK BURKE,

Defendant and Appellant.

D059603

(Super. Ct. No. SCD217582)

APPEAL from a judgment of the Superior Court of San Diego County,
Yvonne E. Campos, Judge. Affirmed.

A jury found Patrick Burke guilty of two counts of attempted murder, shooting at an occupied building and assault with a semiautomatic firearm. The jury also found true gang and other enhancements attached to the counts. Burke appeals, contending his two attempted murder convictions must be reversed because (1) there was insufficient evidence that he had the specific intent to kill, and (2) the trial court gave erroneous instructions on the kill zone theory of attempted murder.

We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2008, the Static Lounge, a bar in downtown San Diego, put on a music event to unite two rival gangs, the Bloods and the Crips. That night, officers patrolling the area made contact with Burke, a documented West Coast Crip member, and conducted a field interview. Burke was with Johnny Hill, a Neighborhood Crip member. Hill told the officers that they had just come from the bar. John Nygren, a security guard working outside the Static Lounge, had seen Burke walking up and down the street near the bar multiple times that night.

During the music event, a performer yelled out, "Fuck the Crips." The crowd got worked up and a fight broke out. Nygren saw a man on top of the bar making gang signs and being pulled down into the crowd. More than 50 people ran outside the bar where the fight continued and escalated.

Nygren, who was standing near the bar's door, heard five or six gunshots. He then saw blood coming from his neck and dropped to one knee. As the commotion ensued, Daniel Espinoza, a security guard near the door of the Static Lounge, heard gunshots and saw someone running in the street and a "muzzle flash." Similarly, Victor Gonzalez, another security guard, heard gunshots and saw a black male running in the street approximately 10 to 15 feet away from him. The man appeared to be shooting with his right hand across his body. Gonzalez pulled out his gun and pointed it at the person running because he believed that person was the shooter. At trial, Gonzalez confirmed that Burke was the shooter.

Officers found five bullet casings near the Static Lounge. One bullet struck a lamppost approximately five feet above the level of the sidewalk. That bullet fragmented and a portion of it hit Nygren. Another bullet hit the marquee of the Static Lounge, ricocheted off the ceiling in the foyer of the bar, and struck the door. Officers also saw that a bullet pierced the interior foyer window frame and another struck the exterior of the building approximately ten feet above the sidewalk.

DISCUSSION

I. *Sufficiency of the Evidence*

Burke contends that his two attempted murder convictions must be reversed because there was insufficient evidence that he had the specific intent to kill. Specifically, he argues that the evidence showed a conscious disregard for life rather than a specific intent to kill because he fired randomly as he ran down the street with the shots too high or too wide to hit anyone and he did not target a specific victim. We reject Burke's arguments.

In reviewing the sufficiency of the evidence to support a conviction, we determine "'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.' [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13.) Under this standard, we review the facts in the light most favorable to the judgment, drawing all inferences in support of the judgment to determine whether there is substantial direct or circumstantial evidence the defendant committed the charged crime. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496;

People v. Rodriguez (1999) 20 Cal.4th 1, 11.) The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury's conclusions. (*People v. Arcega* (1982) 32 Cal.3d 504, 518; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 996.) In making the determination, we do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact. (Evid. Code, § 312.)

The crime of attempted murder includes the element of a specific intent to kill. (*People v. Visciotti* (1992) 2 Cal.4th 1, 56.) "Intent to unlawfully kill and express malice are, in essence, 'one and the same.' [Citation.] To be guilty of attempted murder . . . , defendant had to harbor express malice toward th[e] victim. [Citation.] Express malice requires a showing that the assailant "'either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur.' [Citation.]" [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*)).

Whether the defendant harbored the specific intent to kill may be inferred from the facts and the circumstances surrounding the act. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945–946.) Thus, the nature of an assault, the weapon chosen, the manner in which the weapon was used, the actual consequences of the assault, including the nature of the wound, can all provide evidence of the intent to kill necessary for attempted murder. (See *Id.* at p. 946.) For example, firing a gun toward a victim at close range "in a manner that could have inflicted a mortal

wound had the bullet been on target is sufficient to support an inference of intent to kill" (*Id.* at p. 945.) That "the victim may have escaped death because of the shooter's poor marksmanship [does not] necessarily establish a less culpable state of mind." (*Ibid.*) In addition, "even if the shooting was not premeditated, with the shooter merely perceiving the victim as 'a momentary obstacle or annoyance,' the shooter's purposeful 'use of a lethal weapon with lethal force' against the victim, if otherwise legally unexcused, will itself give rise to an inference of intent to kill. [Citation.]" (*Smith, supra*, 37 Cal.4th at p. 742.)

