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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. BILLY DAVID SHIRLEY, Defendant and Appellant.	D056969 (Super. Ct. Nos. RIF121134/ RIF142802)

APPEAL from judgments of the Superior Court of Riverside County, Richard J. Hanscom, Judge. (Retired Judge of the San Diego Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Judgments affirmed.

An information charged defendant Billy Shirley with two counts of attempted murder and alleged the attempted murders were willful, deliberate and premeditated. (Pen. Code, § 664/187, subd. (a),[1] counts 1 & 2.) The information further charged Shirley with two counts of attempted carjacking (§ 664/215, subd. (a), counts 3 & 4), one

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1 All statutory references are to the Penal Code.

count of being a felon in possession of a firearm (§ 12021, subd. (a)(1), count 5), and alleged he fired the firearm causing great bodily injury in connection with counts 1 through 4 (§ 12022.53, subd. (d)), and had served a prior prison term (§ 667.5, subd. (b)).

Prior to trial, Shirley was charged in a second case with assault (§ 245, subd. (a)) in connection with a distinct offense, and he pleaded guilty in that matter. Sentencing in the assault case (the second case) was continued until resolution of the attempted murder case (the first case).

In the first case, the jury found Shirley guilty of the charged offenses and found the allegations and the enhancements true. The court sentenced Shirley to 81 years to life in the first case and a concurrent four-year term in the second case.

I

FACTS OF THE FIRST CASE

Prosecution Case

During the afternoon of December 30, 2004, two friends (Jorge Duran and Brian Chuchua) were on the side of the road in a remote area because their car had broken down. While working to fix their car, a white Chevrolet SUV passed them, slowed down, made a U-turn, and passed them again going in the opposite direction. Shortly afterwards, a black male came up to them and asked them if their cell phones were working, but Chuchua responded their phones were not getting a signal.

The man pulled out a black handgun, pressed it against Duran's side, and demanded his car keys. Duran and Chuchua could not find the keys and explained the car was not working. The gunman grew agitated, demanded the keys again and took sets

of keys from Duran and Chuchua. However, those were not the keys to the car. Chuchua saw the white SUV return, and the gunman walked up to Chuchua and shot him in the ribs. He then approached Duran and shot him in the chest. Duran was six feet away from the gunman, and looking into his face, when shot.

Diane Schmidt was driving past the incident at that moment. She saw a white SUV stopped next to another smaller car, and she thought it was merely a vehicle breakdown. However, she saw a man on the ground, heard a scream, and then saw a man shoot another man in what looked like his stomach. The gunman was a black man, 18 to 22 years old, approximately 5'8" in height and 150 pounds in weight. He was wearing diamond earrings, baggy black pants, a black long-sleeved jersey shirt, and a white "do-rag."

Schmidt's children were in her car and apparently saw the shooting, because they began screaming hysterically. She told them not to look anymore, ordered them to get down on the floor of the car, and continued driving away. However, the shooter jumped into the passenger side of the SUV, which then followed her car. It followed so closely that Schmidt could not see the SUV's license plate. She tried calling 911 but there was no cell phone reception. While driving, Schmidt saw the shooter remove his black shirt to reveal a white shirt underneath. She had earlier noticed that either the driver or the shooter wore large diamond earrings. The SUV followed her for some distance before turning at Lake Summit.

Schmidt connected to 911 within minutes and relayed what she had seen. Sergeant Salisbury of the Riverside County Sheriff's Department responded to the

dispatch. He was familiar with the area and knew there was limited egress from Lake Summit, so he drove directly to a position where he could observe both of the most common exits from the area. When Salisbury arrived, he saw Shirley leaving a fast food restaurant. He caught Salisbury's attention because he was wearing large diamond earrings, and his race, age, build and clothing were consistent with the broadcast description of the shooter.

Salisbury approached Shirley, who appeared to want to avoid him. When Salisbury walked up to him, Shirley did not acknowledge his presence until Salisbury asked to speak with him, and Shirley paused for several seconds before responding. He continually looked away from Salisbury. Shirley said he had recently moved to Moreno Valley, but could not give Salisbury the address, and he told Salisbury that a cousin had dropped him off at the fast food restaurant[2] and would be returning soon to pick him up. When the cousin arrived, Salisbury spoke to the cousin, and then arrested Shirley.

Shirley told Salisbury he was going to live with his aunt in Moreno Valley. However, after Salisbury contacted the aunt,[3] Shirley next stated he was going to live with an uncle, but could not direct Salisbury to the uncle's house. Salisbury finally turned Shirley over to other officers to be interviewed.

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[2] Shirley told another interviewer later that day that his mother had dropped him off at the fast food restaurant.

[3] The aunt testified at trial that she had no intention of having Shirley stay with her and had not even spoken to him in over a month.

