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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ULISES OROZCO, Defendant and Appellant.	F060865 (Super. Ct. No. F09905561) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Gary D. Hoff, Judge.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Kathleen A. McKenna, Deputy Attorney General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of the Facts and part I. of the Discussion.

A jury convicted Ulises Orozco of second degree murder (Pen. Code, § 187, subd. (a))[1] and found true an allegation that he used a deadly and dangerous weapon in the commission of the murder (§ 12022, subd. (b)(1)). The court imposed a prison term of 15 years to life with a consecutive one-year term for the weapons use enhancement. On appeal, Orozco contends (1) defense counsel was ineffective when he elicited testimony from Orozco that he had witnessed stabbings in the past, and (2) the trial court's order requiring him to pay a probation report fee pursuant to section 1203.1b was unauthorized. We affirm.

FACTS

In the early afternoon on September 23, 2009, Valentina Valdovinos Mancilla and Serenio Flores were watering the lawn of their house in Orange Cove when they saw Jesus Horacio Martinez Tapia walk by and Tapia's girlfriend, Daisy Pantoja, drive up and stop next to him in her car. As the two talked through the car's passenger side window, Orozco drove by in a blue truck and parked "very abruptly" on the north side of the street. Tapia told Pantoja to park the car at their nearby apartment. As Pantoja drove into the apartment's driveway, Orozco got out of the truck, pulled out a bat from inside the truck's cab, placed it under his left armpit, pulled out a knife, opened it, and grabbed the bat with his right hand while holding the knife in his left hand.

Orozco ran to Tapia and the two exchanged words. Orozco swung the bat at Tapia while Tapia raised his hands to block the blows. Mancilla saw Orozco do "something" with his other hand, but she did not know what he did. Tapia then fell to the ground and Orozco ran to the truck and got inside. Tapia stood up, ran after Orozco, and grabbed the bed of the truck as Orozco sped away. Tapia turned, walked a short distance, and fell to the ground.

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[1] All further statutory references are to the Penal Code.

Pantoja testified that when she saw Orozco hitting Tapia with the bat, she quickly backed out of the driveway. As she put her car in drive, she saw Orozco standing over Tapia. Orozco looked at her and then ran toward his truck. Pantoja drove fast towards the men so she could help Tapia. While she thought about trying to hit Orozco with her car, when she saw Tapia get back on his feet she decided not to do so as she thought he was okay. Pantoja slowed the car down, stopped next to Tapia and told him to get in. Tapia opened the car door and collapsed on the street.

When Fresno County Sheriff's Department deputies arrived on the scene shortly thereafter, they found Tapia lying on the street, face up, with bruises and an open laceration on his head, a puncture wound to his left chest area, and a clean cut on the small finger of his left hand. Pantoja's car was parked near Tapia in the middle of the street and Pantoja was standing next to Tapia. Burnout marks, which are caused by tires spinning when a vehicle accelerates fast from a parked position, were on the north side of the street. Tapia died from a single, four and one-half inch deep stab wound to his chest which perforated his heart. He also suffered multiple blunt impacts to the head, abrasions to the back of the head, an abrasion to the right side of the forehead, and a laceration to the top of the head with corresponding hemorrhage. Toxicology results showed traces of marijuana and alcohol in Tapia's blood, neither of which contributed to his death.

Pantoja testified she thought there had been "bad blood" between Orozco and Tapia two to three months before this incident concerning a missing paycheck. Pantoja told police that the day before the incident, Orozco had driven by her aunt's house a couple times and looked in Tapia's direction, and this behavior had been going on over the course of a month. Pantoja believed that at some point before this incident, Tapia wanted to fight Orozco; the fight, however, never occurred because Orozco ran away.

Orozco was arrested later that day at his girlfriend's home in Orange Cove. His blue truck was parked in the driveway. Blood found on the top of the truck bed and door frame on the driver's side matched Tapia's blood. Orozco told the arresting officers

where to find the bat and knife. The aluminum bat, which was in plain view, was recovered outside the house. The knife, which was determined to be the murder weapon, was found hidden in the compartment of a trailer at the rear of the property wrapped in green artificial turf. The knife's blade was slightly over four and one-half inches long.

Defense Case

Orozco testified on his own behalf. He explained that he and Tapia had become friends while working together in the fields and when he left the job in June 2009, he understood that Tapia would deliver his last paycheck to him, but he never did. Orozco called the police, who carried out an investigation. After this, the two were no longer friends. On one occasion, Tapia approached Orozco with a metal object, called him a snitch and chased him. Tapia stopped chasing him after Pantoja told him to stop. Tapia then left the area and Orozco left right after him. On two separate occasions following this incident, Tapia threw a rock at Orozco's truck.

