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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. NAM DINH DUONG, Defendant and Appellant.	G035340 (Super. Ct. No. 03WF0215) O P I N I O N

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

Rodger Paul Curnow, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Pat Zaharopoulos, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Nam Dinh Duong of attempted premeditated murder, second degree robbery, and being an ex-felon in possession of a firearm. It also found true the allegations that defendant had personally discharged and used a firearm

and personally inflicted great bodily injury. In a bifurcated hearing, the trial court found true the allegation that defendant had a prior strike conviction. Defendant contends his convictions should be overturned because: (1) the court improperly refused to appoint an interpreter; (2) the jury should not have been instructed pursuant to CALJIC No. 2.21.2; (3) his counsel was ineffective because he failed to move to suppress the victim's pretrial identification; (4) the court should have granted his motion for a mistrial based on prosecutorial misconduct; (5) he had a right to a jury trial on whether consecutive sentences should be imposed; (6) Penal Code section 12022.53, subdivision (d) (all further statutory references are to this code unless otherwise indicated) is unconstitutional on its face; and (7) the imposition of consecutive sentences for robbery and attempted murder violated section 654. Finding no error, we affirm.

FACTS

Hieu "Steven" Le is a bookie who accepted bets on sporting events. Defendant placed bets with Le using the name "Nam." As of January 2003, defendant owed Le over $11,000.

On the evening of January 20, defendant called Le and said he would pay half of what he owed. They agreed to meet at a car wash and exchanged several telephone calls. Le arrived first in his silver Mercedes and called defendant. Defendant arrived a few minutes later in a black BMW. Le saw defendant's face clearly.

Le got out of his car and walked to the front of defendant's car. Defendant was already standing outside his door with a gun in his hand, about12 feet away. Le thought defendant was "just fooling around," but then heard, "What do you want?" At that point, Le was shot and fell to the ground.

Le pulled his cell phone out to dial 911. But before he could make the call, defendant approached and yanked the phone out of Le's hand, got in the car, and drove off. A passerby helped Le cross the street to a gas station where an attendant call 911.

When the police arrived, Le indicated he spoke Vietnamese and a little English; the officer had someone nearby translate. Through the translator, Le said he had been shot in the face at the car wash across the street and motioned with his hand. The officer saw a Mercedes parked there and a Mercedes car key on the key ring Le was holding. As he walked across the street, the officer saw a blood trail starting near Le's Mercedes leading toward the gas station. The area around the car wash, which was closed, was "very dark." The officer took Le's wallet into evidence and recovered two business cards, one with Le's name on it and the other containing the name "Nam," the place where Nam worked, and Nam's cell phone number.

After paramedics began to treat Le, a certified translator arrived. Because Le's face was completely smeared with blood and could not talk, the translator wrote his questions on a piece of paper and gave it to Le to write his answers while he was being treated. In response to the questions, Le wrote that "Nam" shot him and that a black BMW was involved.

At the hospital the next day, Le described the shooter and the shooter's car to a detective. The detective showed Le the business cards taken from his wallet and asked if one of them belonged to the shooter; Le said, "Yes." The detective showed Le a photographic lineup, but Le was unable to recognize anyone.

That evening, defendant was pumping gas into a black BMW at the gas station across the street from where Le was shot. When a deputy pulled up, defendant "bolted" and ran down the alley, leaving his car. Inside the BMW, police found a cell phone and a wallet containing defendant's business cards and driver's license. One of the numbers in the cell phone belonged to Le.

A week later, a detective contacted defendant at his residence. He found a pair of shoes with a pattern similar to that left in the blood at the crime scene. He also found gambling records that were later shown to match Le's betting records. Defendant was placed under arrest.

The detective asked Le to look at a photographic lineup again to see if he recognized anyone. Le said he did not, but that he might be able to recognize the shooter if he saw him in person. Prior to the night of the shooting, Le had met defendant twice in person and knew that defendant had tattoos on both arms.