When he was arrested, Shirley admitted he had not showered for two days before the shooting. The day before the shooting, Shirley had seen his parole officer, and the parole officer testified that, at the time of his visit, Shirley was wearing baggy black pants, a black long-sleeved jersey shirt, a white T-shirt underneath, a white "do-rag," large diamond earrings, and a black cap.

Both Chuchua and Duran had been badly injured. They were finally able to flag down a passing motorist to obtain help, and both were transported to the hospital. By the time an investigator arrived to ask them about the shooting, Chuchua had been heavily sedated with morphine. Chuchua was shown a photographic lineup with Shirley's picture in it but could not "really focus on it," and the investigator described Chuchua as "a little bit out of it." Duran was more lucid, and told the investigator the shooter was dressed in black and wore earrings. When shown the photographic lineup, Duran picked Shirley as the shooter. At trial, Duran explained he was sure of the identification because he was standing within six feet from, and looking right at, the shooter when he was shot. Thirteen days later, after Chuchua was discharged from the hospital and was no longer on medication, he was shown a photographic lineup, and identified Shirley as the shooter.

The Defense

Shirley denied any involvement in the shooting. He had spent the morning with his mother, who had dropped him off at the restaurant. He did not tell Salisbury his cousin had dropped him off at the restaurant, and he did not tell Salisbury he was living with his aunt or his uncle. He had seen his parole officer the prior day but denied wearing the clothing ascribed to him by the parole officer. Shirley admitted his prior

convictions but initially denied he had served any time in prison; however, when confronted with records, he admitted he had served a four-year term for one of those convictions.

II

ANALYSIS

A. Shirley's Due Process Claim

Shirley contends he suffered a due process violation because the prosecution did not separately allege a deliberation and premeditation enhancement under section 664, subdivision (a). Based on this premise, he concludes the trial court improperly submitted the deliberation and premeditation issue to the jury and unlawfully sentenced him to a life term authorized under the premeditation and deliberation provision. This argument is based on a flawed premise.

Section 664 provides that: "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished . . . as follows: [¶] (a) . . . [I]f the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. . . . *The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact.*" (Italics added.)

In *People v. Bright* (1996) 12 Cal.4th 652 (*Bright*) (disapproved on other grounds by *People v. Seel* (2004) 34 Cal.4th 535, 550 fn. 6), the California Supreme Court held that the provision in section 664, subdivision (a), authorizing a life sentence for a deliberate and premeditated attempted murder, constitutes a penalty provision that prescribes the circumstances under which a person convicted of attempted murder will be subject to a greater base term. (*Bright,* at pp. 656-657.) However, *Bright* carefully noted that section 664, subdivision (a), constituted a *penalty* provision that increased the base term for the offense of attempted murder, rather than an *enhancement* for which an additional term of imprisonment would be added to the base term. (*Bright,* at pp. 656-657 & fn. 2.)

Here, the information charged Shirley as follows: "The District Attorney . . . hereby accuses [Shirley] of a violation of Penal Code section 664/187, subdivision (a), a felony, in that on or about December 30, 2004, . . . he did [willfully], unlawfully, and with malice aforethought attempt the willful, *deliberate and premeditated* murder of JORGE DURAN, a human being" (italics added), and employed the identical charging language in connection with the attempted murder of Chuchua. Although Shirley contends the attempted murder charge as framed did not provide him with notice that he was subject to the penalty provision for deliberate and premeditated attempted murder, his argument hinges on the prosecution's failure to allege that he acted with deliberation and premeditation in a *separate* paragraph, arguing that enhancements typically are alleged by a separate paragraph in the charging document after the prosecution details the underlying offense. Shirley, although conceding the information "deploys the terms

'willful' 'deliberate' and 'premeditated' to describe [the attempted murder charges]" argues this was insufficient because "it does so only to describe *the offenses* charged therein. . . . There is but a single offense at issue—attempted murder—and deliberation in such may be alleged as an enhancement."

Shirley's only cited authority is *Bright*, but it undercuts rather than supports his position. The information expressly charged that Shirley attempted "the willful, deliberate and premeditated murder" of the two victims, which is ample notice that the prosecution sought to increase his punishment under section 664 for acting with deliberation and premeditation. As *Bright* points out, "the purpose of the charging document is to provide the defendant with notice of the offense charged. [Citation.] The charges thus must contain *in substance* a statement that the accused has committed some public offense, and may be phrased in the words of the enactment describing the offense *or in any other words sufficient to afford notice* to the accused of the offense charged, so that he or she may have a reasonable opportunity to prepare and present a defense." (*Bright, supra*, 12 Cal.4th at p. 670, italics added.) This is precisely what occurred here. Even assuming Shirley is correct that a deliberation and premeditation allegation is often alleged in a separate paragraph, it does not follow that the failure to do so here resulted in an absence of notice. Instead of a separate paragraph, the prosecution merely combined the deliberate and premeditated penalty provision with the underlying offense of attempted murder. Shirley's claim that counts 1 and 2 described only the underlying offense of attempted murder fails because deliberation and premeditation are not elements of the crime of attempted murder. As *Bright* explains, section 664's penalty

