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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK A. DIAZ,

Defendant and Appellant.

D062080

(Super. Ct. No. SCN275310)

APPEAL from a judgment of the Superior Court of San Diego County,

Kerry Wells, Judge. Affirmed.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Mark A. Diaz guilty of the first degree murder of Hector Gil (count 1), attempting to murder Ricardo Gutierrez (count 2), assaulting Peter Moreno with a

semi-automatic firearm (count 3) and making a criminal threat against Gil (count 4). It also found true certain enhancements related to counts 1 and 2. The trial court sentenced Diaz to prison for 75 years to life plus 11 years.

Diaz appeals, contending the evidence does not support a finding that he committed (1) first degree murder by lying in wait or (2) attempted murder. He also asserts the trial court erred by allowing admission of a victim's statements and behavior showing his fear of Diaz as relevant to the homicide. Finally, he requests we review sealed materials the trial court reviewed pursuant to his motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), to determine if there are additional discoverable materials in the police personnel files. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Diaz contested his identity as the shooter at trial, but does not challenge the sufficiency of the evidence supporting the jury's implied finding on this issue on appeal. Because the parties are familiar with the facts, we do not summarize the evidence supporting this finding and limit our account of the evidence presented at trial to background facts.

Ari Soltani opened Pacific Coast Boxing (the gym) in a commercial center in Vista. Diaz was the head boxing coach at the gym. There was conflicting evidence presented regarding the extent of Diaz's ownership interest in the gym. Diaz trained several boxers at the gym, including Gutierrez and Nicolas Lopez.

In early January 2010, Gutierrez and Diaz signed a contract whereby Gutierrez agreed that Diaz would be his manager, trainer and promoter when Gutierrez turned

professional. Gutierrez later approached Soltani and told him about his contract with Diaz. Gutierrez thought Diaz was being too aggressive and did not want to train with him anymore. Gutierrez then began training at the gym with Gil, another boxing trainer. Sometime later that month, Gil started to receive threatening telephone messages from Diaz. One of the messages said, "[If] [y]ou don't leave [Gutierrez] and my boxers alone, I'm going to kill you." Gil expressed fear and at times, trained Gutierrez at other gyms.

In the meantime, Diaz and Soltani got into a dispute regarding control of the gym, resulting in Soltani obtaining a temporary restraining order (TRO) against Diaz. Additionally, Soltani called Moreno, another boxing trainer that knew Diaz, to train along with Gil because he was getting rid of Diaz. In early February 2010, the TRO issued and Soltani had the locks on the gym changed. The following Monday morning, Moreno and another individual attempted to serve Diaz with the TRO paperwork when he showed up at the gym. The police were called to the gym. Ultimately, the police served Diaz with the TRO and asked him to leave. Later that month, Diaz and Soltani appeared in court on the TRO. Although Diaz claimed the gym belonged to him, he admitted that he could not prove his assertion.

On the evening of April 7, 2010, Diaz called Lopez and told him to stay away from the gym because there were bad people there. Meanwhile, Moreno, Gil, Gutierrez and several other people were at the gym sitting around the boxing ring when gunfire erupted. Gutierrez normally trained with Gil after work on set days. Gil suffered a single gunshot wound to his torso and was killed. Gutierrez was shot in the calf as he ran away. Moreno suffered a single gunshot wound to his shoulder.

That evening, Alexander Castellanos and several other individuals were in a parking lot near the gym. They heard a loud noise behind them, and saw a charcoal gray, lifted Nissan Titan truck with dark tinted windows being driven through the alley recklessly. It drove over a curb and parked. About ten minutes later, Castellanos heard six shots. A man then ran back to the truck and left without turning on the lights. The witnesses in the parking lot and a neighbor identified Diaz's unique truck as the same truck that the shooter drove away in. Several witnesses testified that Diaz matched the description of the shooter.

DISCUSSION

I. *Sufficiency of the Evidence*

A. General Legal Principles

When a defendant challenges the sufficiency of the evidence to support his conviction, we examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which the jury could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576, 578.) We may not reweigh the evidence, reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 884.) Additionally, we may reject the testimony of a witness who was apparently believed by the trier of fact only if that testimony is inherently improbable or impossible of belief. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict," we will affirm. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) "The question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the elements of the underlying enhancement beyond a reasonable doubt. [Citations.]" (*People v. Alvarez* (1996) 14 Cal.4th 155, 225.) If the circumstances, plus all the logical inferences the jury might have drawn from them, reasonably justify the jury's findings, our opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) The same standard of review applies even "when the conviction rests primarily on circumstantial evidence." (*People v. Kraft, supra*, at p. 1053.)

