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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ABEL JULIO MENDOZA,

Defendant and Appellant.

F062048

(Super. Ct. No. VCF235060)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

Robert Derham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Stephen G. Herndon, Deputy Attorneys General, for Plaintiff and Respondent.

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After gunfire hit a car driving through Ducor, a small community in Tulare County, a jury found Abel Julio Mendoza guilty of four counts of attempted willful, deliberate, and premeditated murder, four counts of assault with a firearm, and one count

of shooting at an occupied motor vehicle and found criminal-street-gang and personal-discharge-of-firearm allegations true.¹ On appeal, he challenges the judgment on three grounds. We affirm.

BACKGROUND

On January 24, 2011, the district attorney filed an amended information that charged Mendoza with four counts of attempted willful, deliberate, and premeditated murder (counts 1-4; Pen. Code, §§ 187, subd. (a), 664),² one count of shooting at an occupied motor vehicle (count 5; § 246), and four counts of assault with a firearm (counts 6-9; § 245, subd. (a)(2)). Counts 1-4 alleged his active participation in a criminal street gang (§ 186.22, subds. (b)(1)(C), (b)(5)), his personal use of a firearm (§ 12022.53, subd. (b)), and his personal and intentional discharge of a firearm (§ 12022.53, subd. (c)). Count 5 alleged his active participation in a criminal street gang (§ 186.22, subd. (b)(4)), his personal use of a firearm (§ 12022.53, subd. (b)), and his personal and intentional discharge of a firearm (§ 12022.53, subd. (c)). Counts 6-9 alleged his active participation in a criminal street gang (§ 186.22, subd. (b)(1)(C)) and his personal use of a firearm (§ 12022.5, subd. (a)(1)).

On February 1, 2011, a jury found Mendoza guilty as charged and found each allegation true. On March 3, 2011, the court sentenced him to an aggregate term of 35 years to life. The components of his sentence were a term of 15 years to life with the possibility of parole for attempted willful, deliberate, and premeditated murder plus 20 years for personal and intentional discharge of a firearm on count 1 and concurrent terms of 15 years to life with the possibility of parole plus 20 years for personal and intentional discharge of a firearm on counts 2-5. The court imposed and stayed sentence on counts 6-9.

¹ The discussion sets out additional facts, as relevant (*post*).

² Later statutory references are to the Penal Code unless otherwise noted.

DISCUSSION

1. Evidence of Exercise of State Constitutional Right

Mendoza argues that the court's ruling excluding evidence of the refusal of a victim to speak with a defense investigator in exercise of a state constitutional right was federal confrontation clause error, state constitutional error, and state evidentiary error. The Attorney General argues that there was no error and that error, if any, was harmless. We agree with the Attorney General that error, if any, was harmless.

The issue before us arose out of a brief exchange on cross-examination between Mendoza's attorney and Belen Avila (Belen).³ "Now," he asked her, "did you ever talk to a man named Jake Torrence about this case?" She replied, "I've never spoke to him, but he went looking for me." He inquired of her, "Did you refuse to talk to him?," and she answered, "Yes." The prosecutor interjected, "Objection. Move to strike based on relevance." The court ruled, "Granted. The question and the answer will be struck," and admonished, "Jurors, you're not to consider those matters or [*sic*] for any purpose."

Later, out of the presence of the jury, the court identified Jake Torrence as an investigator for the public defender's office and solicited argument by counsel about the ruling.⁴ Mendoza's attorney contended that Belen's decision "to discuss the matter with sheriff deputies but not defense investigators demonstrates bias on her part" and that the evidence was "relevant for that purpose." He grounded his argument in the "Right to

³ For brevity, with no disrespect, subsequent references to witnesses who have the same surname as other witnesses are by first name only.

⁴ In his briefing, Mendoza observes that Torrence was so identified "outside the presence of the jury" but cites to nothing in the record showing that he was so identified to the jury. "Each brief must: [¶] ... [¶] Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C); cf. Cal. Rules of Court, rule 8.366(a).) We interpret his briefing as reflecting his lack of reliance on any knowledge by the jury of Torrence's affiliation. (See *In re Keisha T.* (1995) 38 Cal.App.4th 220, 237, fn. 7; *In re David L.* (1991) 234 Cal.App.3d 1655, 1661.)

