



## The People v. Jose Antonio Pasillas

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P. v. Pasillas

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Affirmed.

### INTRODUCTION

A jury convicted defendant and appellant Jose Pasillas of attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, subd. (a) & 187, subd. (a)<sup>1</sup>) and assault with a deadly weapon (§ 245, subd. (a)(1)). As to each offense, the jury found true the allegation that defendant personally inflicted great bodily injury on his victim. (§ 12022.7, subd. (a).) Defendant admitted that he suffered a prior felony charged under sections 667, subdivisions (a)(1) and (b) through (i), and 1170.12, subdivisions (a) through (d), and two prior felonies charged under section 667.5, subdivision (b). The trial court sentenced defendant to 23 years to life in state prison.

On appeal, defendant contends that there is insufficient evidence that he had the specific intent to kill that is required for attempted murder or to support the jury's finding that the attempted murder was premeditated and deliberated. Defendant also contends that his counsel provided ineffective assistance when he failed to request a modified version of CALJIC No. 8.73. We affirm.

### BACKGROUND

About 12:15 a.m., on December 27, 2008, David Vega and his friend Rosario Portugal were at the Potrero Club in Cudahy. According to Portugal, at some point she left Vega and went to the restroom. Prior to going to the restroom, Portugal did not see Vega taking any photographs in the club. When she returned, Portugal saw Vega speaking with defendant. There was nobody near Vega and defendant when they spoke.



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As defendant and Vega spoke, Portugal saw defendant remove a brown object from his glove, raise his hand towards Vega's neck, and cut Vega. Vega grabbed his neck, turned, and walked toward a security guard in the back of the club. Portugal saw a lot of blood. Portugal followed Vega, and a security guard told them to leave. Portugal told an investigating police officer that the brown object that defendant held was "like a little razor."

Vega testified that at some point he took out his camera to take pictures with Portugal. Vega's camera accidentally flashed and a woman who was dancing approached Vega, slapped or "threw" away his camera, and attempted to hit him. The woman was wearing a short skirt and dancing in a manner that caused "many guys" to watch her. Vega believed that was the reason she was upset when his camera flashed. That was the only time Vega took out his camera that night, and he took no other photographs.

After Vega picked up his camera, defendant approached him. Defendant said to Vega, "It's my hina," by which Vega understood defendant to mean that the woman who slapped away Vega's camera was "[defendant's] woman." Vega responded that if "she was his woman, to tell her not to throw away my things." Defendant told Vega to give him the camera. Defendant pulled a knife from his glove and pressed it against Vega's neck. Vega described the knife as the type that is "used to cut boxes or to scratch cars." When Vega tried to move, defendant pressed the knife against Vega's neck even harder and cut Vega's neck. According to Vega, defendant "swiped" at Vega's neck one time. Vega's neck was not bleeding profusely, but it was dripping blood at such a rate that Vega lost a lot of blood. Vega ran towards security. Vega was taken to the hospital where he stayed overnight. Vega received internal stitches for his neck wound. The neck wound left a scar.

According to Vega, defendant did not appear angry prior to cutting Vega's neck. Vega testified that defendant did not act as if he was upset in order to take Vega off his guard. That is how defendant was able to cut Vega.

On cross-examination, Vega testified that he told an investigating police officer that the woman who was dancing with defendant became upset when the flash on his camera went off. Vega did not tell the officer that he had taken pictures of several women on the dance floor.

Claudia Espinal testified that about 10:00 p.m. on December 27, 2008, she was dancing with defendant at the Potrero Club when Vega, from a distance of two to three feet, put his hand close to the area between her legs and took a photograph. Espinal knocked Vega's camera to the floor. Vega picked up his camera. Defendant interceded and told Espinal to relax. Defendant then spoke with Vega. Defendant appeared to be calm and relaxed when he spoke with Vega. At some point, Vega left, holding his neck. Espinal did not see defendant raise his hand in the direction of Vega's head or neck.

On December 27, 2008, Ivan Garcia was working as a security supervisor at the Potrero Club. Garcia



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grabbed defendant as defendant attempted to run out of the club. Garcia called the police. About 12:15 a.m. on December 27, 2008, Maywood-Cudahy Police Department Officer Mark Wong responded to the Potrero Club concerning a man who was bleeding. Officer Wong saw Vega sitting on the curb in front of the club holding the left side of his neck as blood streamed between his fingers. Vega told Officer Wong that he was inside the club taking pictures of girls on his cell phone and defendant approached him and cut him with an unknown object on the left side of his neck. Vega did not tell Officer Wong that he took an accidental photograph. As defendant was being placed in a police car, he said to Vega, "So you are going to rat on me?"