On the morning of September 23, 2009, Orozco saw Tapia walking out of the backyard of a friend's house holding a two by four wood plank in one hand. When Tapia saw Orozco, he walked toward Orozco slapping the two by four into the palm of his left hand, called him a snitch and said he wanted to fight. As Orozco drove away in his truck, Tapia threw a rock at it.

Later that day, Orozco saw Pantoja in her car, which was stopped in the middle of the street, with Tapia talking to her through the passenger side window. As Orozco drove by, Tapia lifted his hands and said "what's up." Orozco continued driving, but stopped because he wanted to end the dispute. When he got out of the truck, he had a closed knife in his right front shorts pocket. He retrieved a bat from between the truck's seats because he knew from past confrontations that Tapia had come at him with weapons.

Orozco walked toward Tapia, who started walking toward him. Orozco tried to talk to Tapia, telling him he did not want any more problems; Tapia, however, responded by hitting Orozco with his fists. As Orozco backed up out of reach, Tapia came toward

him, socking him in the chest area. Orozco hit Tapia with the bat two or three times on the head, but he did not fall. Orozco saw Pantoja's car heading straight for him. Tapia grabbed the back of Orozco's shirt. Scared that Tapia might try to throw him in front of the car or that the car otherwise would hit him, Orozco, who was still holding the bat, pulled the knife out of his pocket with his left hand, opened it with his left hand, and told Tapia to back up and leave him alone. When Tapia still tried to "reach at" him, he "poked" Tapia with the knife. Orozco denied wanting to kill Tapia. He knew he had stuck a knife in Tapia's chest, but did not know where. Tapia "fell on his knee" and Orozco ran back to the truck. Tapia ran after Orozco and grabbed onto the truck. Orozco gunned the accelerator and sped away.

When Orozco was arrested later that day, he did not know Tapia was dead. By the time the police arrived, he had changed clothes because other people told him to do so, and disposed of the bat and knife. The knife had blood on it, which he washed off. Orozco told police where to find both items. Although he told various lies in official questioning because he "was scared" and "wasn't in the right state of mind," he did not deny his involvement and tried to be truthful. While Orozco told the police he was acting in self-defense and that he knew Tapia did not have any weapons in his hands, he testified at trial that he did not know whether Tapia had any weapons on him when he got out of the truck.

DISCUSSION

I. *Ineffective Assistance of Counsel*

Orozco contends he was denied his constitutional right to effective assistance of counsel when his trial counsel elicited testimony from him on cross-examination that he had seen other people stabbed, yet none of them died, and argued from that testimony that malice was not proven.

During the prosecutor's cross-examination of Orozco, he asked Orozco if he would agree, "just generally speaking," that "stabbing someone with a knife is something

that could be dangerous to human life" and whether it was correct that "someone could actually die from being stabbed with a knife." Orozco responded, "Yes." The prosecutor then asked: "And knowing this, you still used the knife anyway?" Orozco answered: "Yes."

On redirect examination, the following exchange occurred between Orozco and defense counsel:

"[DEFENSE COUNSEL]: Q Now you have stated that you did not intend to kill [Tapia], correct?

"A Yes. [¶] … [¶]

"Q Did you have it in your mind that every time a knife was used someone is going to die? [¶] … [¶]

"A No.

"Q. Have you seen or been around times when there has been somebody who's got stabbed. [¶] … [¶]

"A Yes. [¶] … [¶]

"Q. Has anyone died in those instances that you've been aware of?

"A No."

On re-cross examination, the following exchange occurred between the prosecutor and Orozco:

"[PROSECUTOR]: Q. Your attorney asked you about having seen other people get stabbed, do you remember those questions?

"A Yes.

"Q But you responded you never saw anybody die as a result, correct?

"A Yes.

"Q Somebody can get shot by a gun and not die as well, correct?

"A It depends where you get shot at.

"Q Right. Depends on where the bullet goes?

"A Yes.

"Q And depends where the knife goes when you get stabbed, right?

"A Yes.

"Q You get stabbed in the pinky you won't necessarily die?

"A Yes.

"Q You get stabbed in the foot you won't necessarily die, correct?

"A Yes.

"Q You get stabbed in the chest in your heart there's a big chance you will die, right?

"A I don't know.

"Q I'm sorry.

"A I don't know.

"Q But as you had agreed once before, the natural consequence of sticking a knife through somebody's chest in the center of the chest where the heart is located, that's dangerous to human life, isn't it?

"A I didn't know where I poked him at, that's why.

"Q But that's a dangerous thing to do to anybody?

"A Yes, I was just thinking about the car. I wasn't thinking about at that time what I was doing. I was just trying to get away."