In early February, the detective conducted a live lineup at the county jail using six men. Defendant was number one in the lineup. Le looked at all of the men and then returned his gaze to defendant. Le said he recognized number one as the shooter but was not certain because he "had a short haircut." Le looked at defendant "most of the time" and then asked that the men in the lineup roll up their sleeves, explaining, "The face [of number one] already looked familiar to me, but I just want to look at the arm . . . to recognize whether there was a tattoo." Of the six men, only defendant had tattoos on his arms. Le identified defendant as the shooter.

A very small amount of blood found on the brakes of defendant's BMW had the same profile as Le's. No blood was found on the car's carpet or gas pedal cover. Although there was a little DNA on the shoes collected from defendant, it was not enough to be typed.

DISCUSSION

1. Failure to Provide an Interpreter

Defendant contends the trial court erred by failing to provide him with an interpreter, "even on a standby basis" (capitalization omitted), in violation of his right

under the California Constitution, as determined in *People v. Aguilar* (1984) 35 Cal.3d 785 (*Aguilar*). We disagree.

In *Aguilar*, the California Supreme Court considered "the scope of interpreter assistance which article I, section 14 of the California Constitution requires be afforded a non-English speaking criminal defendant." (*Aguilar*, *supra*, 35 Cal.3d at p. 787.) According to *Aguilar*, "when an interpreter is appointed for a non-English speaking accused, the accused has a constitutional right to the assistance of the interpreter throughout the entire proceeding." (*Ibid*.) *Aguilar* concluded that the trial court, having determined the defendant required the services of an interpreter (*id*. at p. 789, fn. 4), denied his constitutional right to an interpreter throughout the proceedings by borrowing his interpreter to translate for a prosecution witness. (*Id*. at pp. 789, fn. 4, 790.)

Here, in contrast, the trial court determined defendant did not require the services of an interpreter. In other words, it determined he was not a "non-English speaking defendant" entitled to an interpreter "during the whole course of the proceedings" under the California Constitution. (*Aguilar*, *supra*, 35 Cal.3d at p. 790; see also *In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1453 ["The prerequisite to an appointment of an interpreter is, therefore, that the person charged with a crime be 'unable to understand English,' not that he demand an interpreter"].)

To establish the necessity of an interpreter, the burden is on the defendant "to show that his understanding of English is not sufficient to allow him to understand the nature of the proceedings and to intelligently participate in his defense." (*In re Raymundo B.*, *supra*, 203 Cal.App.3d at p. 1454.) Additionally, "'[t]he question of the necessity of an interpreter, as distinguished from the question of whether one should be appointed when the necessity is clear, is a matter for judicial determination over which the trial court is permitted to exercise its discretion.' [Citations.]" (*Id*. at pp. 1455-1456.) "When evaluating a determination as to the necessity of appointing an interpreter, the policy of upholding a lower court's decision based upon informed discretion is strong.

The trial judge is in a unique position to evaluate the reactions and responses of the accused and to determine whether he or she does or does not require an interpreter in order to be adequately understood or in order to adequately understand the proceedings. This exercise of discretion should not be reversed unless there is a complete lack of any evidence in the record that the accused does understand English, thereby rendering the decision totally arbitrary." (*Id*. at p. 1456.)

The record here shows defendant never requested an interpreter for all purposes. During pretrial discussions, defense counsel noted the victim would require an interpreter and asked defendant whether he was comfortable with the fact the trial would be conducted in English or whether he needed an interpreter. Defendant responded, "I can understand everything." The case was almost two years old and defendant had not used an interpreter in prior proceedings. The court asked again whether defendant was comfortable going forward without an interpreter. Defendant responded, "I think mostly I understand everything, Your Honor[]" and that yes, he felt comfortable. Defense counsel also advised he had had discussed the matter with his client.

The prosecutor pointed out defendant had used the word "mostly" and asked the court to inform him that if at any point during the trial he did not understand something to inform his attorney, at which time the court could make an assessment. The court declined, stating it was not going to start the trial in English only to have defendant later claim he did not understand.