Viewing the evidence in the light most favorable to the judgment, as we must, there was sufficient evidence to support the attempted murder convictions. The evidence showed that Burke was only 10 to 30 feet from the front door of the Static Lounge. He fired five shots, many of which were in the direction of the bar, as people poured out of it. Bullets hit the bar's marquee, the interior foyer window frame and the exterior of the building. Burke's act of discharging a firearm multiple times near a large crowd at close range supports the inference that he shot each time with the intent to kill. The fact that some of the shots were high or wide of the crowd and that the only injury resulted from a bullet fragmenting after hitting a lamppost does not compel a different conclusion. Considering that Burke was running and shooting across his body, the direction of the shots is not surprising. However, "poor marksmanship" does not negate the intent to kill. (*People v. Lashley, supra*, 1 Cal.App.4th at p. 945.)

We are also not convinced by Burke's argument that he did not have the requisite intent for attempted murder because he did not target a specific individual. A person can be guilty of attempted murder if the person purposely creates a kill zone intending to kill, not a specific target, but anyone present within the kill zone. (*People v. Stone* (2009) 46 Cal.4th 131, 140 (*Stone*) [describing, as an example, a terrorist who places a bomb on a commercial airliner intending to kill as many people as possible without knowing or caring who they are].) An identifiable primary victim is not necessary for the kill zone theory to apply as "[t]he mental state required for attempted murder is the intent to kill *a* human being, not a *particular* human being." (*Id.* at p. 134.) Similarly, when a defendant fires a gun at a group of people with the intent to kill a primary target in that group, a charge of attempted murder of someone else in the group can be sustained if "'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.'" (*People v. Bland* (2002) 28 Cal.4th 313, 329–330.)

There was evidence in this case from which the jury could reasonably conclude that Burke's primary targets were Blood gang members exiting the Static Lounge and that he created a kill zone. The gang expert testified that it is common for gang members to commit shootings in locations where they know rival gang members will be present. That type of shooting gains notoriety for the gang.

Further, the shooter gains prestige within the gang regardless of whether he hit the intended target or an innocent victim.

While Burke's primary targets were rival gang members, he used lethal force designed to kill everyone in the area around his targeted victims as the means to accomplish his goal. Under the circumstances in this case, a rational jury could conclude beyond a reasonable doubt that Burke intended to kill not only rival gang members, but also others in the zone of harm. (*Smith, supra*, 37 Cal.4th at p. 746.) Thus, he had the requisite intent for attempted murder.

In sum, we conclude there was substantial evidence to support the intent element of Burke's attempted murder convictions.

II. *Kill Zone Theory Instructions*

A. Background

The People charged Burke with two counts of attempted murder (counts 1–2). Count 1 did not name a specific victim, while count 2 named Nygren. On both counts, the trial court instructed the jury with a modified version of CALCRIM No. 600 regarding attempted murder. In both instructions, the trial court included an optional paragraph regarding the "kill zone" theory of attempted murder.

Specifically, the trial court informed the jury of the following:

"A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of John Nygren, the People must prove that the defendant not only intended to kill Blood gang members but also either intended to kill John Nygren, or intended to kill everyone within the kill zone. If you have a reasonable doubt

whether the defendant intended to kill John Nygren or intended to kill Blood gang members by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of John Nygren."

In regard to count 1, the prosecutor argued that "Count 1 is for Blood gang members. With murder and attempt[ed] murder, it is not who, it's the act that we're looking at. We're not concerned about whether the defendant was trying to kill a specific person. It is the act that we're looking at. In this particular case, the People have charged that the defendant was trying to kill any -- trying to kill every Blood member that came out of the Static Lounge. So that's why we charged that for Count 1. That's in regards to every Blood member coming out of the Static Lounge. The defendant is trying to kill those people. So that is attempt[ed] murder for Count 1."

In regard to count 2, the prosecutor stated, "Now, obviously, [Nygren] is a victim of attempted murder. The theory behind [Nygren] was not that [Burke] was trying to kill [Nygren], specifically, that he was aiming for that person that he knew to be [Nygren], or that person he knew to be the security guard. But rather, when he intended to kill every Blood gang member that came out of the Static Lounge, he created what we call in the law a kill zone. [Nygren] was the victim of the defendant's attempts, because the defendant was trying to kill everyone who came out of the Static Lounge so that he could get to Blood gang members. And that's what we call the kill zone." The prosecutor gave examples of situations in which the kill zone theory applies and explained that the perpetrator's intent is to "kill

everyone to get to their intended target." The prosecutor then argued, "That's exactly what happened in this case. So that's why you have two counts of attempt[ed] murder, one for the gang members and two for everyone else the defendant tried to kill in his attempts to get to those Blood gang members."

