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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR JOHN DISALVO,

Defendant and Appellant.

G045305

(Super. Ct. No. 09CF0139)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Stephen M. Lathrop, 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, Michael T. Murphy and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Victor John Disalvo guilty of first degree murder and found to be true he personally used a firearm within the meaning of Penal Code section 12022.53, subdivision (d).¹ The court denied Disalvo's motion for new trial and sentenced him to an aggregate term of 50 years to life in state prison. On appeal, Disalvo argues his trial counsel was ineffective for failing to investigate and call character witnesses and the trial court should have granted his motion for new trial on that same basis. We disagree and affirm the judgment.

I

Disalvo met Rosie in Mexico, and they married in 2001. Disalvo lived with Rosie and her eight-year-old son, David, and they eventually all moved to the United States. When Disalvo and Rosie divorced, Rosie began dating other men, including Jorge Diaz. A few years later, Disalvo and Rosie reconciled and in August 2007, they remarried.

After Disalvo and Rosie reconciled, Diaz began calling Disalvo multiple times a day, calling him names and making threats. Diaz texted Disalvo photographs of himself on the toilet and of his penis. Disalvo believed Diaz vandalized his car.

On Christmas Eve 2008, Disalvo looked up several Spanish phrases on his computer from a language translation website including, "I'm scared" and "You're dead." A few hours later, Diaz's neighbor, Mario Aguilar, saw Disalvo moments before Diaz was killed. Aguilar's apartment was adjacent to Diaz's apartment. At approximately 10:30 p.m., he heard someone pushing against the inside of the front door of Diaz's apartment. He then saw Disalvo come up the stairs to the outside of the apartment door, and Disalvo asked Aguilar whether Rosie lived there. Aguilar told him, "No." Aguilar later testified he knew Rosie used to live there.

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

Aguilar said Disavlo left the apartment but returned three minutes later and knocked on Diaz's apartment door. Aguilar saw Rosie open the door and leave the apartment in an agitated state. He then watched Disavlo enter the apartment. Within three seconds, Aguilar heard two gunshots fired approximately one second apart. Aguilar closed his apartment door but saw Disalvo exit Diaz's apartment.

Several hours later, at approximately 2:30 a.m., on December 25, Diaz's brother, Juan Diaz (Juan), found Diaz's body lying on the floor of the apartment. Diaz's cellular telephone was lying next to the body. Juan used it to call Rosie to see if she knew what happened. Juan explained that after Rosie moved out of the apartment in 2007, she continued to visit Diaz, often entering the apartment without knocking, as if she was still living there.

Diaz died from two gunshot wounds from a nine millimeter semiautomatic handgun. One wound was on his torso, on the left front side of his abdomen. The second wound was located near his temple, towards the top of his ear (and the exit wound was near the right side of his cheek). The placement of the head wound indicated the bullet entered the head from the left side and traveled downward to the right cheek. Disalvo had a nine millimeter gun registered to him.

On January 14, 2009, Disalvo's long time friend, Betty Davis,² contacted the police after Disalvo told her that he killed Diaz. Investigators set up a pretext call during which Disalvo again told Davis he murdered a man. Disalvo told Davis he was concerned the telephone was being tapped and asked to meet her in person. She wore a recording device to the meeting. At the meeting, Disalvo claimed he shot Diaz in self defense. He told Davis that Rosie had gone to Mexico "until the time was right."

² Sometime after the murder, Betty Davis changed her last name to Hooper. Because there are numerous references in the record to her prior last name, we have continued to refer to her in this opinion as Betty Davis to avoid confusion.