B. Murder

1. Background

Diaz was charged with Gil's murder. The trial court instructed the jury on first or second degree murder with malice aforethought. (CALCRIM No. 520.) Without objection, the court also instructed the jury with CALCRIM No. 521, which listed the requirements for first degree murder. This instruction explained the prosecutor was relying on theories of (1) willful, deliberate, and premeditated murder and (2) lying in wait. The instruction explained the legal requirements for both theories and informed the jury that it "may not find the defendant guilty of first degree murder unless all of you

agree that the People have proved that the defendant committed first degree murder under one of the above theories. *However, all of you do not need to agree on the same theory.*" (Italics added.)

During closing argument, the prosecutor argued to the jury the following, without objection: "[T]here are two theories of first-degree murder that apply, and you can find it on both theories. Six of you could find one, six of you can find the other. The law doesn't really have you specify what specific theory, just that you find the degree being murder in the first degree."

2. Analysis

Diaz tenders a multi-layered argument attacking his first degree murder conviction. He asserts the evidence did not support murder by means of lying in wait as there was no proof of a substantial period of watching and waiting for an opportune time to act. Because the theory of lying in wait was unsupported by the evidence, he contends his conviction must be reversed based on the prosecutor's argument to the jury that they did not need to agree on whether he committed the murder on a theory of lying in wait or premeditation and deliberation. Specifically, he asserts a reasonable probability exists that the jury in fact found him guilty solely on the unsupported theory and that this amounted to error of federal constitutional dimension requiring that his murder conviction be reversed. As we shall explain, even if there was insufficient evidence that the murder was of the first degree based on a lying in wait theory, we need not reverse the judgment.

A jury is not required to unanimously decide on the specific theory of murder upon which it based its guilty verdict because those theories are not distinct elements of the crime, but are instead distinct means of committing the offense. (*Schad v. Arizona* (1991) 501 U.S. 624, 636.) Following this rationale, our high court has found that lying in wait is the functional equivalent of proof of premeditation, deliberation and intent to kill. (*People v. Russell* (2010) 50 Cal.4th 1228, 1257.) "Because lying in wait and deliberate and premeditated theories of murder are simply different means of committing the same crime, juror unanimity as to the theory underlying its guilty verdict is not required." (*Ibid.*)

Where, as here, a jury is presented with alternative theories regarding the commission of a crime, we must reverse the verdict if one of the prosecutor's alternative theories is *legally* incorrect. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126–1129.) "[T]his rule 'is perhaps most commonly invoked when the alternate theory is legally erroneous,' that is, when one of the theories is infected by prejudicial error such as inadmissible evidence or incorrect instructions. [Citation.] However . . . the 'same rule applies when the defect in the alternate theory is not legal but factual, i.e., when the reviewing court holds the evidence insufficient to support the conviction on that ground.' [Citation.]" (*Id.* at p. 1122.) Nonetheless, when the erroneous theory is merely factually inadequate, reversal is not required whenever a valid ground for the verdict remains absent an affirmative showing that the jury relied on the erroneous theory. (*Id.* at pp. 1128–1129.)

Here, Diaz does not contend that the lying in wait theory was legally insufficient. Nor has he made an affirmative showing that the jury relied on the lying in wait theory to convict him of first degree murder. His reliance on the prosecutor's argument to make such a showing is misplaced as the prosecutor correctly recited the law and merely reinforced the jury instruction stating that while all jurors needed to agree that Diaz committed murder, all jurors did not need to agree on the same theory. (CALCRIM No. 521.)

Thus, even assuming, without deciding, there was insufficient evidence that the murder was of the first degree based on a lying in wait theory, we conclude there was sufficient evidence that Diaz committed willful, deliberate and premeditated murder.

"An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. [Citations.] However, the requisite reflection need not span a specific or extended period of time." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) The act of obtaining a weapon is evidence of planning consistent with a finding of premeditation and deliberation. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081–1082.) Additionally, the method of killing "can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder." (*People v. Memro* (1995) 11 Cal.4th 786, 863–864.)

Here, there was overwhelming evidence of premeditation and deliberation. Before the shooting, Diaz threatened to kill Gil, stating he was going to blast or shoot Gil and that Gil was going to die. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 757 [defendant's threat against the victim is relevant to prove intent in a prosecution for murder].) About

20 minutes before the shooting, Diaz called Lopez and warned him to stay away from the gym because there were bad people there. Thereafter, Diaz drove to the gym with a gun, presumably aware of which individuals would likely be there that evening because the evidence revealed that Gutierrez trained with Gil at a set time, on set days. Diaz positioned himself in a doorway to the gym and shot into a room where Gil and Gutierrez were sitting next to three other people, hitting Gil first and then Gutierrez as Gutierrez attempted to flee.