B. Standard of Review

The applicable standard of review that guides our analysis with respect to Burke's claims of instructional error was explained by the Court of Appeal in *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 335 (*Mock*): "[E]rror in instructing the jury shall be grounds for reversal only when the reviewing court, "after an examination of the entire cause, including the evidence," concludes that the error "has resulted in a miscarriage of justice." The test of reversible error has been stated in terms of the likelihood that the improper instruction misled the jury. [Citation.]' [Citations.] Thus, if a review of the entire record demonstrates that the improper instruction was so likely to have misled the jury as to become a factor in the verdict, it is prejudicial and a ground for reversal. [Citation.]" The *Mock* court also explained that "[t]he determination whether, in a specific instance, the probable effect of the instruction has been to mislead the jury and whether the error has been prejudicial so as to require reversal *depends on all of the circumstances of the case*, including the evidence and the other instructions given. No precise formula can be drawn.' [Citations.]" (*Mock, supra*, 4 Cal.App.4th at p. 335; see also *People v. Smithey* (1999) 20 Cal.4th 936, 963 [stating that the relevant inquiry is whether "there is a reasonable likelihood that the

jury misunderstood and misapplied the instruction"]; *People v. Cain* (1995) 10 Cal.4th 1, 35–36 [same].) We determine the correctness of jury instructions ""from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction."" (*People v. Solomon* (2010) 49 Cal.4th 792, 822.)

C. Analysis

1. *Application of Kill Zone Theory to Count 2*

Relying on *Stone*, Burke first argues that the trial court erred in instructing the jury on the kill zone theory with respect to count 2 because that theory does not apply where the charge names a specific victim. We reject his argument.

In *Stone*, the defendant was charged with and convicted of a single count of attempted murder for firing a single shot at a group of ten people. (*Stone, supra*, 46 Cal.4th at p. 136.) Our high court found that the trial court erred in instructing the jury on the kill zone theory. (*Id.* at p. 138.) The court explained that "[t]he kill zone theory simply di[d] not fit the charge or facts of th[at] case" because "[t]here was no evidence . . . that [the defendant] used a means to kill the named victim . . . that inevitably would result in the death of other victims within a zone of danger." (*Ibid.*) However, the court clarified that "a person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind. An indiscriminate would-be killer is just as culpable as one who targets a specific person." (*Id.* at p. 140.)

Here, count 2 specifically alleged that Burke attempted to kill Nygren. However, the prosecutor clarified that the theory behind count 2 was not that Burke was trying to kill Nygren, but rather that he targeted Blood gang members exiting the Static Lounge and thus created a kill zone. Unlike *Stone*, there was evidence in this case that Burke used a means to kill his target that could result in the death of others in the zone of danger. He fired five shots, many of which were in the direction of the bar and a large crowd. By doing this, Burke created a kill zone. Further, we note that Burke did not object at trial to the prosecutor's theory of guilt and does not argue on appeal that he was prejudiced by the variance between the pleading and the prosecutor's theory at trial. Rather, his defense at trial was based on a theory that he was not the shooter. His defense did not pertain to the identity of the victim. Under these circumstances, a kill zone instruction on count 2 was proper.

2. Effect of Identical Instructions on Counts 1 and 2

Burke next argues that the kill zone instructions were erroneous because (1) they allowed the jury to convict on count 1 based upon an intent to kill Nygren, and (2) they allowed the jury to convict twice based on the same act and intent to kill the same person. We reject Burke's arguments.

We are not convinced that the kill zone instructions caused the jury to convict Burke on count 1 based upon an intent to kill Nygren. Although the jury instruction stated that "the People must prove that the defendant not only intended to kill Blood gang members *but also either intended to kill [Nygren], or intended to*

kill everyone within the kill zone," that theory was clarified by the prosecutor during closing argument. The prosecutor stated that count 1 pertained to Burke's attempt to kill Blood gang members and that the People's theory was *not* that Burke intended to target Nygren, but rather that Burke created a kill zone.

Although the jury instruction was inartful, it is not reasonably likely that the jury interpreted the instruction in the way Burke asserts. There was substantial evidence in the record to support the conviction on count 1 for attempting to murder Blood gang members. As we previously noted, the gang expert testified that it is common for gang members to commit shootings in locations where they know rival gang members will be present. Burke did exactly that by discharging his firearm multiple times in the direction of the bar as people exited. Further, the prosecutor very specifically identified the theories of attempted murder on both counts and there was no evidence of jury confusion.

Based upon the prosecutor's arguments and evidence presented at trial, it is unreasonable to conclude that the jury convicted on count 1 based upon an intent to kill Nygren. Thus, we turn to Burke's argument that the instructions allowed the jury to convict twice based on the same act and intent to kill the same person.

While we find that the court erred in giving an inartful identical kill zone instruction on counts 1 and 2, we again conclude it is not reasonably likely that the jury interpreted the instructions as Burke asserts. As we already explained, the prosecutor detailed the People's theory of attempted murder on both counts and the jury did not express any confusion. Further, it is unlikely that either conviction was

based on an intent to kill Nygren because the prosecutor specifically stated that was not his theory. Instead, the People's theory was that count 1 was for Burke's attempt to kill rival gang members and count 2 was for his attempts to kill everyone else in the zone of danger. There was substantial evidence to support the convictions on these theories.

Burke's argument may have been more convincing if he only fired his weapon one time, but that is not the case before us. Burke fired five separate shots toward a crowd of people. Those five shots could support separate attempted murder charges based on distinct acts. Given the evidence and prosecutor's arguments, we conclude it is not reasonably likely that the jury misapplied the instructions in the manner Burke claims.

DISPOSITION

The judgment is affirmed.

MCINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.