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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GENE DEMENDOZA,

Defendant and Appellant.

E060676

(Super.Ct.No. RIF1203929)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Charles J. Koosed, Judge.

Affirmed.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, and William M. Wood and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant and appellant, Gene Demendoza, guilty as charged of the premeditated attempted murder of a homeless man, Michael Pritchard (Pen. Code, §§ 664, 187, subd. (a); count 1),¹ and assaulting Pritchard with a deadly weapon (§ 245, subd. (a)(1); count 2). In count 1, the jury found defendant used a knife (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)) and in count 2, defendant personally inflicted great bodily injury on Pritchard² (§§ 12022.7, subd. (a), 1192.7, subd. (c)(31)).

The evidence at trial showed that, around 2:00 a.m. on August 25, 2012, after defendant and his friend, Bill Wood, Jr., had been drinking at a Riverside bar, defendant assaulted Pritchard and stabbed him multiple times with a knife. The defense claimed a third party, either Wood or a stranger but not defendant, assaulted and stabbed Pritchard.

On this appeal, defendant claims his trial counsel rendered ineffective assistance in failing to request a pinpoint instruction on third party culpability—that if the jury believed there was a reasonable doubt that someone other than defendant assaulted and stabbed Pritchard, it had to acquit defendant. We affirm. As we explain, defense counsel’s performance was not deficient for failing to request the pinpoint instruction, and even if it was, the error was not prejudicial. In light of the entire record, including

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

² Defendant was sentenced to seven years to life in prison for the attempted murder, plus one year for the knife enhancement in count 1. Additional terms were imposed but stayed on the assault conviction and great bodily injury enhancement in count 2. (§ 654.)

the other instructions and defense counsel's focus on the conflicting evidence concerning defendant's identity as the perpetrator, there is no reasonable probability that defendant would have realized a more favorable result had a pinpoint instruction been given.

II. FACTUAL BACKGROUND

A. *Pritchard's Initial Encounter With Defendant*

On August 24, 2012, defendant picked up his friend Wood in his white El Camino, and the two went to Shooters Bar in Riverside to play pool. Wood was five feet eight inches tall and weighed 130 pounds, and defendant was six feet one inch tall and weighed around 185 pounds. Defendant and Wood spent the night drinking shots and sharing pitchers of beer. According to Wood, he was doing most of the drinking because he was the "designated drinker" and did not have to drive. When they left the bar around 1:00 to 1:30 a.m., Wood was very intoxicated and just wanted to go home and sleep. Wood had stitches in his leg from a second surgery after his leg was seriously injured in an earlier automobile accident. Wood walked with a limp and usually used a cane, but he did not have a cane that night and was unable to run.

A bartender, Larraina Pierce, saw the two men when they arrived at the bar and noticed they were acting aggressively toward each other near closing time. Jason White was at the bar that night because Pierce, his girlfriend at the time, was a bartender there. Around closing time, White was sitting inside his parked car watching through its front window when he noticed two men arguing and "rough housing" near a white El Camino. White could not tell whether the men were serious or just "playing around," but the taller

man seemed angry. Both White and Pierce noticed that the shorter man was trying to calm down the taller man. White later identified the taller man from a photographic lineup as defendant.

Around the same time, White noticed a homeless Black man, Pritchard, outside a liquor store in the same strip center as the bar, rummaging through trash and looking for cans. According to White, Pritchard was “minding his own business” when defendant approached Pritchard, pulled a knife out of his pocket, and made several “jab[bing]” motions toward Pritchard. White heard the shorter man yelling, “Don’t do it. Don’t be stupid.” White also heard Pritchard say, “What the fuck,” as if he were surprised, and saw Pritchard jump back. From inside the bar, Pierce also saw the taller man walk “aggressively” toward the homeless man and pull something out of his pocket, but at that point her view was obstructed by a beam in front of the liquor store.

White decided to intervene and drove his car toward defendant and Pritchard. At that point, defendant and Wood got into the El Camino and drove away. White saw that the taller man, defendant, was in the passenger seat and the shorter man, Wood, was in the driver’s seat. Pritchard dropped his bag of cans and began running away. White drove after Pritchard and offered him a ride. After Pritchard declined help, White followed the El Camino hoping to get its license plate number, but he was unable to read it because the El Camino’s taillights were off.

B. *The Charged Stabbing Incident in the Business Complex*³

Pritchard testified he was collecting cans outside a liquor store when he heard someone yell, “Don’t do it. Don’t do it.” A man quickly approached him, took a swing at him, and did something like a “round house kick.” Pritchard ducked and ran away to avoid being beaten. He had never seen or spoken to the man before. The man told him to “drop” what he had. He threw his bags of cans at the man and ran away.

