Number S123074

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff/Respondent,	)
v.	)
JARMAAL LARONDE SMITH,	)
Defendant/Appellant.	)

Appeal from the Superior Court of Sacramento County,
Case Number 00F01948

Hon. Michael S. Ullman, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

GREGORY MARSHALL (77306)
P.O. Box 996
Palo Cedro, CA 96073
(530) 549-4836

Attorney for Appellant*

TABLE OF CONTENTS

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TABLE OF AUTHORITIES

CASES

///

///

Number S123074

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APPELLANT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

Appellant replies to respondent's Answer Brief on the Merits ("A.B.M.") as follows:

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DISCUSSION

1. Introduction

The facts of this case feature a man firing one gunshot at the car driven by his ex-girlfriend, whose baby was also in the car. The issue is whether, without more, these facts support conviction of two counts of attempted murder.

In his brief on the merits appellant contended that this court's decision in People v. Bland (2002) 28 Cal.4th 313 dictates a negative answer to this question. By contrast, the Court of Appeal had answered the question in the affirmative, relying on People v. Chinchilla (1997) 52 Cal.App.4th 683.

In his Answer Brief respondent is unable to state a persuasive case for affirming the Court of Appeal decision. Respondent's presentation is flawed with respect to each one of three subjects — the specific facts of and evidence in this case; the general issue of intent to kill; and the Bland and Chinchilla opinions, themselves.

2. Respondent's treatment of the facts does not withstand scrutiny

The facts and the evidence here form a square peg which respondent must try to fit into a round hole of legal doctrine. The strain of this effort shows in respondent's presentation.

In respondent's statement of the facts, it is noted correctly that Karen S. was at the wheel of her car, with her baby strapped into a rear-facing infant seat in the back seat area of the car; that when the altercation began to escalate, Karen started driving away; and that as she drove away, appellant fired one shot through the rear window of the departing car. (A.B.M. 2.)

However, in arguing the case respondent is less faithful to the record. Respondent claims that appellant "positioned himself behind the car, aimed, and fired his gun at the baby and Karen" (A.B.M. 7). Further on, respondent repeats that appellant "position[ed] himself behind the vehicle in such a way that both the baby and Karen would be in his direct line of fire" (A.B.M. 11). There is no evidence whatsoever that appellant "positioned himself" so as to shoot at both Karen and the baby, and no evidence that appellant fired "at" both of them, in the willful sense of the word "at." The clear implication of the evidence is that appellant did not change his position as Karen drove away.

Respondent claims that Karen and the baby were "seated together" (A.B.M. 10). They were not; Karen was at the wheel, and the baby was in the back seat area.

Respondent speculates that perhaps more than one shot was fired (A.B.M. 11, fn. 5). But the evidence did not prove more than one shot was fired, and certainly only one shot hit the car

— which, as respondent notes, was only a few feet away from the shooter. This case must be analyzed as a single-shot case.

Respondent baldy states that a shooter "could not have killed Karen without shooting a bullet through the baby first" (A.B.M. 9.) This is simply a false statement.[1]

Respondent gratuitously offers that the bullet "somehow miraculously missed the baby" (A.B.M. 10). It is no miracle when a bullet that was not intended to hit a given person, and was not fired directly at that person, fails to hit that person. The fact that the bullet did not hit the baby favors appellant's position here, not respondent's.

Respondent seeks to rely on other facts which are true, but which do not support respondent's position. It is noted that appellant fired from a point very near the car, and thus a "high potential for accuracy" existed (A.B.M. 9). This potential for accuracy has little probative effect on the question of what the target was. And the fact that the baby was *not* hit, under such conditions of accuracy, tends to prove the baby was *not* a target.

Respondent notes that the baby, strapped in his seat, was "immobile and incapable of escaping the bullet or the shattering shards of glass" (A.B.M. 9). This is not significant, even in

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[1] Respondent cites to pages 93 and 94 of the reporter's transcript in support of this assertion. There is nothing in this two-page sequence to support the assertion that appellant could not have killed Karen without also killing the baby. The only testimony about the baby was: "I continued driving because my son was in the back seat and it wouldn't matter if I were to duck because he could have still got hit."

respondent's own terms, since no one seated in a car who is unaware that a shooter on the outside is about to fire could possibly have an opportunity to "escape the bullet." But furthermore, the issue of the baby's mobility has no bearing whatsoever on the issue of whether the baby was an intended *target*.

The same analysis applies to the fact, emphasized by respondent, that the bullet was a .38, a bullet "so large that if it hit any part of the fragile baby's body, death would be likely" (A.B.M. 9). Absent evidence that the shooter demonstrated some intention to use a large caliber gun and bullet for the express purpose of hitting more than one person with a single bullet, the caliber of the bullet is not a significant fact in the analysis of the issue before the court.