During closing arguments, the prosecutor argued the malice necessary for a murder conviction was shown by Orozco's agreement on cross-examination that he used a knife despite knowing that someone could die from being stabbed. To address this, defense counsel argued in response that implied malice was not proven beyond a reasonable doubt because: (1) it was debatable whether the natural consequences of stabbing someone is dangerous to human life as "many people stab others every[]day, and from your own knowledge you will know that not all those cases end up as fatal injuries," and (2) Orozco did not know his act was dangerous to human life as he acted in

the heat of the moment and, as Orozco testified, he had "seen people being stabbed, and that there would be no death resulting or serious injury." Defense counsel further argued that Orozco's testimony that stabbing a person would be dangerous to human life was based on a "general, hypothetical question that was asked of [Orozco]," and did not refer to the actual situation between he and Tapia, and because Orozco testified that all he was thinking about was the car, he did not admit knowing of the danger to human life. In rebuttal, the prosecutor argued that Orozco could not set up his own standard of conduct to say he was acting in the heat of the moment and it was not an excuse to say that some people who are stabbed do not die, just like some people who are shot do not die.

Orozco contends defense counsel's performance fell below the objective standard of reasonableness because no reasonably competent criminal defense attorney would adduce prejudicial evidence from his client, particularly evidence that proves critical elements of the prosecutor's case. While Orozco recognizes it was necessary for his attorney to rehabilitate him after the prosecution's cross-examination, in which he agreed that danger to human life was a natural and probable consequence of stabbing someone and someone could actually die from being stabbed with a knife, he asserts defense counsel's choice of questions was "neither helpful to, nor reasonably calculated to help, the defense," and instead the questions "torpedoed the defense chosen by defense counsel," namely that Orozco stabbed Tapia in self-defense or imperfect self-defense. Orozco contends that eliciting testimony that he had seen other stabbings allowed the jury to infer that he "associated with bad people," was involved in those stabbings, and if he was involved in similar crimes in the past, he likely committed the charged crime with the requisite intent to kill. Orozco asserts there was no plausible tactical explanation to justify defense counsel's inquiry in this area, as it elicited highly prejudicial and damaging character and conduct evidence.

"To prevail on a claim of ineffective assistance, a defendant must show both that counsel's performance was deficient — it fell below an objective standard of

reasonableness — and that defendant was thereby prejudiced." (*People v. Cash* (2002) 28 Cal.4th 703, 734.) With regard to the question of whether counsel's performance was objectively unreasonable, "'"[r]eviewing courts defer to counsel's reasonable tactical decisions … , and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" [Citations.] "[W]e accord great deference to counsel's tactical decisions" [citation], and … the "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight."'" (*People v. Jones* (2003) 29 Cal.4th 1229, 1254 (*Jones*); accord, *People v. Weaver* (2001) 26 Cal.4th 876, 928 ["'even "debatable trial tactics" do not "constitute a deprivation of the effective assistance of counsel"'"].) And "[i]n order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission." (*People v. Ray* (1996) 13 Cal.4th 313, 349.) "'In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions.'" (*Jones*, *supra*, 29 Cal.4th at p. 1254.)

We acknowledge the testimony that Orozco's defense attorney elicited from him, and the use of that testimony during closing arguments, was potentially harmful. The record, however, admits of the possibility defense counsel had a tactical reason for pursuing this line of questioning and argument. Since Orozco admitted he stabbed Tapia, Orozco's mental state was the key element in the case. His testimony on cross-examination that stabbing someone can be dangerous to human life was damaging on this issue. Faced with this problematic testimony, defense counsel rationally might have concluded as follows: it was necessary to emphasize that not everyone who is stabbed dies; rather than relying solely on common sense, he decided to obtain Orozco's testimony that he had personally witnessed other stabbings, none of which resulted in death, and from that argue Orozco did not intend to kill Tapia when he stabbed him; and

Orozco's testimony on cross-examination was so damaging that the likelihood that his tactic would be successful, even if slight, outweighed the risks. (Cf. *People v. McPeters* (1992) 2 Cal.4th 1148, 1187, superseded by statute on another point as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107 [counsel conceded defendant's presence at the crime scene, thus repudiating defendant's alibi testimony, but "[u]nder these circumstances, we cannot say counsel was constitutionally ineffective in his attempt to make the best of a bad situation"].)

Orozco also argues counsel was ineffective for failing to take "some other appropriate actions" to remedy the negative effects of asking Orozco about other stabbings. Orozco contends his counsel could have done this by clarifying that the stabbing did not involve him, by asking him further questions about Tapia's stabbing, by requesting a mistrial or by asking for a limiting or curative instruction. This contention, too, is without merit. Defense counsel attempted to mitigate the negative consequences of Orozco's testimony by minimizing his testimony on this point. Defense counsel reasonably could have concluded that it would have been counterproductive to unduly emphasize the other stabbings testimony to the jury by asking more detailed questions about it or asking for a limiting or curative instruction. Again, the possibility of a rational tactical purpose for the challenged conduct defeats Orozco's claim. (Cf. *People v. Williams* (1997) 16 Cal.4th 153, 215 [counsel not constitutionally ineffective in failing to object to evidence where he reasonably could have concluded "an objection would have highlighted the testimony and made it seem more significant . . . "].)