Truth-in-Evidence” provision of the California Constitution,⁵ which he characterized as “equally as broad” as the right at issue, and in the Sixth Amendment confrontation clause of the United States Constitution. The prosecutor argued that Belen’s decision “goes to the heart of Marcy’s [*sic*] law.[⁶] If [she] did not want to speak to the defense or their investigators,” then “the California Constitution” guarantees that “she’s permitted to exercise that right.” The court affirmed the original ruling.⁷

Our Supreme Court has observed that Marsy’s Law “amended the California Constitution to guarantee crime victims a number of rights.” (*Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1080.) As so amended, the California Constitution mandates the prompt enforcement of those rights by the courts.⁸

The Attorney General argues, in reliance on Evidence Code section 913,⁹ “A victim’s right to decline an interview or discovery request is in effect the exercise of a

⁵ Former Cal. Const., art. I, § 28, subd. (d), now Cal. Const., art. I, § 28, subd. (f)(2).

⁶ On November 4, 2008, the voters passed Proposition 9, the “Victims’ Bill of Rights Act of 2008: Marsy’s Law,” which took effect the following day and which, as relevant here, added a new constitutional guarantee to the California Constitution: “In order to preserve and protect a victim’s rights to justice and due process, a victim shall be entitled to the following rights: [¶] To refuse an interview, deposition, or discovery request by the defendant, the defendant’s attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interview to which the victim consents.” (Cal. Const., art. I, § 28, subd. (b)(5).)

⁷ The court’s ruling likewise precluded Mendoza’s attorney from inquiring whether Torrance contacted Karla Hernandez, another prosecution witness.

⁸ “A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right. The court shall act promptly on such a request.” (Cal. Const., art. I, § 28, subd. (c)(1).) There is no dispute before us about Belen’s status as a victim within the scope of Marsy’s Law. (See Cal. Const., art. I, § 28, subd. (e).)

⁹ “(a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent

privilege that may not be commented on.” In a case arising before the adoption of Marsy’s Law, our Supreme Court held, “The jury may not draw any inference from a witness’s invocation of a privilege.” (*People v. Doolin* (2009) 45 Cal.4th 390, 441.)

Mendoza argues, in reliance on another case arising before the adoption of Marsy’s Law, that Belen’s refusal to talk with Torrence “shows the possibility of bias against [him].” In that case, *People v. Hillhouse* (2002) 27 Cal.4th 469 (*Hillhouse*), our Supreme Court held, “A witness’s refusal to talk to a party is relevant to that witness’s credibility because it shows the possibility of bias against that party.” (*Id.* at p. 494.) With commendable candor, Mendoza acknowledges the holding in *Hillhouse* that the ruling at issue in that case sustaining a relevance objection to evidence of the witness’s refusal to talk was harmless error under state law but was not a violation of the federal confrontation clause. (*Id.* at pp. 494-495.) Accordingly, he “raises the issue to preserve it for federal review.” Duly noted.

The Attorney General argues that the witness at issue in *Hillhouse* “was not a victim” but that Belen *was* a victim who “had the benefit of relying on the newly-created right of crime victims to decline to talk with the defense.” Mendoza insists, “Although this section gives victims the right to refuse to be interviewed, it says nothing about the admissibility of evidence of that refusal.” The Attorney General retorts, “But that would punish her for exercising a constitutional right.” On a record of overwhelming evidence of Mendoza’s guilt, we need not lower our oars into those troubled waters.

another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding. [¶] (b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.” (Evid. Code, § 913.)

Assuming, without deciding, that the exclusion of Belen's refusal to speak with Torrence was error, the error was harmless beyond a reasonable doubt. (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680, citing, e.g., *Davis v. Alaska* (1974) 415 U.S. 308, 318, *Chapman v. California* (1967) 386 U.S. 18, 24; but see *Hillhouse, supra*, 27 Cal.4th at pp. 494-495.) Belen, a Fresno State University student, grew up in Ducor, moved out when she was 18, and stayed with her parents on weekends and vacations. As she drove from her aunt's home to her parents' home one Friday night in the car that her brother Ismael usually drove, three passengers were in the car with her – her sister-in-law Selena Casillas in the front passenger seat, her sister-in-law Karla Hernandez in the rear seat behind Casillas, and her niece Aliene Avila (Ismael's and Casillas's baby) in a car seat behind her. Turning at the T-intersection in front of Mendoza's home, she saw, illuminated by the headlights of the car, seven people in the yard of his home, all of whom she knew, all of whom started running toward the car.