Respondent contends that "there is reason to believe that, had Karen not successfully fled in her car, appellant would have continued firing upon her and the baby" (A.B.M. 12). This is utter speculation, of course, and cannot support any conclusion about what the actual evidence proved. Moreover, even this speculation tends to support appellant's position in this court. Had there been evidence that appellant actually fired more shots, that evidence may have tended to support a conclusion that appellant intended for more than one death to occur. But, to repeat the single most important fact in this case, appellant fired only one shot. Even if it were assumed he fired at Karen S., intending to go on and fire at the baby, this would more or

less conclusively dictate reversal of the judgment, because the "attempt to kill" the baby never happened.

3. Respondent's discussion of the issue of intent to kill is flawed

Respondent's discussion of the issue of intent to kill must be scrutinized with some care. Repeatedly respondent refers to fundamental rules that apply to single-target cases: intent to kill may be inferred from circumstantial evidence, close-range shooting tends to prove intent to kill, a finding of intent to kill can be founded on a single shot, and so on. (E.g., A.B.M. 6, 10, and cases cited.) But insofar as this case is concerned, these rules pertain to appellant's effort to shoot *Karen S.*, not the baby. Appellant has not contested the attempted murder conviction with regard to Karen, and that conviction is not before this court on review. The rules respondent cites do not aid in the analysis of the actual issue before this court in the slightest.

Respondent does make two other points on the issue of intent which deserve replies.

First, respondent suggests appellant must have been aware that by firing a shot through the rear window of the car, he "could" have caused the baby to die "due to injuries from the glass shards" (A.B.M. 12). Appellant submits that this contention is outlandish, in terms of the issue before the court.

The issue is whether appellant *intended to kill* the baby; respondent would have the court decide that there was substantial evidence to prove appellant intended both to kill Karen with the bullet and at the same time to kill the baby with flying glass. It is true that appellant must not have cared what happened to the baby, but that does not constitute intent to kill.

Similarly, respondent alludes to the possibility that the baby might have died in a car wreck resulting from Karen's having been disabled or killed by the gunshot (A.B.M. 12). But this would require a conclusion that appellant *intended* for this highly unlikely consequence to occur. Conviction of an attempt crime cannot be predicated on the mere possibility of a highly unlikely outcome.[2]

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[2] Thus, for example, in the famous Palsgraf fact situation (Palsgraf v. Long Island R.R. Co. (1928) 248 N.Y. 339 [162 N.E. 99, 59 A.L.R. 1253]), where a negligent act causes an injury in a remote location that could not reasonably have been predicted, the long running doctrinal debate is about whether the actor is liable at all, not about whether the actor can be deemed to have *intentionally* caused the injury.

4. Respondent's argument on the two main cases affecting the decision in this case should be rejected

Respondent seemingly agrees that People v. Bland, *supra*, and People v. Chinchilla, *supra*, are the key cases to be analyzed in deciding the issue here.

Appellant contends the only result here that would be consistent with this court's Bland case is reversal. Respondent contends appellant's "reading of Bland is too narrow" (A.B.M. 11). However, respondent proceeds to suggest a reading that is not grounded on the Bland opinion at all. (A.B.M., pp. 11-13, passim.)

Appellant's position is solidly grounded on the Bland opinion. In Bland this court allowed the possibility of an attempted murder conviction with regard to "nontargeted" persons, in the situation where the assailant has created a "kill zone." The court fleshed out this concept by referring to attempts to kill a targeted person by means of *intentionally harming* — not just endangering — everyone in the vicinity. The court offered several examples of what it meant by this: placing a bomb on an aircraft, shooting into a crowd with an automatic weapon, use of an explosive device. In this general fact pattern, the court summarized, the defendant creates a "kill zone" when he " 'escalate[s] his mode of attack from a *single bullet* . . . to a *hail of bullets* or an *explosive device* . . ..' " (28 Cal.4th 313, 329-330, quoting p. 330, emph. added.)

As appellant has noted, it is unmistakable that the instant case does not feature a "kill zone" pattern under Bland. Appellant specifically *did not* "escalate his mode of attack from a single bullet."[3]

Respondent notes that this court in Bland cited with approval the case of People v. Vang (2001) 87 Cal.App.4th 554, on the point that it is not even necessary to a "kill zone" finding that the shooter know who all is present or how many people are present. (A.B.M. 14-15.) This is true. But Vang featured a textbook "kill zone" fact pattern: "Twenty-one shell casings from an AK series assault rifle and five shotgun shells were found at the scene. At least 50 bullet holes dotted the front of the [building]. 'In fact, there was so much gunfire damage, it was hard to follow each and every hole.' The damage spanned a distance of 25 feet, ranging from three inches to six and one-half feet above ground. There was also extensive gunfire damage throughout [the] interior." (87 Cal.App.4th at p. 558.)

