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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JARMAAL LARONDE SMITH, Defendant and Appellant.	C042876 (Super. Ct. No. 00F01948)

APPEAL from a judgment of the Superior Court of Sacramento County, Michael S. Ullman, J. Affirmed as modified.

Law Office of Gregory Marshall and Gregory Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves Senior Assistant Attorney General and Janis Shank McLean, Deputy Attorney General for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part II of the DISCUSSION.

In this case, one victim, Karen A., was driving her car. The second victim, her infant son, Renell T., Jr. (the baby), was strapped in a car seat in the back seat right behind Karen, and defendant, Jarmaal Laronde Smith, knew this. Defendant fired a single shot from behind the car. The bullet passed through the rear window, narrowly missed the baby, passed through the headrest on Karen's seat (but missed her) and lodged in the door of the car.

On these facts, we conclude defendant was properly convicted of two counts of attempted murder.

A jury convicted defendant of the attempted murder of Karen A. (Pen. Code, §§ 664, 187--count I)[1], the attempted murder of the baby (§§ 664, 187--count II), shooting at an occupied vehicle (§ 246--count III), child endangerment (§ 273a, subd. (a)--count IV), and assault with a firearm (§ 245, subd. (a)(2)--count V). The jury found true firearm use enhancements pursuant to sections 12022.53, subdivision (c) (counts I-II) and 12022.5, subdivision (a)(1) (counts III-V).

Sentenced to state prison for 27 years, defendant appeals contending (1) the evidence is insufficient to support the conviction for the attempted murder of the baby and (2) the firearm use enhancement (§ 12022.5, subd. (a)) attached to the conviction for shooting at an occupied vehicle (count III) must be stricken. In the published portion of the opinion, we reject

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[1] Undesignated section references are to the Penal Code.

defendant's first claim. In the unpublished portion, we agree with his second contention. We shall modify the judgment accordingly.

FACTS

Karen A. testified that around 4:00 p.m. on February 18, 2000, she drove her boyfriend, Renell T., Sr. (Renell) to his friend's home to drop him off for a visit. Her vehicle, a four-door Chevrolet Lumina, had a backward-facing infant seat located in the back seat directly behind Karen. Their three-month-old baby was strapped into the car seat.

As Renell was walking from the car to his friend's residence, Karen saw defendant and several other males in the area. Karen recognized defendant because they had previously been friends. The last time Karen spoke with defendant was during a telephone call approximately eight to nine months before, and he told her the next time he saw her he would "slap the shit out of [her]."

Defendant approached the passenger side of Karen's car, looked inside and said, "Do I know you, bitch?" Renell heard defendant's comment and told him, "Well, you don't know me." As defendant and Renell confronted each other, defendant lifted his shirt and placed his hand on a handgun in his waistband. Renell said that it was "cool" and stepped backwards toward the car. While Renell was getting into the car, the other males and defendant began hitting him.

Once Renell was in the car, Karen drove off. After driving about a car length, Karen looked in her rearview mirror and saw defendant "[s]traight behind" her holding a gun. A single shot was fired. The shot passed through the rear window, shattering the glass onto the baby, and continued through the driver's headrest and lodged in the driver's door. Karen did not see defendant fire the shot; however, defendant was the only person she saw with a gun.

Karen drove to a school parking lot about a half-mile away. The baby's "face was just full of glass pieces and he was screaming." Karen then drove to a friend's home where she called 911 and reported the incident

Shortly after the shooting, a police officer searched defendant's bedroom and found two .38 caliber shell casings. A crime scene investigator extracted a .38 caliber slug from the door of Karen's car.

Defendant testified that Karen had previously been his girl friend. The day before the shooting, defendant argued with Karen and Renell over the telephone and Renell threatened to "smoke" him. Defendant did not take the threat seriously and suggested they meet on defendant's turf. When Renell showed up, defendant approached the car, saw the baby and Karen inside, and asked Karen what she was doing there. Renell got out of the car and defendant challenged him to a fist fight; Renell responded by pulling a gun from his waistband. Someone, not Renell, fired a shot and defendant hit the ground. Defendant heard additional

shots and Renell tell Karen, "Go, go, go." At some point, defendant heard glass shatter. Defendant got up and started to walk away when he discovered two .38 caliber casings on the ground. He put them in his pocket and left.