During the meeting, Disalvo explained to Davis that Diaz had been threatening him and Rosie. He said Diaz had called them over 150 times in the last few months. He claimed Diaz said he had a gun and would kill them if they reported the harassment to the police. Diaz also threatened to kill David. He explained Rosie visited Diaz on Christmas Eve to try to end the threats. Disalvo said he thought Diaz was insane and he was “scared [that] this guy doesn’t care”

Disalvo said he drove with Rosie to the apartment, but he waited in the car. He went upstairs to check on her and saw Rosie was very upset when she walked out of Diaz’s apartment. Disalvo said he pushed open Diaz’s door and Diaz lunged at him. Disalvo reacted by shooting Diaz twice. Disalvo said Diaz had something in his hand, but he was not certain if it was a gun because Diaz did not fire a shot. Disalvo left the apartment and put the gun in a trash bin. Rosie later told Disalvo that Diaz had tried to rape her. Disalvo stated he did not want to come forward because he was afraid to go to prison. He justified his action a reaction to Diaz’s harassment and because he was in fear for his family’s life. He said he took his gun to the apartment because Rosie told him that Diaz had a gun. Disalvo told Davis, “I didn’t do this out of malice”

Disalvo was arrested and charged with first degree murder and personally using a firearm causing death (§ 12022.53, subd (d)) and personally using a firearm (§ 12022.5, subd. (a)). At trial, Disalvo testified on his own behalf, essentially reiterating what he told Davis during their recorded meeting. He added details about Diaz’s harassment and stated he was worried about his safety and the safety of his family. He moved David to live with grandparents in Mexico after Diaz threatened to kill the boy. He claimed to have contacted the Santa Ana and Garden Grove Police Departments about the harassment. Disalvo stated the officers told him to change his phone number.

Disalvo stated that after receiving more threatening calls he retrieved his gun from his safe and drove with Rosie to Diaz’s apartment. Rosie went to talk to Diaz and he stayed in the car. After five to ten minutes he became nervous and went to look

for her. He asked a neighbor where Rosie had gone and he saw her come out of an apartment looking upset and crying. She did not tell him what happened. Disalvo testified he pushed on Diaz's door with the back of his hand. As he walked in, Diaz lunged at him with something in his hand. Disalvo shot Diaz twice and left the apartment. He stopped on the way home to throw away the gun in a gas station trash can. He did so because he was scared and upon reflection thought he may have shot an unarmed man. Disalvo stated he took the gun to the apartment because he was scared of Diaz. He wanted to protect Rosie. He never intended to use the gun or kill Diaz.

Disalvo's friend, Daniel Sexton, was called as a character witness. Sexton testified Disalvo was a good friend and had a reputation for honesty in the community. Sexton stated he has known Disalvo since they were in high school 25 years ago.

On rebuttal, a detective testified he was unable to locate any record from the Santa Ana or Garden Grove Police Departments showing Disalvo had reported receiving threats from Diaz.

After the jury returned a guilty verdict, Disalvo retained new counsel and filed a motion for new trial raising several different issues. Relevant to this appeal, Disalvo asserted the verdict should be reversed because he received ineffective assistance of counsel. He alleged counsel failed to investigate potential witnesses who would have testified as to Disalvo's nonviolent character. He maintained his counsel presented no evidence of his nonviolent character to adequately support his claim of self defense. He attached declarations from five potential defense witnesses who would have testified as to Disalvo's nonviolent character. The prosecution filed an opposition. At the hearing, the court considered testimony from Disalvo's former retained counsel, Errol Cook and Rondee Eagle. The court denied the motion for new trial.

II

On appeal, Disalvo asserts his counsel was ineffective for failing to investigate and present evidence of his nonviolent character, and in addition, the trial

court erred by denying his motion for new trial based upon this ground. The Attorney General argues counsel considered and decided not to call additional witnesses for tactical reasons. Moreover, the Attorney General alleges the evidence was so compelling that Disalvo would not have received a more favorable result had witnesses testified regarding his nonviolent character. We conclude that even if Disalvo's counsel's representation fell below an objective standard of reasonableness, there was not a reasonable probability that but for the deficient performance a more favorable result would have been achieved. (*Strickland v. Washington* (1984) 466 U.S. 668, 594 (*Strickland*)). After carefully reviewing the entire record, the judgment should not be disturbed.

A. Facts Pertaining to New Trial Motion

Disalvo presented declarations from David Goodrich, Patrick O'Rourke, Joshua O'Rourke, and Peter Scherz indicating they were not contacted by counsel and all would have testified Disalvo was honest and possessed a nonviolent character. He also presented Sexton's declaration stating he was called at the last minute and never asked about Disalvo's nonviolent character.