In his defense, defendant called his friend Trinidad Magana who was with defendant at the Potrero Club during the night of December 26, and morning of December 27, 2008. Defendant and Magana ordered a bucket of beers and went upstairs, where they ran into Espinal. Defendant danced with Espinal. While defendant danced with Espinal, Magana saw Vega taking provocative photographs of Espinal and other women.

Magana testified that when Vega took the photograph of Espinal, she slapped the telephone out of his hands. Vega picked up the telephone and defendant approached and talked to him. As defendant talked to Vega, another man walked between them and slit Vega's throat. Vega ran off. Defendant said to Magana, "Hey, let's get out of here before they think that we had something to do with this." Defendant was detained by club security and the police arrived. Magana did not tell the police that someone other than defendant was the perpetrator because the police told him to leave and did not give him a chance.

Ricardo Haro, a defense investigator, interviewed Vega about the incident. When discussing what led up to the incident, Vega said that he had been taking pictures of various female dancers.

The parties stipulated that if District Attorney Investigator Will Jordan testified, he would have testified that when he interviewed Espinal, Espinal said she saw defendant lean in towards Vega's neck and say something in Vega's left ear. Vega then walked off the dance floor holding his neck.

### DISCUSSION

#### I. Sufficient Evidence Supports The Jury's Finding That Defendant Had The Specific Intent To Kill That Is Required For Attempted Murder

Defendant contends that insufficient evidence supports the jury's finding that he had the specific intent to kill that is required for attempted murder. The evidence is insufficient, defendant contends, because he did not stab Vega, he only cut Vega's neck; Vega was able to walk away from defendant's attack when defendant, if he wanted, easily could have slashed Vega's jugular vein thus causing Vega to bleed to death in seconds; and defendant did not pursue Vega. Instead, defendant concludes, such



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evidence only supports an inference that he "intended to give Vega a nasty cut and a crude lesson in manners." Sufficient evidence supports the finding.

### A. Standard of Review

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence--that is, evidence that is reasonable, credible, and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] (People v. Avila (2009) 46 Cal.4th 680, 701.) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.] (People v. Medina (2009) 46 Cal.4th 913, 919.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.] (People v. Zamudio (2008) 43 Cal.4th 327, 357.) "Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." (People v. Ugalino (2009) 174 Cal.App.4th 1060, 1064.) "We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.] [Citation]" (People v. Zamudio, supra, 43 Cal.4th at pp. 357-358.)

### B. Application of Relevant Principles

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]" (People v. Lee (2003) 31 Cal.4th 613, 623.) "A defendant's intent is rarely susceptible of direct proof, and may be inferred from the facts and circumstances surrounding the offense. [Citation.]" (People v. Felix (2009) 172 Cal.App.4th 1618, 1624.)

Based on the evidence, a reasonable juror could find that defendant acted with the specific intent to kill. The evidence showed that Vega took a photograph of Espinal that Espinal objected to, Espinal knocked the camera from Vega's hand, and defendant calmly approached Vega. Defendant informed Vega that Espinal was his "woman," demanded that Vega turn over the camera, and placed a knife to Vega's neck before cutting Vega's neck when Vega attempted to move. Defendant cut Vega's neck with sufficient force to inflict a wound that caused Vega to lose a substantial amount of blood and that required stitches to close. The jurors were justified in inferring an intent to kill because defendant did not cut Vega's arm or leg, but his neck, "an extremely vulnerable area of the body." (People v. Moore (2002) 96 Cal.App.4th 1105, 1114.) That defendant did not cut Vega's jugular when he cut Vega's neck "was fortuitous rather than indicative of the absence of an intent to kill." (People v. Gonzalez (2005) 126 Cal.App.4th 1539, 1552.) Upon such evidence, a reasonable juror could find that defendant acted with the specific intent to kill. Accordingly, substantial evidence supports the jury's finding. (People v. Felix, supra, 172 Cal.App.4th at p. 1624; People v. Ugalino, supra, 174 Cal.App.4th at p. 1064.)



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### II. Sufficient Evidence Supports The Jury's Finding That The Attempted

#### Murder Was Premeditated And Deliberated

Defendant contends that insufficient evidence supports the jury's finding that the attempted murder was premeditated and deliberated because he acted rashly and impulsively when Vega did not comply with his demand to turn over the camera. Sufficient evidence supports the jury's finding.

