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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.

MIGUEL LOPEZ GUILLEN,

Defendant and Appellant.

G045989

(Super. Ct. No. 09CF0684)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Robison D. Harley, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Lise Jacobson, Vincent P. LaPietra and Meredith White, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Miguel Lopez Guillen of one count of first degree premeditated murder, and a second count of premeditated attempted murder. (Pen. Code §§ 187, subd. (a), 664; all statutory citations are to the Penal Code unless otherwise indicated.) Guillen contends trial counsel performed ineffectively by neglecting to develop potentially exculpatory alibi evidence. He also argues the record contains insufficient evidence of premeditation and deliberation to support the verdicts. For the reasons expressed below, we affirm.

I

FACTUAL AND PROCEDURAL HISTORY

In March 2009, Guillen worked at Superior Warehouse supermarket in Santa Ana. On Saturday evening, March 14, Grant Ballester, Eduardo Amezola, Bryan Bate, David Sotelo, and Sean Crawford went to Superior Warehouse to purchase beer. Inside, the men began arguing with Guillen, apparently concerning mutual friends. The squabble spilled into the parking lot. Sotelo complained ““that guy [Guillen] keeps staring . . . at me.”” Guillen pursued the men out of the store, followed by another employee. Sotelo and Guillen cursed at each other and argued. Jose Torres, a security guard, interceded before the confrontation turned violent. According to Ballester, Amezola told Guillen ““all right, whatever. [] I’ll see you later.”” Guillen replied he got off work at 10:00 p.m. and he would ““see you guys on the street when I am done at 10:00.”” It was about 9:45 p.m.

The group returned to Amezola’s front yard, about a half mile, and less than five minutes, from the store. They drank beer, and discussed the incident and their plans to go out that evening. Around 10:50 p.m., a green Honda with nonfactory “ghetto” chrome wheels drove past the group and turned out of sight. The car returned

about a minute later and stopped down the street from Amezola's. Guillen and another man exited the vehicle. They walked side by side towards Amezola's group, as the Honda drove slowly alongside. Amezola confronted the men stating "'you're not going to disrespect my house' like that." The second man pulled out a handgun, said "'hey homie,'" and shot Amezola in the forehead and cheek. He died at a hospital about a week later. The shooter fired several more shots that Ballester heard go "over our heads." Ballester dove for cover, but a bullet hit him in the buttocks. The Honda sped away.

Ballester and Bate identified Guillen at trial as the nonshooter walking next to the gunman. They identified a photograph of Guillen's green Honda as looking like the car they saw that night, although Ballester told the police he remembered a Honda emblem on the back, which was missing in the photo of Guillen's car introduced at trial. Ballester, who had smoked marijuana and taken a prescription Vicodin tablet around 6:00 p.m. on the night of the shooting, selected a different person from a six-pack photographic lineup the morning after the shooting. Bate selected Guillen from a six-pack photographic lineup, and recognized Guillen as the person he periodically saw waiting at a high school bus stop.

A store manager testified Guillen was scheduled to work from 3:15 p.m. to 10:00 p.m., and records show he clocked out at 10:23 p.m. Coworkers, an aunt, and a friend described Guillen as a nonviolent, peaceful person who did not get into arguments. According to witnesses, he remained calm during and after the argument with Amezola's group.

An experimental psychologist, Dr. Robert Shomer, described various factors involved in perception, memory, and eyewitness identification. According to

Shomer, even “without stress,” accurate eyewitness identification is “very low” and “about like flipping a coin.” Shomer explained stress “significantly interferes with accuracy.” He also observed that “similar resemblance among people is the largest single factor in the low level of accuracy,” and people often “make assumptions” about “who we think it might be.” A weapon is a “visual magnet” that further diminishes accuracy in identifying a face. Shomer testified racial differences between an eyewitness and perpetrator may reduce the accuracy of an identification, drugs and alcohol may negatively affect the way the brain processes and stores information, and memory degrades as time passes. A photographic lineup can “taints the in-court I.D.” because the person sitting at the “defendant’s table . . . is one of those faces you have seen in that set of photographs.”

Following a trial in September 2010, a jury convicted Guillen as noted above. In October 2011, the trial court denied Guillen’s motion for a new trial and imposed a term of 25 years to life for premeditated murder, and a consecutive life term for attempted premeditated murder.

II

DISCUSSION

A. *The Trial Court Did Not Err By Denying Guillen’s Motion for New Trial Based on the Ineffectiveness of Trial Counsel*

Guillen moved for a new trial on the ground of ineffective assistance of counsel (see *People v. Fosselman* (1983) 33 Cal.3d 572, 582).¹ “To prevail on a claim of ineffective assistance of counsel, defendant ‘must establish not only deficient

¹ Guillen also argued there was newly discovered evidence (§ 1181), and he filed a separate motion for new trial based on juror misconduct. Guillen does not contend the trial court erred in denying these motions.

performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. [Citation.]” (*People v. Hart* (1999) 20 Cal.4th 546, 623.) Prejudice occurs only if the record demonstrates “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Lucero* (2000) 23 Cal.4th 692, 728.) With these principles in mind, we consider Guillen’s claim trial counsel inadequately presented alibi evidence because he failed to locate a key witness, and failed to request a continuance so he could find the witness and subpoena him for trial.