Defendant asked if he could have a translator stand by in case he needed help. The court refused the request, but offered defendant a translator for the course of the trial if he felt uncomfortable with his knowledge of English. It observed defendant had answered all its questions and that it appeared he understood everything even without an interpreter. Defendant agreed he had understood everything that happened that day. His only concern was the prosecutor might ask him a difficult question that he did not understand. But the judge told him if he did not understand something to let him know

and he would have the prosecutor rephrase the question in manner that was easier to understand. The court then noted the case was almost two years old and that defendant had appeared several times, including at his preliminary hearing, without an interpreter. Although defendant did not testify at the preliminary hearing, the court determined there was no distinction between testifying and deciphering information from the witnesses who testified.

After speaking with defendant, defense counsel informed the court that defendant felt "very comfortable and comprehended everything that's going on around him, and he doesn't feel he would have a problem with that. His fear is more in a communication manner. And I think that he's just afraid that he would not be able to communicate because he's using a language which is . . . his second language . . . . But I think he's comfortable now that we've spoken with [*sic*] proceeding without an interpreter." In response to the court's direct question whether he felt comfortable without an interpreter, defendant replied, "Yes, Your Honor."

On this record, the trial court's finding defendant did not need an interpreter for all purposes was far from arbitrary, and therefore was not an abuse of its discretion. Defendant was not deprived of the right to an interpreter under the California Constitution.

Defendant argues the court was on notice that he "wanted interpreter help." But wanting it and needing it are two different things. The constitutional right to an interpreter arises only when a defendant has shown his or her "understanding of English is not sufficient to allow him to understand the nature of the proceedings and to intelligently participate in his defense." (*In re Raymundo B.*, *supra*, 203 Cal.App.3d at p. 1454.) Defendant has not made this showing.

Alternatively, defendant contends the court should have appointed an interpreter on a standby basis because such procedure is allowed in the federal courts.

But federal authority is not binding in matters involving state law, such as the right to an interpreter under the California Constitution. (See *People v. Burnett* (2003) 110 Cal.App.4th 868, 882.) Moreover, the fact that a federal court may appoint a standby interpreter does not require it to do so; the court still retains its discretion. For the same reason, we reject defendant's analogy to the "custom[]" of providing standby counsel to assist defendants who waive the right to counsel.

People v. Alvarez (1996) 14 Cal.4th 155 is inapposite because there, at the start of trial, defendant specifically asked for and received an interpreter to assist him throughout the proceedings. (*Id*. at p. 208.) No such request was made here.

Defendant asserts he "indeed did experience language difficulties during the trial," citing his *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118) hearing at which his attorney read a handwritten note from defendant. The note accuses the court of denying him a right to defend himself because the court had determined his English was "good enough to be on that stand" when in fact the court knew his English is limited and he did not "know a lot of English words to describe to speak, to explain stuff into more details. I know my English is not good enough to be up there to be question and answer, all the questions from my attorney and prosecutor." He does not identify any particular question or answer in the record where he was confused or did not understand or misspoke. And contrary to showing someone with a limited grasp of English, the note shows defendant had sufficient command of the language to express his thoughts clearly, succinctly, and logically. Proper grammar is not a prerequisite before a court may conclude a defendant's understanding of English is sufficient to proceed without an interpreter.

The trial court did not abuse its discretion in concluding defendant understood English and did not require an interpreter. It follows there was no due process violation.

2. CALJIC No. 2.21.2

Defendant argues the giving of CALJIC No. 2.21.2 (witness willfully false) denied him a fair trial because he was "the only witness to [whom] the jury was likely to apply this instruction . . . ." According to him, "[t]he instruction encourages a jury to reject the entire testimony of the defendant if it finds a material falsehood somewhere in his testimony" and "create[d] a preponderance-of-the-evidence standard to be met by a defendant who by law is supposed to be required only to raise a reasonable doubt[,]" thereby lessening "the prosecution's burden of proof." (Underlining omitted.) The contention lacks merit.