We must assume the jury based its conviction on the theory supported by the evidence. (*People v. Seaton* (2001) 26 Cal.4th 598, 645.) Accordingly, Diaz has failed to demonstrate prejudice, i.e., a reasonable probability that the jury found him guilty solely on the alleged factually unsupported theory of lying in wait murder. (Cf. *People v. Guiton*, *supra*, 4 Cal.4th at p. 1129–1130.)

In any event, this same evidence sufficiently revealed a period of watching and waiting necessary to support the theory of lying in wait murder. First degree murder by lying in wait requires (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. (*People v. Russell*, *supra*, 50 Cal.4th at p. 1244.) While it might appear that these elements have not been satisfied, our high court has concluded that lying in wait is "'the functional equivalent of proof of premeditation, deliberation and intent to kill.'" (*People v. Hardy* (1992) 2 Cal.4th 86, 162.) Our high court has never fixed a minimum time period for the waiting requirement, stating that "'[t]he precise period of time is . . . not critical,'" so long as the period of

watchful waiting is "substantial." (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1073 [a few minutes is sufficient].) Rather, "[t]he purpose of the watching and waiting element is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse." (*People v. Stevens* (2007) 41 Cal.4th 182, 202.) Here, "the jury could reasonably conclude [that Diaz] concealed [his] murderous intention and struck from a position of surprise and advantage, factors which are the hallmark of a murder by lying in wait. Insisting on a showing that [Diaz] actually watched the victims . . . and waited a moment before attacking reads the law in too literal a fashion." (*People v. Hardy, supra*, 2 Cal.4th at p. 164.)

C. Attempted Murder

Diaz contends the evidence was insufficient to prove he intended to kill Gutierrez. We disagree.

Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Ervine* (2009) 47 Cal.4th 745, 785.) Attempted murder also requires express malice, meaning the assailant desires the victim's death or knows to a substantial certainty that the victim's death will occur. (*People v. Booker* (2011) 51 Cal.4th 141, 178.) "Intent to unlawfully kill and express malice are, in essence, 'one and the same.' [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739.) Intent to kill may be inferred from the defendant's acts and the circumstances of the crime. (*Id.* at p. 741.) "The act of shooting a firearm toward a victim at close range in a manner that could have inflicted a mortal wound had the shot been on target is sufficient to support an inference of an intent to kill." (*People v.*

Houston (2012) 54 Cal.4th 1186, 1218.) The circumstance that the bullet misses its mark or fails to prove lethal is not dispositive. (*People v. Smith, supra*, at pp. 741–742.)

"Moreover, attempted murder does not necessarily require a specific target. We have held that an indiscriminate would-be killer who fires into a crowd is just as culpable as one who targets a specific victim." (*People v. Houston, supra*, at p. 1218.)

Here, Diaz's acts and the circumstances of the crime support an inference that he intended to kill Gutierrez. As we detailed above, Diaz positioned himself in a doorway and fired six shots into a room of unsuspecting victims. He first shot Gil in the torso, killing him. Hearing the shot, Gutierrez started to run, planning to hide behind some televisions. As Gutierrez ran, he glanced back and saw a "hand shooting towards [him]." Gutierrez clarified that he ran "straight ahead" in the same direction that the shots were fired. Gutierrez immediately fell after a shot hit him in the leg. On these facts, a rational jury could find beyond a reasonable doubt that Diaz intended to kill Gutierrez when he shot in the direction that Gutierrez ran. The possibility "that the evidence could reasonably be reconciled with a finding of innocence . . . does not warrant a reversal of the judgment." (*People v. Hill* (1998) 17 Cal.4th 800, 848–849.)

II. *Evidence of Gil's Fear*

A. Background

Diaz was charged with murdering Gil and making criminal threats against him. He moved in limine to exclude the alleged threats as inadmissible hearsay or to bifurcate trial on the criminal threats count. After hearing argument, the trial court ruled that the threats were relevant to motive and identity. After additional argument, the court

concluded the question came down to whether the jury should be instructed on how to use the evidence, indicating it would think about the issue.

During a later discussion, the parties agreed that the threats were admissible to prove the criminal threats charge and also admissible on the murder "as going to motive, intent, and premeditation." The court concluded that Gil's reaction to the threats, or state of mind was relevant to the criminal threats charge. Noting that the issue whether Diaz's statements were actual threats or "huffing and puffing" was disputed, it admitted the entirety of Gil's statements without a limiting instruction.

Based on the trial court's ruling, a number of witnesses testified regarding the threats Diaz made against Gil. Some of these witnesses also testified that Gil was afraid.