Goodrich declared he has known Disalvo as a friend and co-worker for eight years. He was aware Diaz had been making threats, but he "never once heard [Disalvo] utter a threat" against Diaz. He stated Disalvo was "not a man of violent character." Goodrich said he had a brief conversation with an investigator for the defense after Disalvo's arrest. The investigator asked if he had any knowledge about Disalvo being threatened. Goodrich was not asked about Disalvo's character or the nature of their relationship. He never heard from the investigator again.

Patrick and Joshua O'Rourke (age 21 and 19 respectively) are Davis's sons. They had known Disalvo since their childhood, having lived with Disalvo for a period of time. They still consider him to be their uncle. They testified they were shocked when they learned of his involvement in the murder. They still believed he was a nonviolent

person. Joshua described him as easy going, gentle, and caring. They were never asked to testify on Disalvo's behalf as a character witness.

Scherz had known Disalvo since kindergarten as a friend. He had never seen Disalvo act in a violent manner, even when they were kids playing on the school playground. Disalvo had a reputation for being a nice guy and being nonconfrontational. After Disalvo's arrest, Scherz tried to find out about the case. He was never asked to provide information about Disalvo's "peaceful and honest" character. Scherz once received a message from a private investigator, but before he responded Sexton informed him the investigator was no longer on the case. The first time he heard from a lawyer was during the trial and he was unavailable because he was in Ohio.

Finally, Sexton declared that in all the years they had known each other Disalvo was "passionate in a debate, but never to the point of a physical altercation." He believed that it was against Disalvo's nature to murder someone. Sexton declared he attended many of the hearing dates and was surprised on the day he was asked to testify as a character witness. Disalvo's counsel, Cook, told him the trial was proceeding more quickly than anticipated. Sexton said Cook did not know he would be attending court that day and only briefly explained the nature of his testimony. He was not properly dressed or prepared to be a witness. Sexton recalled he asked Cook if he had contacted Scherz and Mark Davis to be possible character witnesses. He was "flabbergasted" when Cook told him no. At the trial, Sexton was only asked about Disalvo's character for honesty. He was not asked about his character for nonviolence.

There is no dispute the above character evidence would be admissible under Evidence Code section 1102 and was relevant to prove Disalvo killed Diaz in self defense. At the motion for new trial, Eagle and Cook were questioned about their investigation and decision not to call any witnesses to testify about Disalvo's nonviolent character.

Trial counsel, Eagle, acknowledged at the hearing that Disalvo's character for lack of violence was an issue in the case and something to be presented to the jury. Eagle stated she tried to contact Scherz several times but was unable to reach him. She did not subpoena him. Eagle said Rosie was not called as a witness because her testimony would have been very damaging. Rosie would have testified Disalvo was wearing rubber gloves that evening. Rosie's son David was not called because he heard Disalvo threaten to kill Diaz on numerous occasions.

Cook stated that although character was an issue at trial, it was not "the thrust or guts of the defense in the case." Cook recalled Mark Davis was rejected as a character witness because he had not spoken to Disalvo in years. Cook also considered calling Scherz but recalled there was an issue as to whether he would be hurtful to the case on cross-examination. Upon further cross-examination, Cook admitted he had a vague recollection of telephoning Scherz during the trial to testify and learned he was in Ohio for business. Cook then contradicted himself, saying he may not have wanted to telephone Scherz because Scherz had never attended any of Disalvo's court hearings. Cook stated Goodrich was not called as a witness because he was the son of the lead defense investigator on the case and counsel felt his testimony would be disregarded as biased. Cook testified he and Eagle debated whether to call Sexton or "any of these witnesses because some of these witnesses were buddies that [Disalvo] went hunting with, shooting with." Cook stated the defense had subpoenaed Rosie's son as a "star character" witness and a detective named John Rowe. Neither of these witnesses were actually called to testify.

B. Discussion

The Attorney General argues counsel was not ineffective because Eagle and Cook considered calling additional witnesses and declined to do so for tactical reasons. As will be explained below, we find it difficult to attribute the failure to call any character witnesses (in a case hinging on the theory of self defense) to a strategic choice.