As defendant concedes, the California Supreme Court has rejected similar challenges. "The instruction is phrased in neutral fashion and applies to witnesses called by either side. To the extent the jury could reasonably infer defendant was not testifying truthfully in whole or part, [defendant] was not entitled to a false aura of veracity. [Citations.]" (*People v. Millwee* (1998) 18 Cal.4th 96, 159-160; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1139; *People v. Beardslee* (1991) 53 Cal.3d 68, 95.) "When CALJIC No. 2.21.2 is considered in context with CALJIC Nos. 1.01 (consider instructions as a whole) and 2.90 (burden of proof), 'the jury was adequately told to apply CALJIC No. 2.21.2 "only as part of the process of determining whether the prosecution had met its fundamental burden of proving [defendant's] guilt beyond a reasonable doubt." [Citation.]' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 429.) We are bound by these precedents. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Defendant distinguishes *Beardslee* on the basis that not all of the testimony in that case was exculpatory, whereas here, "literally all of [his] testimony was exculpatory." We find nothing in *Beardslee* or any other Supreme Court decision upholding the use of the instruction only where there is nonexculpatory testimony and decline to so find.

3. Ineffective Assistance of Counsel

Defendant contends his counsel was ineffective by not moving to suppress the victim's identification of him in the live lineup as unduly suggestive because defendant was the only man with tattoos on his arms. We disagree.

The standard of review for claims of ineffective assistance of counsel is well settled: Defendant must show his attorney's representation fell below an objective standard of reasonableness and that he was prejudiced as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216.) Prejudice arises only if there is a reasonable probability of a more favorable result, i.e., a probability sufficient to undermine confidence in the outcome. (*People v. Ledesma, supra,* 43 Cal.3d at pp. 217-218.) "'[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.'" (*People v. Cox* (1992) 53 Cal.3d 618, 656; see also *In re Alvernaz* (1991) 2 Cal.4th 924, 945 ["'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed'"].)

Here, we need not address whether counsel's failure to make the suppression motion resulted in subpar performance because we conclude defendant was not prejudiced. Even if such a motion had been made and granted, the totality of the evidence pointed to defendant as the shooter. Le testified he had met defendant twice before the night of the shooting. On the night of the shooting, Le was meeting with defendant to collect a gambling debt. Defendant chose the meeting place and the two spoke telephonically several times. Defendant's gambling records matched Le's betting records item for item. Immediately after he was shot, while being treated by medics inside the ambulance, Le informed the police that "Nam" had shot him and a black BMW was involved. Defendant's first name is Nam and he drove a black BMW, which he

abandoned the next day at the gas station across the street from where Le was shot after a sheriff's deputy pulled up next to him. Le's DNA was found on defendant's brake pedal. Le had defendant's business card in his wallet and when the police asked whether it belonged to the person who had shot him, he answered yes. This evidence is far from "fleeting and speculative," contrary to defendant's claims. We conclude there was no prejudice in counsel's failure to challenge the lineup as unduly suggestive.

4. Prosecutorial Misconduct

Defendant next asserts the prosecutor committed misconduct by emphasizing the defense failure to call a blood or gunshot residue expert to support its case and the trial court erred in not granting a mistrial. The trial court correctly denied the motion for mistrial. Prosecutorial comment on the defendant's failure to introduce material evidence or call logical witnesses is proper. (*People v. Wilson* (2005) 36 Cal.4th 309, 338; *People v. Wash* (1993) 6 Cal.4th 215, 263.)

Defendant maintains "it was not logical for [him] to call a blood expert, because it was immaterial to his defense." Whether or not it was relevant to his misidentification defense does not alter the fact that blood evidence was an important part of the case linking defendant to the crime scene. The prosecution had an expert testify the victim's blood was on the brake pedal of defendant's BMW. During closing argument, defense counsel conceded the blood in defendant's car belonged to the victim but pointed out no other blood was found in his car and that if defendant was the shooter, more blood would have been found both inside and outside the car. In rebuttal, the prosecutor argued if that were the case, "Where is their blood evidence expert?" The prosecutor's statements merely served to highlight the fact the evidence was undisputed and was fair comment on the evidence.