DISCUSSION

I

Defendant contends the evidence is insufficient to support his conviction for the attempted murder of the baby, the purported insufficiency being a lack of evidence from which the jury could reasonably infer that he had either a specific or concurrent intent to kill the baby. We reject the contention.

Because defendant claims that *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*), "provide[s] the essential key for analysis of the sufficiency of the evidence issue here," we examine that case in detail.

In *Bland, supra,* 28 Cal.4th 313, one Wilson, accompanied by passengers Morgan and Simon, drove his vehicle to where the defendant and another man were standing, each of whom was a gang member. After a short conversation during which Wilson told the defendant that he was a gang member but that his companions were not, the defendant and the other man fired a series of shots into Wilson's car, killing Wilson and wounding Morgan and Simon. (*Id.* at p. 318.)

A jury convicted the defendant of the first degree murder of Wilson and the premeditated attempted murders of Morgan and Simon. (*Bland, supra,* 28 Cal.4th 313, 318.) The Court of

Appeal reversed the attempted murder convictions, finding that the trial court had erroneously instructed the jury on the doctrine of transferred intent. (*Ibid.*) The California Supreme Court, in turn, reversed the Court of Appeal on the attempted murder convictions, concluding that (1) the doctrine of transferred intent did not apply to the crime of attempted murder (*id.* at pp. 326-330); (2) although the instruction given was labeled "'transferred intent'" it referred only to "a mistaken killing, but not injuries," hence there was "no reasonable likelihood that the jury understood the [instruction] as permitting it to transfer intent to kill to a person merely injured" (such as Morgan or Simon) (*id.* at pp. 332-333); and (3) the evidence "virtually compelled" a finding that even if the defendant primarily wanted to kill Wilson, he also concurrently intended to kill the others in the car (*id.* at p. 333).

The Supreme Court observed that while "transferred intent does not apply to attempted murder [it] still permits a person who shoots at a group of people to be punished for the actions towards everyone in the group even if that person primarily targeted only one of them. As to the nontargeted members of the group, the defendant might be guilty of crimes such as assault with a deadly weapon or firing at an occupied vehicle. [Citation.] *More importantly, the person might still be guilty of attempted murder of everyone in the group, although not on a*

transferred intent theory." (*Bland, supra,* 28 Cal.4th 313, 329, italics added.)

In discussing the italicized portion in the foregoing quote, *Bland, supra,* 28 Cal.4th 313, drew from *Ford v. State* (1993) 330 Md. 682: "The *Ford* court explained that although the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what it termed the 'kill zone.' 'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive

device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone. This situation is distinct from the "depraved heart" [i.e., implied malice] situation because the trier of fact may infer the actual intent to kill which is lacking in a "depraved heart" [implied malice] scenario.'" (*Bland, supra,* 28 Cal.4th 313, 329-330.)

Defendant claims that "[t]he *Bland*[*, supra,* 28 Cal.4th 313,] case makes it perfectly clear that only one count of attempted murder can stand on these facts" because to prove attempted murder the evidence must establish that the defendant had the specific intent to kill the victim or that he created a "'kill zone'" such that it insured harm to everyone in that area. Here, according to defendant, the evidence fails to establish a specific intent to kill the baby because there was "*no evidence whatsoever that* [*defendant*] *had any motive or intent to kill the baby, himself,"* and the "kill zone" exception does not apply because "[t]his is not a bomb-on-the-airplane

case or a rocket-propelled-grenade case or a hail-of-bullets case; this is a single-shot case."