“Certain defense strategies may be so ill-chosen that they may render counsel’s overall representation constitutionally defective.” (*United States v. Tucker* (1983) 716 F.2d 576, 586.)

For example, the alleged tactical decision to not call Goodrich because he is a close friend and the son of an investigator is questionable because typically character witnesses are people who know a defendant well and have close ties. After deciding the two “star witnesses” should not testify, Cook and Eagle apparently did not find replacement character witnesses. Neither attorney offered any tactical reason for not contacting other potential character witnesses, such as the O’Rourke brothers. Neither attorney offered a tactical reason for the last minute decision to call Sexton to the stand to testify about Disalvo’s honesty, but not about his nonviolent nature. Scherz was not interviewed before trial or subpoenaed, but Cook considered him a potential witness and appeared surprised Scherz was unavailable to appear at trial. There is no indication either counsel meaningfully investigated Disalvo’s character for nonviolence. Cook did not consider the issue to be important to the defense case. Whereas Eagle conceded the issue was relevant to the case and should be presented to the jury. This was Cook’s first murder trial and Eagle’s second murder trial.

We conclude defense counsel’s performance fell below the professional norms. As stated by the *Strickland* court, counsel has a duty “to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” (*Strickland, supra*, 466 U.S. at p. 691.) A criminal defendant has the right to expect not just that his counsel “will undertake those actions that a reasonably competent attorney would undertake, but as well ‘that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics *founded on*

adequate investigation and preparation.’ [Citations.]” (*People v. Jones* (2010) 186 Cal.App.4th 216, 238.) The record indicates defense counsel did not conduct an adequate investigation or present available relevant evidence on the issue of Disalvo’s nonviolent nature.

However, to prevail on an ineffective assistance of counsel claim, Disalvo must also establish the second prong of the *Strickland* test. We conclude Disalvo failed to establish there was a reasonable probability that, but for counsel’s deficient performance, a more favorable result would have been achieved. (*Strickland, supra*, 466 U.S. at p. 691.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 153, 215.)

Here, there was substantial evidence of guilt and it would not have been effectively countered by Disalvo’s friends attesting to his nonviolent character. The prosecution presented ample evidence Disalvo planned the murder. Hours before the murder, he looked up how to say, “I’m scared” and “You’re dead” in Spanish. He left the house with a loaded gun to confront a man he allegedly feared. He waited until Rosie had gone downstairs before entering Diaz’s apartment so she would not be a witness to what occurred between the two men. He opened the door with the back of his hand to avoid leaving fingerprints. He did not knock on the door or announce his presence before entering. The neighbor testified the two shots were fired within seconds of Disalvo entering the apartment. Disalvo created a situation where he had the element of surprise, and he was prepared for combat armed with a loaded gun. He ambushed the victim.

We agree with the Attorney General’s assertion the locations of the gunshot wounds were significant. Disalvo did not fire just one defensive shot, but two well planned fatal shots hitting Diaz’s head and torso. The trajectory of the bullet to the head suggests Disalvo shot from above Diaz’s head and downward. If Diaz had lunged at Disalvo, a wound to the temple area of the head would be difficult. Disalvo’s actions after the murder were also telling. He did not report the incident to the police. Rather, he

fled and disposed of the gun in a trash bin at a gas station, which is strong evidence of consciousness of guilt. Shortly after the shooting, he met with Davis to establish his conduct was in self defense and an attempt to ease his conscience.

Moreover, the prosecution also presented evidence Disalvo had a strong motive to kill Diaz. Rosie had a past romantic relationship with Diaz, and Disalvo believed she and her son were in danger. Diaz taunted, threatened, and harassed Disalvo for months. Disalvo believed Diaz vandalized his car.

In conclusion, evidence of Disalvo's nonviolent character would not have diffused the strong evidence of this deliberate murder of an unarmed foe. We conclude the trial court correctly denied the motion for new trial based on ineffective assistance of counsel. Disalvo's claim fails the second prong of *Strickland*.

III

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.