B. Analysis

Diaz contends the trial court erred in refusing to give his proposed limiting instruction that evidence of Gil's fear of him was relevant to the criminal threats count, but not the homicide count because there was no foundational evidence that he was actually aware of Gil's fear and was motivated by it. He contends the error was prejudicial because it was reasonably likely that the jury impermissibly considered the evidence to show motive which, in turn, supported a finding of identity or premeditation. Accordingly, he contends that the erroneous admission of the hearsay statements rendered his trial so fundamentally unfair that it violated both state and federal due process. The People respond that a limiting instruction was not necessary because the statements were relevant as to all counts. Even assuming there was error, the assumed error was harmless.

As a preliminary matter, the parties stipulated below that evidence of Diaz's threats towards Gil was admissible as to both the criminal threats and murder counts. Additionally, it is clear that evidence of Gil's fear or reaction to Diaz's threats, was admissible as to the criminal threats count as fear constitutes an element of the crime. (Pen. Code, § 422; CALCRIM No. 1300). Thus, the sole issue presented is whether evidence of Gil's fear or reaction to Diaz's threats, was admissible as to the murder count.

We will assume, without deciding, that evidence of Gil's fear was inadmissible as to the murder count and that the trial court erred in refusing to give a limiting instruction to the jury directing that they consider evidence of Gil's fear only as to the criminal threats count. We conclude, however, that the assumed error was harmless. As we have discussed, there was ample evidence to support the jury's murder finding on either a theory of lying in wait or premeditated murder. (*Ante*, part I.B.2.)

It is not reasonably probable that Diaz would have obtained a more favorable verdict whether we review prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836 (whether it is reasonably probable that a result more favorable to the appellant would result in the absence of the error), or under *Chapman v. California* (1967) 386 U.S. 18, 24 (whether the error was harmless beyond a reasonable doubt). Diaz's assertion that the jury must have considered evidence of Gil's fear to establish a motive for the murder is speculative, at best. Moreover, there was evidence that Diaz's motive for the crime was Gil's act of taking Diaz's boxers.

III. *Pitchess* Motion

A. Background

During trial, deputy sheriffs conducted a search of Diaz's jail cell to address possible security concerns regarding the jury's proposed view of the crime scene. Thereafter, Diaz filed a *Pitchess* motion, requesting discovery relating to the deputies who searched his cell, and any findings related to a subsequent internal affairs investigation. The trial court granted the request to review the personnel files of three deputies and an internal affairs investigation regarding Diaz's complaint regarding the search.

After reviewing that material in chambers, the court ordered there would be no disclosure regarding any complaints of untruthfulness. As to the internal affairs investigation, it ordered the interviews of two deputies to be released, with certain irrelevant information redacted. It also ordered disclosure of discipline imposed on one of the deputies related to the investigation. Finally, it ordered the release of certain documents, including the release of the names of witnesses and their reports and photographs taken during the course of the cell search.

Based on a supplemental petition filed by defense counsel, the court ordered the release of audio recordings of two witness statements to confirm the accuracy of the internal affairs reports. The court declined to release audio recordings of all the witnesses. Thereafter, sheriff's legal counsel provided a copy of the entire internal affairs file to the court and the court ordered it sealed.

B. Analysis

Diaz asks that we conduct our own review of the record including the unredacted material to determine whether the trial court abused its discretion by making its findings. The Attorney General does not oppose our review. We may independently examine the materials in camera under the abuse of discretion standard. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.) We have done so and conclude that there is no additional information discoverable under *Pitchess*.

Review of the sealed *Pitchess* hearing transcript regarding the personnel files of the deputies involved in the search shows that the trial court followed the correct procedure. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1228–1229.) We conclude the trial court did not abuse its discretion when it ordered there would be no disclosure regarding any complaints of untruthfulness.

As to the internal affairs investigation documents, the trial court's orders gave Diaz access to (1) the interviews of two deputies, with certain irrelevant information redacted, (2) the discipline imposed on one of the deputies related to the investigation, (3) certain documents, including the names of witnesses and their reports and photographs taken during the course of the cell search, and (4) the audio recordings of two witness statements. After comparing what was ordered to be disclosed with all the documents provided, the materials withheld pertain to the analysis and conclusions drawn from the materials that were disclosed or were otherwise not relevant to Diaz's motion. (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1088 [internal affairs report is discoverable, with the exception of the portions of the internal affairs

report in which the investigating officer states his analysis and conclusions regarding the incident].) We conclude the trial court did not abuse its discretion in ruling on Diaz's motion.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

McDONALD, Acting P. J.

O'ROURKE, J.