One was Mendoza, who does not get along with Ismael. He had shot at Ismael a couple months before. Mendoza was the husband of one of Belen's childhood friends, Maria Maciel. Another person in the yard was Albert Chavez, whom Belen knew from elementary school. He used to hang out with Ismael but, once they got to high school, Chavez picked the Norteños and Ismael chose the Sureños. Also in front of Mendoza's home was Hector Leon, who "hangs around with" and "backs up the Norteños." Luis Selvedra was there, too. Leon and Selvedra used to be Ismael's friends, but once they went to high school they stopped being his friends. Ismael had had problems with both Leon and Selvedra before. Two others she saw in Mendoza's yard were Manuel Ramos and Juan Saldana, both neighbors of her parents. As far as she knew, Ramos was not part of a gang. The other person she saw was Gerardo Lucio, whom she had known since she was a little girl and who was best friends with one of her uncles, on good terms with her parents, and Mendoza's neighbor. She had never seen him take sides with the Norteños or the Sureños.

Belen testified that Mendoza, Chavez, Leon, and Selvendra started to run toward Ismael's car. Mendoza, who was in front of everyone else, pointed something he pulled out from the side of his waist. No one else pointed anything. After Hernandez said to "duck," Belen ducked and heard two shots. Belen's niece started to cry after a shot hit the door next to her. Belen brought her head above the dashboard, accelerated, ran a stop sign, and drove to her parents' home, where she called 911. She found two bullet holes in the car, one under the gas tank and one next to where her niece was sitting. She was absolutely sure Mendoza fired the shots.¹⁰

Apart from minor discrepancies characteristic of any trial in which multiple eyewitnesses communicate individual perceptions of the same traumatic event, Casillas and Hernandez, both of whom were in the car with Belen, testified congruently. Casillas testified that Mendoza and the others, "all standing in front of the yard," were "looking at us" or "at the car." She saw Mendoza reach with his hand and "pull something out" and "heard about 2 or 3 gunshots." After Hernandez "screamed to duck," Aliene "started crying." Mendoza and the others probably "thought it was Ismael" since she saw no one else pull anything out. Hernandez testified that as the car Belen drove approached the house she saw Mendoza, in a group of seven to 10 people, pull out a gun and point the gun at the people in the car. She yelled "duck" and then heard "about three" gunshots.

Along with the devastating evidence of Mendoza's guilt in Belen's, Casillas's, and Hernandez's testimony, the evidence of the criminal street gang motives of disrespect and

¹⁰ In a footnote of his appellant's opening brief, Mendoza asks that we "take judicial notice of the moon rise" on the night of the shooting. We deny his request. "To obtain judicial notice by a reviewing court under Evidence Code section 459, a party *must* serve and file a separate motion with a proposed order." (Cal. Rules of Court, rule 8.252(a)(1) (italics added); cf. Evid. Code, §§ 452, subd. (h), 459, subd. (a); Cal. Rules of Court, rule 8.366(a); see *Patterson Flying Service v. California Dept. of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 419, fn. 2, citing *Canal Ins. Co. v. Tackett* (2004) 117 Cal.App.4th 239, 243.)

retaliation and of Mendoza's and Ismael's opposing gang affiliations refutes Mendoza's claim of prejudice. Error, if any, in the court's ruling was harmless beyond a reasonable doubt.

2. *Sufficiency of the Evidence: Premeditation and Deliberation*

Mendoza argues that an insufficiency of the evidence of attempted willful, deliberate, and premeditated murder is in the record. The Attorney General argues the contrary. We agree with the Attorney General.

Our role on a challenge to the sufficiency of the evidence is limited. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*)). Our duty is to review the entire record in the light most favorable to the prosecution, to presume in support of the judgment every fact a reasonable trier of fact could reasonably deduce from both circumstantial and direct evidence, and to determine whether the record discloses substantial evidence – credible and reasonable evidence of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251 (*Prince*)).

Our analysis commences with a review of the record by the usual rules on appeal for a challenge to the sufficiency of the evidence. (*Ochoa, supra*, 6 Cal.4th at p. 1206.) Mendoza and Ismael were members of opposing criminal street gangs who had a history of violent confrontations with each other. On the night of the shooting, Mendoza had a single-barrel shotgun stashed in the trunk of a car outside his house. On seeing Ismael's car approach, he said, "Here we go, this fool is starting shit again." He got the shotgun from the trunk of the car and opened fire, striking the car twice. From that evidence, a jury could reasonably infer that he had a motive to kill Ismael, that he assumed Ismael was driving the car he usually drove, and that as soon as he saw the car approach he tried to execute his plan to kill Ismael with premeditation and deliberation. (See, e.g., *People*

v. Brady (2010) 50 Cal.4th 547, 561-563; *People v. Romero* (2008) 44 Cal.4th 386, 400-401; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223-1225.)