Guillen filed several declarations in support of his new trial motion.² Jose Victoria’s declaration stated that in March 2009 he and Guillen were friends, and “[o]n the date of the incident,” which he “believe[d] to be March 14, 2009,” Guillen arrived at his house in the Honda. Guillen was wearing his work uniform, black pants and a gray shirt. After “kick[ing] back” for a few minutes, they drove to “Cameron’s” house, about 20 minutes away, apparently in Costa Mesa, to pick up a small amount of marijuana. They spent a few minutes with Cameron, then returned to Victoria’s residence. Victoria decided to go to a party, but Guillen said he was tired and did not want to go. Guillen left shortly before midnight. Victoria remembered the trip because this was the last time he saw Guillen. Victoria admitted he “initially lied to the [defense] investigator [Ed Solis] because I was scared about being prosecuted for purchasing marijuana . . . on the date of

² The trial court stated it was not necessary for counsel to “call the witnesses to talk about the same things . . . in their declarations,” which the court was “taking at their face value.”

the incident.” Victoria stated he had continuously lived in Santa Ana and “have always been available for service of a subpoena.”

Ed Solis, a private investigator retained by Guillen’s trial counsel, stated he met Victoria at Victoria’s home on two occasions, in April 2009 and September 2009. In October 2009, he arranged a meeting with counsel, but Victoria failed to show up. Solis attempted to contact Victoria on several occasions, but Victoria did not answer the phone or was not at home. In December 2009, Solis spoke to Victoria, who agreed to meet with Guillen’s trial attorney. But when Solis went to Victoria’s home on December 7, 2009, Victoria was not home. Victoria’s mother, Maria, stated he had just left and did not know when he would return. Victoria did not return subsequent calls.

In February 2010, Solis and Guillen’s lawyer drove to Victoria’s home, but learned the Victoria family had moved and the home phone number was no longer in service. In March, Solis conducted various searches to locate Victoria and left messages with people who knew the Victorias. Maria contacted Solis in mid-March, stated Jose was out, and provided a phone number, which proved to be incorrect. In April, Solis spoke with Maria after obtaining her new phone number. She claimed Jose no longer lived with her and might be in Las Vegas. She did not wish her son to be involved with Guillen, explaining that while Victoria “told the truth, . . . she does not want him to get into any trouble.”

In August 2010, counsel directed Solis to serve Victoria with a subpoena for trial. In September, Solis matched an address to Maria’s phone number, but the residents at that location stated the Victorias had moved about three months earlier and did not have any information about where they had moved or how to locate them. In September, Solis spoke with Ernie Mota, a mutual friend of Guillen and Victoria. Mota

had not seen Victoria for several months, but heard he was “doing drugs and currently living on the streets,” sometimes staying near a certain park. Solis visited the park, but did not locate Victoria.

C.J. Ford, a private investigator hired by Guillen’s newly retained lawyer after trial, declared he had no difficulty in locating Victoria. Ford interviewed Victoria, who claimed he met with Guillen “shortly after 10:30 p.m. on the night of the murder,” although Victoria was “not sure of the exact time.” Guillen wore work clothes, and they went to Costa Mesa to purchase marijuana. After purchasing marijuana, they returned home so Victoria could attend a party at his uncle’s house. Ford investigated the distances and times required to travel between Superior Warehouse supermarket, Victoria’s home, the murder scene, and Costa Mesa.

Guillen filed a declaration stating his memory of “locations after [he] got off work at 10:23 p.m. on March 14,” was consistent with Victoria’s declaration. After he was arrested he informed trial counsel about Victoria and his importance to the case. Before trial, he learned his investigator had been unable to locate Victoria for trial. During trial, his lawyer asked if he wanted to testify, but Guillen was “under the impression that the trial was going okay without” Victoria’s testimony and he “decided that there was no need to testify.” He was also nervous that “there was nobody to back up [his] alibi.”

The defense produced cellular phone records and argued they corroborated Victoria’s and Guillen’s account and showed “it would be impossible for [Guillen] to be at the shooting scene . . . at 11:00 [or 11:05 p.m.] when the” crimes occurred.

The record does not support Guillen’s claim his trial attorney provided constitutionally inadequate representation. Solis, counsel’s retained investigator, located

Victoria and secured his agreement to meet with Guillen's attorney. Counsel intended to personally interview Victoria, and when Victoria did not show up for the scheduled meeting, counsel directed Solis to continue his efforts to arrange a meeting. Indeed, in February Guillen's attorney and Solis drove to Victoria's residence, but discovered the Victoria family had vacated the premises a few days earlier. At counsel's direction, Solis continued his efforts to subpoena Victoria.