In making the statements, the prosecutor did not impermissibly shift the burden of proof. He did not suggest that the defense had the duty or burden of producing

evidence, or proving his innocence. Rather, he acknowledged in his argument that the prosecution bore the burden of proof beyond a reasonable doubt and simply commented, as he was entitled to, that the defense did not produce any evidence material to the points being espoused. This was proper. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.)

5. Consecutive Sentences

Defendant's next contention is that the imposition of consecutive sentences violated his right to a jury trial under *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]. This argument was rejected in *People v. Black* (2005) 35 Cal.4th 1238, 1257-1258, and we are bound by this decision. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.) Because no error occurred, defense counsel was not ineffective for failing to object on *Blakely* grounds.

6. Section 12022.53

Defendant contends section 12022.53, subdivision (d) is unconstitutional on its face. He claims the 25-years-to-life sentence enhancement for discharging a firearm and causing great bodily injury is disproportionate to the gravamen of the crime, and is therefore cruel and unusual punishment under both the federal and state Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) According to him, section 12022.53, subdivision (d), imposes cruel and unusual punishment because it "does not recognize significant gradations of culpability depending on the severity of the current offense, and does not take into consideration mitigating factors." The contention lacks merit.

In *People v. Martinez* (1999) 76 Cal.App.4th 489, our colleagues in the Second District rejected the same claim. The court noted the severity of the enhancement does in fact correlate to the severity of the offense. "The statute . . . sets forth three gradations of punishment based on increasingly serious types and consequences of firearm use in the commission of the designated felonies[.]" (*Id.* at p. 495.) The fact that

within each subdivision there may be "significant variations in the degree [of the effect of the firearm use] . . . does not render the statute unconstitutionally excessive. Lines must be drawn somewhere, and the Legislature has reasonably drawn the line" with section 12022.53. (*Ibid*.) Though the statute is mandatory as to the enhancement, it does not deprive the trial court of its discretion to take mitigating factors into consideration when sentencing a defendant on the underlying offense. (*Ibid*.)

Here, the trial court found "it very hard to find any mitigating factors" given defendant's lengthy criminal record since 1992 for various charges, the facts underlying the jury's finding of a premeditated attempted murder, the victim's particular vulnerability, and defendant's pattern of increasingly serious conduct. We agree that section 12022.53, subdivision (d) is not unconstitutional on its face.

7. Section 654

Defendant's last contention is the trial court violated section 654 by imposing sentences for both robbery and attempted murder because "[t]he robbery . . . was incident to a single objective: attempted murder." We disagree.

Section 654, subdivision (a) declares, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The statute applies where either a single act or an indivisible course of conduct violates more than one offense. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1208; *Neal v. State of California* (1960) 55 Cal.2d 11, 18-19.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California*, *supra*, 55 Cal.2d at p. 19.) The

determination of whether a defendant acted pursuant to a single intent and objective is a factual question, and the trial court's finding on this issue will not be reversed on appeal unless the evidence fails to support it. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; *In re William S.* (1989) 208 Cal.App.3d 313, 318.) A finding that the crimes were divisible may be implied in the judgment imposing multiple punishments, and such an implied finding will likewise be upheld if supported by substantial evidence. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.)

Here, by imposing consecutive sentences, the court implicitly found that the offenses involved more than one intent and objective. The record supports this finding. Although defendant's crimes occurred during a single course of conduct, it appears that his robbery of the victim's cell phone was a completely separate objective from his attempted murder. The facts elicited at trial demonstrate that defendant shot Le in the face from 12 feet away. The robbery of the cell phone occurred after the shooting and was not necessary to accomplish the attempted murder. As we decided on a prior occasion, the intent and objective for a crime against property is divisible from that required for a crime against the person. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.) Because defendant acted with multiple criminal objectives, section 654 does not preclude imposition of punishment for both robbery and attempted murder even though the violations may have been part of an indivisible course of conduct. (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196.)

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.