In a due process challenge to the sufficiency of the evidence, the “critical inquiry” is “to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 318 (*Jackson*)). In that inquiry, the reviewing court does not “ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt” but only “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Id.* at pp. 318-319, italics in original.) Mendoza’s argument simply asks us to reweigh the facts. That we cannot do. (*People v. Bolin* (1998) 18 Cal.4th 297, 331-333 (*Bolin*)).

3. Sufficiency of the Evidence: Two Counts of Attempted Murder

Mendoza argues that the reversal of two convictions of attempted willful, deliberate, and premeditated murder is necessary since the record shows he fired only two gunshots. The Attorney General argues that the record shows his intentional creation of a kill zone in which the trier of fact could reasonably infer his intent to kill everyone in the immediate vicinity. We agree with the Attorney General.

The crux of Mendoza’s argument is that he “fired at most three shots at a car containing four people” and “did not use force calculated to kill everyone in the car” so the “number of convictions is limited to the number of shots fired.” He relies primarily on *People v. Perez* (2010) 50 Cal.4th 222 (*Perez*), which adjudicated the issue of whether the firing of a single bullet at a distance of 60 feet, from a car going 10 to 15 miles per hour, at a group of eight people constituted a sufficiency of the evidence of “multiple convictions of attempted murder *where no particular individual was being targeted*, and one shot was fired at the group,” striking a single person. (*Id.* at p. 224, italics added.) Our Supreme Court held that “where the shooter indiscriminately fires a single shot at a

group of persons with specific intent to kill *someone, but without targeting any particular individual or individuals*, he is guilty of a single count of attempted murder.” (*Id.* at p. 225, italics in original; italics added.)

On the record before us, *Perez* is inapposite. Belen testified that after seeing Mendoza shoot she heard two shots. Casillas testified that she “heard about two or three gunshots.” Hernandez testified that after she saw Mendoza point a gun at the people in the car she yelled “duck” and heard “like about three” shots. A sheriff’s deputy testified that Hernandez told her shortly after the shooting that she heard four shots fired at the car. Belen testified that she saw two bullet holes in the car. A detective testified to the recovery of fragments of two projectiles. On that record, a jury could reasonably infer that Mendoza fired two, three, or four shots.

The exact number of shots that Mendoza fired is not determinative, however. As our Supreme Court holds, “a person who shoots at a group of people [can be] punished for the actions towards everyone in the group even if that person primarily targeted only one of them.” (*People v. Bland* (2002) 28 Cal.4th 313, 329 (*Bland*)). With a sufficiency of the evidence of the attempted willful, deliberate, and premeditated murder of Ismael in the record (*ante*, part 2), a jury could reasonably infer that Mendoza thought Ismael was driving the car, that his passengers, if any, were fellow Sureños, and that he intended to kill not just Ismael but everyone in the car. Whether that was by hitting each person with a bullet or by causing the car to crash is immaterial.

The fact that “the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what [is] termed the ‘kill zone.’” (*Bland, supra*, 28 Cal.4th at p. 329.) “‘This concurrent intent [i.e., “kill zone”] theory is not a legal doctrine requiring special jury instructions” but “‘is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.’” (*People v. Smith* (2005) 37

Cal.4th 733, 746, quoting *Bland, supra*, at p. 331, fn. 6.) Even if Mendoza might not have seen or known the identities of all of his victims, that “did not somehow negate [his] express malice or intent to kill as to those victims who were present and in harm’s way, but fortuitously were not killed.” (*People v. Vang* (2001) 87 Cal.App.4th 554, 564.)

Our review of the record satisfies us that “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Jackson, supra*, 443 U.S. at pp. 318-319, italics in original.) Again we decline Mendoza’s tacit invitation to reweigh the facts. (*Bolin, supra*, 18 Cal.4th at pp. 331-333.)

DISPOSITION

The judgment is affirmed.

Gomes, J.

WE CONCUR:

Cornell, Acting P.J.

Franson, J.