Counsel's efforts belie Guillen's claim his trial attorney failed to act diligently in locating Victoria and investigating whether he could have supported Guillen's misidentification defense by providing an alibi. The evidence supports the trial court's conclusion that Victoria, who initially feigned cooperation, had in fact no interest in testifying for Guillen and avoided Solis and his efforts to locate him. An attorney under these circumstances does not render inadequate assistance by failing to interview a potential witness who misled the lawyer's investigator, dodged meetings and phone calls with counsel, and went into hiding to avoid any involvement with the pending trial.

We also do not agree with Guillen's claim he received constitutionally inadequate assistance when his lawyer did not request a trial continuance to locate Victoria. Counsel's decision to proceed with the trial supports the trial court's inference that Guillen's attorney decided not to call Victoria because he believed Victoria would not be a credible witness. Counsel knew that Mota, a mutual friend of Guillen and Victoria, had informed Solis that Victoria was "doing drugs and currently living on the streets." Otherwise, the record is silent on counsel's reason for not requesting a continuance to secure Victoria's attendance. In this evidentiary void we must reject Guillen's claim. As the California Supreme Court observes, "We have repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to

act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” the claim on appeal must be rejected.’ [Citation.]” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Here, the record is devoid of any explanation from Guillen’s trial attorney. Guillen neither submitted a declaration from his former attorney nor called him to testify at the hearing on Guillen’s new trial motion. It is quite possible additional facts would show counsel acted competently. For instance, Victoria may have provided Solis with an account that would have undermined Guillen’s alibi, or counsel may have uncovered information that either placed Victoria at the scene of the crime or showed his lack of veracity. All of the cases Guillen cites to support his argument found inadequate representation based on evidence presented in a habeas corpus proceeding, which allows the court to consider evidence outside the trial record. If evidence exists showing Guillen’s trial attorney acted incompetently, Guillen’s remedy is to file a petition for writ of habeas corpus. (*Mendoza Tello, supra*, 15 Cal.4th at p. 267.)

B. *The Evidence Supports the Premeditated Murder and Attempted Murder Convictions*

Guillen also challenges the sufficiency of the evidence to support the jury’s conclusion the murder and attempted murder were committed with premeditation and deliberation. On appeal, the reviewing court must view the evidence in the light most favorable to the judgment. (*People v. Elliot* (2005) 37 Cal.4th 453, 466 (*Elliot*).) It is the trier of fact’s exclusive province to assess witness credibility and to weigh and resolve conflicts in the evidence. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330 (*Sanchez*).) We therefore presume in support of the judgment the existence of every fact reasonably inferred from the evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.)

The test is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. (*Ibid.*; *People v. Johnson* (1980) 26 Cal.3d 557, 576 (*Johnson*)). In other words, reversal is not warranted even though the circumstances could be reconciled with a contrary finding. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) Thus, a defendant attacking the sufficiency of the evidence “bears an enormous burden.” (*Sanchez*, at p. 330.)

“Deliberation” refers to the actor carefully weighing considerations in forming a course of action; “premeditation” means the actor thought over those considerations in advance. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) “The process of premeditation and deliberation does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .” [Citations.]’ [Citation.]” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) The type of evidence that will “sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing — what may be characterized as ‘planning’ activity; (2) facts about the defendant’s *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a ‘motive’ to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of ‘a pre-existing reflection’ and ‘careful thought and weighing of considerations’ rather than ‘mere unconsidered or rash impulse hastily executed’ [citation]; [and] (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant

must have intentionally killed according to a ‘preconceived design’ to take his victim’s life in a particular way for a ‘reason’ which the jury can reasonably infer from facts of type (1) or (2).” (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27; see *People v. Perez* (1992) 2 Cal.4th 1117 [*Anderson’s* framework aids appellate courts in assessing whether the evidence supports an inference the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse].)

The evidence supports the jury’s conclusion the murder and attempted murder were committed with premeditation and deliberation. Following a heated argument at the supermarket, which Guillen acknowledges establishes a prior relationship and constitutes a motive (although he characterizes it as a “verbal spat”), Guillen assembled a group, including a person with a loaded firearm, and drove to Amezola’s home. The assailants cased the scene as they drove past the house, then came around the block and parked. Guillen and the shooter walked up on the victim’s group as Guillen’s Honda crept alongside. After a brief verbal exchange, the shooter calmly removed a loaded firearm and fired approximately six shots at the heads of his intended victims. As the prosecutor persuasively argued, “This was a classic example of a preplanned operation to exact revenge for the disrespect . . . Guillen felt occurred to him” at the market 30 or 40 minutes earlier. The record contains ample evidence the crimes were committed after reflection, with careful thought and weighing of considerations, and not on a rash impulse.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.