The argument is not persuasive. We do not read the extreme examples set forth in the dicta in *Bland*, *supra,* 28 Cal.4th 313, namely, placing a bomb on a commercial airline, spraying a group with automatic weapon fire, or using an explosive device devastating enough to kill everyone in a group, as establishing minimum circumstances for drawing a reasonable inference of concurrent intent to kill others than those primarily targeted. Indeed, *Bland* suggests the rule is not so limited: "Where the means employed to commit the crime against a primary victim create a *zone of harm* around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone." (*Id.* at p. 330, italics added.)

Illustrative of such a "zone of harm" is *People v. Chinchilla* (1997) 52 Cal.App.4th 683, a case left untouched by *Bland, supra,* 28 Cal.4th 313. There, Officer Clark pulled into a parking lot and was told by the victim that the defendant had shot at him. Seeing that defendant had a gun, Clark ordered him to put it down and called for backup. The defendant disregarded Clark's order and walked away. Officers Meisels and Silofau arrived at that time and ordered the defendant to drop his gun. The defendant ignored the directive and ran around a corner of a building. (*People v. Chinchilla, supra,* 52 Cal.App.4th at p. 687.)

Clark went to one side of the building while Meisels and Silofau went to another side. The defendant fired two shots and Clark radioed that he had been fired upon. Hearing that Clark had been fired upon, Meisels crouched down and Silofau crouched behind and above him just as the defendant backed into their vision. Defendant turned and fired a single shot toward the two. Meisels returned fire, striking the defendant in the head and ending the confrontation, although the defendant survived. (*People v. Chinchilla, supra,* 52 Cal.App.4th 683, 687.)

A jury convicted the defendant of the attempted murders of Meisels and Silofau. On appeal, the defendant contended that the attempted murder of Silofau must be reversed because he fired but a single shot at Meisels. (*People v. Chinchilla, supra,* 52 Cal.App.4th 683, 688.) The Court of Appeal rejected the contention, observing, "Where a defendant fires at two officers, one of whom is crouched in front of the other, the defendant endangers the lives of both officers and a reasonable jury could infer from this that the defendant intended to kill both." (*Id.* at p. 691.) Although not expressly using the phrases "zone of harm" or "kill zone," it is clear that this was the concept the court was using in its analysis.

In the present case, by his own testimony defendant was aware, prior to the shooting, that the baby was seated in a rear-facing infant seat. The photographs depicting the location of the infant seat showed that at the time of the shooting the baby's head was directly behind and only slightly lower than

that of Karen, leaving defendant only inches to spare in shooting at Karen and avoiding the baby. The likelihood of missing the baby was further reduced by the fact that defendant was shooting at a moving vehicle. From these facts the jury could reasonably conclude that in shooting at Karen and the baby, who was in the line of fire, defendant had such a minimal possibility of hitting Karen without hitting the baby that he concurrently intended to kill both Karen and the baby.

Substantial evidence supports defendant's conviction for the attempted murder of the baby.

II

Defendant contends, and the People acknowledge, that the trial court erred when it enhanced his conviction for discharging a weapon at an occupied vehicle (§ 246) with a firearm use pursuant to section 12022.5, subdivision (a)(1). We, too, agree. Aside from circumstances not present in a violation of section 246, section 12022.5, subdivision (a)(1) provides the personal use enhancement shall be imposed "unless use of a firearm is an element of [the] offense." Section 246 is violated where "any person . . . shall maliciously and willfully discharge a firearm at an . . . occupied motor vehicle." Since section 246 cannot be committed without "maliciously and willfully" discharging a firearm at an occupied vehicle, firearm use is an element of the offense. (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1527.) Consequently, the enhancement must be stricken. (*Ibid.*)

DISPOSITION

The enhancement for use of a firearm imposed on count III, a violation of Penal Code section 246, is stricken. The superior court is directed to prepare an amended abstract of judgment reflecting this modification and forward a copy thereof to the Department of Corrections. In all other respects, the judgment is affirmed.

SIMS, J.

We concur:

SCOTLAND, P.J.

NICHOLSON, J.