On this record, we cannot conclude there was no conceivable tactical purpose for eliciting the other stabbings testimony from Orozco. Accordingly, this claim must be rejected on direct appeal.

II. *Presentence Report Costs*

After sentencing Orozco to prison, the trial court ordered him to pay a $296 probation report fee pursuant to section 1203.1b within 30 days of his release on parole.

Orozco contends the trial court erred in imposing this fee in that section 1203.1b does not apply to him since he was sentenced to prison rather than granted probation. The Attorney General concedes this was error and agrees this order should be stricken.

We, however, reject both Orozco's claim and the People's concession. Before its 1993 amendment, section 1203.1b, subdivision (a) provided: "*In any case in which a defendant is convicted of an offense and granted probation*, the court, taking into account any amount which the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of probation; and of conducting the presentence investigation and preparing the presentence report made pursuant to Section 1203." (Italics added.) Based on this language, this court held in *People v. Montano* (1992) 6 Cal.App.4th 118 that the statute did not apply to a defendant who was sentenced to prison, as the statute only authorized the court to assess the cost of preparing the probation officer's report against probationers. (*Montano, supra*, 6 Cal.App.4th at p. 123.)

Section 1203.1b, subdivision (a), however, was amended in 1993 to read: "In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, *whether or not probation supervision is ordered by the court*, and in any case in which a defendant is granted probation or given a conditional sentence, the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision or a conditional sentence, of conducting any preplea investigation and preparing any preplea report pursuant to Section 1203.7, of conducting any presentence investigation and preparing any presentence report made pursuant to Section 1203, and of processing a jurisdictional transfer pursuant to Section 1203.9 or of processing a request for interstate compact

supervision pursuant to Sections 11175 to 11179, inclusive, whichever applies...." (Italics added.)

In *People v. Robinson* (2002) 104 Cal.App.4th 902 (*Robinson*), the Third District Court of Appeal explained that this new language and the amendment's legislative history necessitated a new conclusion. We agree with *Robinson*. There, the defendant argued the statute was limited to cases in which a defendant was granted probation or given a conditional sentence, and the additional language inserted in the 1993 amendment referring to "'whether or not probation supervision is ordered by the court,'" (Stats. 1993, ch. 502, § 1, p. 2624), merely emphasized that the statute applied not only to cases in which probation supervision was ordered but also to cases in which a defendant received a conditional sentence. (*Robinson*, *supra*, 104 Cal.App.4th at p. 904.)

The appellate court rejected that interpretation, noting that the legislative history indicated the statute was meant to apply to all cases, including those in which a defendant is sentenced to state prison. (*Robinson*, *supra*, 104 Cal.App.4th at p. 905.) Specifically, a detailed analysis of Senate Bill No. 177, which added the language in the 1993 amendment, explained that the amendment "'would expand the number of cases in which defendant could be required to pay the costs of … preparing a presentence report, by allowing these costs to be assessed regardless of whether probation was granted. Under existing law, the costs can be assessed only when probation is granted. Under this bill, a defendant could be sent to jail or prison and still be assessed the probation department costs.'" (*Robinson*, *supra*, 104 Cal.App.4th at p. 905, citing Sen. Com. on Judiciary, Analysis of Sen. Bill No. 177 (1993-1994 Reg. Sess.) as introduced.) Moreover, other legislative analyses stated that the bill "'would expand the defendant's responsibility to pay for any preplea or presentence investigation and report as well as any probation investigation and report. The bill, in addition, would expand the existing requirement to include the situation when the defendant is not placed on probation.'" (*Robinson*, *supra*, 104 Cal.App.4th at p. 905.)

The *Robinson* court concluded that the statute means what it says — it "allows for recovery of costs associated with preplea or presentence investigation and reporting '[i]n any case' resulting in a conviction 'whether or not probation supervision is ordered by the court.' (§ 1203.1b, subd. (a).) Subsequent statutory references to probation or a conditional sentence should be read to refer to provisions including the 'cost of any probation supervision or a conditional sentence' among the costs the county probation department may recover. (*Ibid.*)" (*Robinson, supra,* 104 Cal.App.4th at p. 905.)

The trial court's imposition of an order to pay the cost of the probation report within 30 days of his release on parole was not unauthorized.

DISPOSITION

The judgment is affirmed.

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Gomes, Acting P.J.

WE CONCUR:

_____
Kane, J.

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Poochigian, J.