As Pritchard ran away, a man pulled alongside him in a Mustang and asked if he was okay. The man said Pritchard should get out of there, and Pritchard told the man he was “working on it.” After the man drove away, Pritchard crossed a parking lot and began walking on the sidewalk on Indiana Street. Minutes later, he noticed a white El Camino driving past him with its lights off, and he yelled for the driver to turn on the lights. The El Camino braked and turned to follow Pritchard. Soon after, the El Camino stopped and the same man who had just swung at Pritchard outside the bar and liquor store began jogging towards him. Pritchard headed into an industrial complex and the man followed him.

Pritchard was backed up against a wall when the man began to strike him. The man struck Pritchard on the side of his head and cut his eyebrow, cheek, and jaw with a knife. Pritchard attempted to fight off the man and block his blows with his left arm. He

³ The jury was instructed that counts 1 and 2 were not based on defendant’s initial encounter with Pritchard outside the bar. Instead, both charges were based on defendant’s subsequent encounter with Pritchard that occurred in a business complex a short distance away from the bar.

slid to the ground and pushed the man back with his feet, but he was stabbed a few more times. Finally, Pritchard rolled to the ground and pretended to be dead, and the man walked away.

After the man left, Pritchard made his way to the main street. He came across the white El Camino with both doors open and could hear voices but did not see anyone by the car. He hid behind a sign until he heard the El Camino leave, then he headed back to his encampment by the railroad and asked a man there to call 911. He collapsed soon thereafter and did not awake until the paramedics were present. He was stabbed 14 times, including in his chest and under his armpit, resulting in two collapsed lungs, bleeding within the brain, and a fractured temporal bone.

At trial, Pritchard described his assailant as white or Hispanic, in his mid- to late 20's, five feet seven or eight inches tall, and wearing Vans tennis shoes, plaid skateboard shorts, and a white shirt with cut-off sleeves and something printed on it. Pritchard was certain the man who stabbed him was the same man who accosted him earlier outside the bar. Around two weeks after the stabbing, Pritchard identified defendant as the man who stabbed him from the same photographic lineup that was presented to White.

C. The Assailant's Tattoos

During pretrial interviews with detectives and while testifying at the preliminary hearing, Pritchard denied his attacker had any tattoos. But at trial, Pritchard testified his attacker had a three- to four-inch discoloration on his right arm which he assumed was a tattoo. He did not tell the police about the discoloration because he did not believe it was

a tattoo, or an important detail, and he would have recalled whether his attacker was “sleeved out” or had tattoos covering most of his arms, like defendant. Pritchard believed defendant must have gotten his numerous arm tattoos after the August 25, 2012, incident. Both the mother of defendant’s children and defendant’s grandmother testified defendant got his numerous arm tattoos several years before August 25, 2012.

D. Wood’s Account

Wood testified that when he and defendant left the bar around 1:00 or 1:30 a.m., he did not remember anything except getting into the passenger seat of defendant’s car and defendant driving away. They drove alongside a middle-aged Black man, around five feet eight or nine inches tall, and defendant began to argue with the man. Defendant then jumped out of the car and chased after the man. Wood then got out of the car, walked away, and called his father to pick him up, but before Wood’s father could arrive defendant drove alongside Wood and picked him up. Wood did not notice any blood or a knife on defendant. Wood’s father testified that when Wood came home, Wood “staggered” into the garage and was “stumbling, falling down, drunk.” Wood’s father did not see anything unusual on Wood’s shirt, such as blood.

E. Defendant’s Pretrial Statement

Defendant was interviewed by detectives on September 27, 2012. He said he had been at Shooters Bar on August 25, 2012, and he drove himself and Wood to the bar. When he and Wood were leaving the bar, defendant admitted he got into an altercation with a homeless man after the man threw something at him after defendant declined to

give him money. Defendant swung at the man because it looked like the man was going to swing at defendant. Defendant and Wood then drove away; defendant was driving and Wood was in the passenger seat.

A short time later, defendant saw the homeless man near a business complex, pulled over, and got into another argument with the man. The man nudged defendant with his body, took off running, and defendant followed him. Defendant denied stabbing the homeless man and claimed he had retreated to his car when he noticed another person near the back of the business complex. Defendant got in his car and drove home with Wood.

F. Police Investigation

No blood was found on the shoes defendant wore during his September 27, 2012, police interview. No human DNA was found in a sample from a smudge-like stain found on the exterior of defendant's El Camino.