Indeed, the Vang court — presaging this court's Bland decision — noted that the appellants' claim of insufficiency of

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[3] Respondent states specifically: "When a defendant fires at two people who are in such close proximity to each other such that the defendant endangers the lives of both, . . . [i]n such a situation, the perpetrator directs his or her gunfire at all persons in a so-called 'kill zone' that includes but is not limited to the primary target," citing Bland at pages 329-331 of 28 Cal.4th. (A.B.M. 9.)

Appellant respectfully submits that this is flatly incorrect. Nothing in this two-page passage of Bland remotely supports the assertion that a single shot fired in the vicinity of more than one person creates what the court in Bland referred to as a "kill zone."

the evidence to prove attempted murder as to anonymous victims inside the shot-up building might have been valid, "if only a single shot had been fired" (87 Cal.App. 4th at p. 564).

Finally, respondent asks the court to approve the Chinchilla opinion.

In so doing, respondent takes issue with appellant's contention that there were no California cases on point when Chinchilla was decided, five years before Bland. This does not matter, respondent claims. (A.B.M. 14, fn. 6.) However, appellant's point is that Bland completely undermines the rationale of Chinchilla; the reasoning of Chinchilla flatly contradicts the discussion in Bland. It matters that Chinchilla preceded Bland because Bland changed the landscape in this area of law.

Respondent contends appellant is wrong to place weight on the concession of appellate counsel in Chinchilla that one shot could support a conviction on two counts of attempted murder if there was evidence the shooter saw both victims, because appellant, like Chinchilla, saw both victims. But this is exactly appellant's point: Under Bland, whether the shooter *knows about* the other person or persons in the area is not decisive; what matters is what *method* he uses to attack the targeted person. The concession made by counsel in Chinchilla could not be made by competent counsel in the wake of Bland, because the *method* Chinchilla used — firing a single shot — was not a "kill zone" method.

Respondent takes issue with appellant's claim that the Chinchilla court mis-applied the substantial evidence rule, noting that the court accurately stated what the rule is and "applied it to the facts of the case" (A.B.M. 15). Appellant stands by his assertion in the Brief on the Merits: The Chinchilla court suggested the question is whether the evidence "compels" a not guilty verdict or "establishes" innocence, and suggested the existence of facts not in the record, i.e., that the shooter "abandoned" an intention to fire more shots and was a "poor marksman[]" (52 Cal.App.4th at p. 690). These statements were not faithful to the substantial evidence rule.

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CONCLUSION

This case is the latest in a long line of cases in which this court has been called upon to manage the legal doctrine pertaining to inchoate crimes. Oftentimes, as here, the court's decision of the issue before it has no significant penal consequences in the actual case before the court. The sole challenge is to keep the law proportional, so that in future cases potential penal consequences will be reasonably related to the actual culpability of the actor.

An effort to kill a single adversary by shooting him at point-blank range should be treated differently from an effort to kill him by stealing a nuclear bomb and setting it off inside the office building where he works. In People v. Bland, *supra*, the court suggested a most reasonable and proportionate means of deciding the number of attempted crimes of violence that can be charged, based on what the facts disclose about the means the actor uses. Under the Bland analysis, the single-shot fact pattern presented in this case can result in only a single count of attempted murder.

Appellant respectfully asks the court simply to reaffirm the rule stated in Bland, and direct that the second attempted murder conviction in this case be reversed.

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RULE 29.1(c) CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that the word count of this Reply Brief on the Merits is: 2,948 words.

Respectfully submitted,

DATE: December 3, 2004

GREGORY MARSHALL
Attorney for Appellant

PROOF OF SERVICE BY MAIL

CASE: People v. Smith, no. S123074

DATE: December 3, 2004

I am a citizen of the United States and am employed in the County of Shasta, State of California. I am over 18 years of age and not a party to the within action. My business address is P.O. Box 996, Palo Cedro, California 96073.

On the date stated above I served the following document(s) on the parties indicated, by placing a true copy of each in an envelope, bearing first class postage prepaid, addressed as indicated below, and deposited the same in the U.S. mail at Palo Cedro, California.

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ADDRESSEE(S):

Office of the Atty. General
Department of Justice
P.O. Box 944255
Sacramento, CA 94244-2550

District Attorney
901 G Street
Sacramento, CA 95814-1858

Cent. Calif. Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816

Court of Appeal
Third Appellate District
900 N Street, Room 400
Sacramento, CA 95814

Superior Court Clerk
ATTN: HON. MICHAEL S. ULLMAN
720 Ninth Street
Sacramento, CA 95814-1398

Jarmaal L. Smith

Executed December 3, 2004, at Palo Cedro, California.

I declare under penalty of perjury that the foregoing is true and correct.

GREGORY MARSHALL