provision for deliberating and premeditating an attempted murder is "separate from the underlying offense and does not set forth elements of the offense." (*Bright,* at p. 661.) Rather, section 664's penalty provision provides for greater punishment when committed under the "specified circumstances" of deliberating and premeditating the underlying offense of attempted murder. (*Bright,* at p. 661.) Consequently, the inclusion of an allegation that Shirley harbored these mental states provided him with notice he was subject to the penalty provision for deliberating and premeditating the attempted murders.

Even if Shirley's argument had merit, *Bright* presents a second obstacle to his due process claim: Shirley forfeited the claim when he did not object at trial. (*Bright, supra,* 12 Cal.4th at pp. 670-671.) Even assuming the express allegations of the information were somehow misleading, Shirley was presented with numerous opportunities to object to an alleged lack of adequate notice: at the preliminary hearing when the judge informed him he would be bound over to stand trial for the charge that he "willfully and unlawfully *and with deliberation, premeditation, and malice aforethought*" attempt to murder Duran and Chuchua; prior to trial by objecting to the prosecution's packet of instructions containing the proposed special finding on deliberation and premeditation; during trial when the instructions (and presumably the verdict forms) containing the proposed special finding on deliberation and premeditation were discussed; during closing argument when the prosecutor argued the jury should find the attempted murders were deliberate and premeditated; and, at the close of the trial, both when the court gave the jury the instructions discussing that if they found Shirley committed the attempted murder they "must then decide . . . the additional allegation that the attempted murder was done . . .

with deliberation and premeditation," and when the court gave the jury the verdict forms containing the proposed special finding on deliberation and premeditation. As *Bright* explained:

> "[T]he purpose of the charging document is to provide the defendant with notice of the offense charged. (§ 952.) The charges thus must contain in substance a statement that the accused has committed some public offense, and may be phrased in the words of the enactment describing the offense or in any other words sufficient to afford notice to the accused of the offense charged, so that he or she may have a reasonable opportunity to prepare and present a defense. [Citations.] [¶] In the present case, count one of the information, designated 'Attempted Murder with Premeditation,' charged defendant in the language of section 664, subdivision (a), so as to serve sufficiently the purpose of the information, i.e., to apprise defendant that he was accused of the offense of attempted murder as well as the penalty allegation that the attempted murder was willful, deliberate, and premeditated. As noted . . . , the trial court instructed the jury . . . on the crime of attempt to commit murder, and separately instructed . . . that, in the event the jury found defendant guilty of attempted murder, it then must determine separately whether the premeditation allegation was true. These instructions clearly defined an attempt to commit murder as a single offense rather than one of degrees, and distinguished the premeditation allegation as separate from, rather than a greater degree of, the offense of attempted murder. The record does not reflect any objection by defendant to these instructions . . . . Under these circumstances, where defendant failed to object at trial to the adequacy of the notice he received, any such objection is deemed waived." (*Id*. at pp. 670-671.)

Shirley's failure to object at numerous stages of the proceeding convinces us he has forfeited any claim on appeal that the charges contained in the information did not provide him adequate notice that he was charged with attempted deliberate and premeditated murder.

B. The Instructional Claim

Shirley argues the standard eyewitness instruction contained in CALCRIM No. 315 was defective because it states that, among the factors the jury could consider for evaluating whether an eyewitness gave accurate testimony, it could consider "[h]ow certain was the witness when he or she made an identification." Shirley asserts this language violated his due process rights because scientific studies show there is no correlation between certainty and accuracy.

However, there is no record Shirley objected to the instruction.[4] Instead, Shirley appears to assert the trial court had a sua sponte obligation to modify this instruction to delete the assertedly offending language. A substantively identical argument was rejected by our Supreme Court in *People v. Ward* (2005) 36 Cal.4th 186, 213 [no sua sponte obligation to modify the "witness certainty" language of predecessor instruction to CALCRIM No. 315), and we are bound by the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Even had Shirley objected, numerous courts have rejected the same claim. In *People v. Johnson* (1992) 3 Cal.4th 1183, our Supreme Court approved CALJIC No. 2.92, the predecessor to CALCRIM No. 315, and specifically rejected a challenge to the portion of the instruction concerning witness certainty. (*Johnson*, at p. 1232 ["The trial court did not err . . . in