G. Defense Theory

Defendant did not testify. The defense claimed Wood, or the man defendant saw near the back of the business complex, was the person who assaulted and stabbed Pritchard, not defendant. During closing argument, defense counsel stressed, among other things, that Pritchard was certain his assailant did not have tattoos on his arms, but defendant did; Pritchard's description of the discoloration on his assailant's arm resembled a "darkened family crest" on Wood's arm; Pritchard originally said his assailant was around five feet seven inches tall, like Wood, but defendant was six feet

one inch tall; the hair length of the assailant in the composite drawing, based on Pritchard's original description, was a "dead ringer" for Wood's hair, and defendant's head was shaved; Wood's account of what he was doing after defendant left his El Camino was suspicious. In sum, defense counsel stressed that "all of the evidence" pointed toward Wood or "the person in the back of the industrial complex" as the perpetrator.

III. DISCUSSION

Defendant claims his trial counsel rendered ineffective assistance because he failed to request a pinpoint instruction on third party culpability. Defendant argues "it was critical that the jury be instructed on how it should treat evidence of third party culpability. Yet, no such instruction was requested by defense counsel."

A. *Standard for Ineffective Assistance of Counsel Determination*

Criminal defendants have a federal and state constitutional right to effective assistance of counsel. (*People v. Nation* (1980) 26 Cal.3d 169, 178.) "The burden of proving ineffective assistance of counsel is on the defendant." (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial . . ." (*Strickland v. Washington*, (1984) 466 U.S. 668, 687.)

B. Counsel's Performance Was Not Deficient

“Reversal of convictions on the ground of inadequate counsel is mandated only if the record affirmatively reveals no rational tactical purpose for his or her act or omission.” (*People v. Terrell* (1999) 69 Cal.App.4th 1246, 1253.) “If the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.” . . .’ [Citation.]” (*Ibid.*) Here, the record does not indicate why defense counsel did not request a pinpoint instruction on third party culpability, but there was a satisfactory explanation for the omission: the jury was instructed that the prosecution had the burden of proving defendant guilty beyond a reasonable doubt. (CALCRIM No. 220.)

Pinpoint instructions on third party liability generally “add little to the standard instruction on reasonable doubt. [Citation.] . . . [R]easonable doubt instructions give defendants ample opportunity to impress upon the jury that evidence of another party’s liability must be considered in weighing whether the prosecution has met its burden of proof.” (*People v. Hartsch* (2010) 49 Cal.4th 472, 504.) Here, the reasonable doubt instruction adequately addressed how the jury should have considered the evidence that a third party—either Wood or the unidentified person defendant claimed he saw near the back of the business complex—stabbed Pritchard. Given the standard instruction on reasonable doubt, defense counsel could have reasonably believed a pinpoint instruction on third party culpability was unnecessary. (See *People v. Castillo* (1997) 16 Cal.4th

1009, 1018 [where instructions adequately advised jury to consider evidence of intoxication on the question of premeditation, additional instruction that “premeditation is a mental state” was unnecessary].)

C. Any Error Was Not Prejudicial

In addition to showing counsel’s performance was deficient, a criminal defendant must establish prejudice before he can obtain relief on an ineffective assistance claim. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217.) In order to establish prejudice, the defendant must show there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Id.* at pp. 217-218, quoting *Strickland, supra*, 466 U.S. at pp. 693-694.)

Here, the failure to request a pinpoint instruction on third party culpability was not prejudicial because, even if such an instruction had been given, there is no reasonable probability the jury would have reached a result more favorable to defendant. As discussed, the jury was given the standard instruction on reasonable doubt, and this instruction adequately addressed how the jury was to evaluate the evidence that Wood or another third party committed the charged crimes. Further, during closing argument defense counsel stressed that the jury had to find defendant guilty beyond a reasonable doubt, and the jury could not do so based on the evidence that someone else may have committed the crimes. Under these circumstances, there is no reasonable probability that defense counsel’s failure to request a pinpoint instruction on third party culpability

affected the outcome. Indeed, as our state Supreme Court has observed: “It is hardly a difficult concept for the jury to grasp that acquittal is required if there is reasonable doubt as to whether someone else committed the charged crimes.” (*People v. Hartsch, supra*, 49 Cal.4th at p. 504 [given standard instruction on reasonable doubt, omission of pinpoint instruction on third party culpability not prejudicial].) In addition, defense counsel spent considerable time in closing argument focusing on Wood’s culpability, and stressed that if circumstantial evidence supported two conflicting inferences, one pointing to defendant’s guilt and the other to his innocence, the jury had to adopt the inference pointing to defendant’s innocence. (CALCRIM No. 224.) In sum, the failure to request a pinpoint instruction on third party culpability was not prejudicial.

IV. DISPOSITION

The judgment is affirmed.

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KING
J.

We concur:

McKINSTER
Acting P.J.

CODRINGTON
J.