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4 Shirley may have believed the "witness certainty" language aided his defense, because defense counsel repeatedly mentioned the "witness certainty" language when he attacked the identifications, noting that Chuchua was not "certain" in his identification of Shirley 13 days after the event because Chuchua picked Shirley's photograph from the lineup by default rather than affirmatively, and Schmidt did not recognize Shirley in a show-up later on the day of the shooting.

instructing the jury on the 'certainty' factor"].) In *Johnson*, the court found no error in the eyewitness certainty instruction despite the fact the defense had presented expert testimony "without contradiction" at trial that "a witness's confidence in an identification does not positively correlate with its accuracy." (*Id*. at p. 1231.) At least two other California courts have rejected the identical claims raised by Shirley. (See *People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1302-1303 [rejecting challenge to eyewitness certainty factor enumerated in CALJIC No. 2.92 based on Supreme Court's approval of CALJIC No. 2.92 in *Wright* and *Johnson*], disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452; accord, *People v. Sullivan* (2007) 151 Cal.App.4th 524, 561-562 [rejecting challenge to eyewitness certainty factor following *Gaglione*].) We adhere to California precedent and conclude there was no error in the instruction.

C. <u>The Denial of Counsel Claim</u>

Shirley argues that he was denied counsel at sentencing in the second case. Shirley claims that attorney Galasso had represented him throughout the course of the second case, and had never been relieved, and Galasso's absence at the time of sentencing denied Shirley his right to counsel.

The record does not support the factual underpinnings for Shirley's argument. Instead, the record reflects that, while Shirley continually changed his mind on whether he wanted to represent himself or wanted counsel, he was representing himself in propria persona in the first case at the time the second case was filed and, by late July 2008, attorney Galasso had been appointed as his counsel in the second case. Shirley was thereafter represented by Galasso in the second case, including representing Shirley at the

time he pleaded guilty in the second case. On the same day Shirley pleaded guilty in the second case, Shirley also moved to have an attorney appointed in the first case and Galasso was then appointed as his attorney in the first case. At that time, the parties also agreed to trail the actual sentencing in the second case behind the sentencing in the first case.

Galasso remained as Shirley's attorney of record *in both cases* for the next few months. However, the record reflects that on April 2, 2009, Shirley requested and was granted leave to substitute a new attorney (Mr. Taylor) in place of Galasso *in both the first and second case*s, and Mr. Taylor thereafter appeared for Shirley *in both matters*, including the jury trial in the first case.

After the jury returned its verdict in the first case, the court set sentencing for June 12, 2009. Sentencing in the matters was continued to June 18, 2009, and on that date, Taylor appeared on Shirley's behalf in both matters. However, Taylor asked for another continuance of the sentencing hearing to permit him the opportunity to move for a new trial, and the court (over the prosecutor's objection) continued sentencing in "both cases" until August 14, 2009.

On August 14, 2009, Shirley sought and obtained leave to relieve Taylor as his attorney and to proceed in propria persona. The court relieved Taylor in both cases, *granted Shirley's request to resume representing himself in propria persona in both cases,* and continued the sentencing hearing in both cases until October 16, 2009. However, on October 16, 2009, when Shirley appeared and claimed he was not ready to proceed with sentencing, the court stated it intended to go forward and that Shirley was

representing himself on both matters. After pronouncing the sentence on the first case, the court then proceeded to consider Shirley's sentence in the second case. Shirley then complained that Mr. Galasso had been his attorney at the time he pleaded guilty but was not present, but the court reminded Shirley that Taylor had represented him in the second case and that he had elected to relieve Taylor and proceed in propria persona. The court then sentenced Shirley in the second matter.

Shirley exercised his right to represent himself on August 14, 2009, and there is no claim that he did not knowingly and intelligently make that election. Even assuming his later objection would be deemed a request to revoke in propria persona status and have an attorney appointed (but see *People v. Lawrence* (2009) 46 Cal.4th 186, 193 [request to revoke in propria persona status and have an attorney appointed must be unequivocal]), such a request is committed to the sound discretion of the trial court. (*Id*. at p. 192.) Shirley makes no effort to show it was an abuse of discretion to deny his effort to *again* change his mind and seek to reappoint counsel (*id*. at p. 196 [a defendant's proclivity to seek changes in counsel status will generally weigh against finding an abuse of discretion]), particularly when the request was made in the middle of a sentencing hearing already delayed numerous times. As stated in a case involving the converse situation of a request to waive counsel, "*Faretta* motions must be both timely and unequivocal. Otherwise, defendants could plant reversible error in the record. [Citations.] Equivocation of the right of self-representation may occur where the defendant tries to manipulate the proceedings by switching between requests for counsel and for self-representation, or where such actions are the product of whim or frustration."

(*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1002.) We conclude Shirley knowingly waived his right to counsel and it was not an abuse of discretion to deny his untimely request to have counsel reappointed.

DISPOSITION

The judgments are affirmed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.