"'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .'" [Citations.]' [Citation.]" (People v. Koontz (2002) 27 Cal.4th 1041, 1080.) "The act of planning--involving deliberation and premeditation--requires nothing more than a 'successive thought[ ] of the mind.' [Citations.]" (People v. San Nicolas (2004) 34 Cal.4th 614, 658.)

In People v. Anderson (1968) 70 Cal.2d 15, 26-27 (Anderson), which concerned premeditation and deliberation in the context of a murder prosecution,<sup>2</sup> the Supreme Court described three categories of evidence relevant to finding premeditation and deliberation: "(1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing--what may be characterized as 'planning' activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' (People v. Thomas [(1945)] 25 Cal.2d 880, at pp. 898, 900, 901); (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (See also People v. Mayfield (1997) 14 Cal.4th 668, 768.)

The Anderson (supra, 70 Cal.2d at pp. 26-27) factors are not, however, the exclusive means for establishing premeditation and deliberation. (People v. Lenart (2004) 32 Cal.4th 1107, 1127.)

"Unreflective reliance on Anderson for a definition of premeditation is inappropriate. The Anderson analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from pre-existing reflection and weighing of considerations." (People v. Thomas (1992) 2 Cal.4th 489, 517.)

Based on the evidence, a reasonable juror could find that defendant acted with deliberation and premeditation. The evidence supports a finding that defendant went to the Potrero Club armed with



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a deadly weapon--a knife--that he hid in his glove. Defendant contends that this evidence is not probative of whether he deliberated or premeditated because he did not know Vega and could not have foreseen the incident at the club. Although evidence that defendant was armed does not demonstrate that he armed himself for the specific purpose of attempting to kill Vega, it does demonstrate defendant's reflection prior to the incident about deadly force and his willingness to use a deadly weapon as he deemed appropriate. As to the events at the club, the evidence shows that defendant had time prior to cutting Vega's neck to reflect on Vega's encounter with defendant's dance partner Espinal and to act according to a plan based on that reflection. The evidence showed that Vega took a photograph of Espinal, to which photograph Espinal objected. After Espinal knocked the camera from Vega's hand, defendant first focused his attention on Espinal, telling her to relax. Defendant next turned his attention to Vega. Defendant was calm and relaxed when he spoke with Vega. Defendant informed Vega that Espinal was his "woman" and demanded that Vega turn over the camera. Defendant removed the knife from his glove and placed it to Vega's neck. When Vega attempted to move, defendant cut Vega's neck. From such evidence, a reasonable juror could find that defendant's act of cutting Vega's neck was the calm product of deliberation and premeditation and not a rash impulse. Accordingly, substantial evidence supports the jury's finding. (People v. Koontz, *supra*, 27 Cal.4th at p. 1080; People v. San Nicolas, *supra*, 34 Cal.4th at p. 658.)

### III. Ineffective Assistance Of Counsel

Defendant contends that defense counsel provided ineffective assistance in failing to request a modified version of CALJIC No. 8.73 that would have allowed the jury to consider provocation in deciding whether defendant premeditated the attempted murder. Defendant fails to show ineffective assistance.

"Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes both of the following: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.]" (People v. Foster (2003) 111 Cal.App.4th 379, 383.) "Generally, . . . prejudice must be affirmatively proved. [Citations.] 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (People v. Ledesma (1987) 43 Cal.3d 171, 217-218.) If the defendant fails to make a sufficient showing either of deficient performance or prejudice, the ineffective assistance claim fails. (People v. Foster, *supra*, 111 Cal.App.4th at p. 383.)

"When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]" (People v. Anderson (2001) 25 Cal.4th 543, 569.) "A





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claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (People v. Mendoza Tello (1997) 15 Cal.4th 264, 266-267.)

The trial court instructed the jury with CALJIC No. 8.41 on the crime of attempted voluntary manslaughter as a lesser included offense of attempted murder upon a theory of sudden quarrel or heat of passion. The trial court instructed the jury with CALJIC No. 8.42 on the concepts of sudden quarrel or heat of passion and provocation. Defendant contends that defense counsel also should have requested the trial court to instruct the jury with a modified version of CALJIC No. 8.73<sup>3</sup> that it should consider provocation in deciding if he attempted to kill with premeditation. Defendant's proposed modified version of CALJIC No. 8.73 is as follows:

"When the evidence shows the existence of provocation that played a part in inducing the unlawful attempted killing of a human being, but also shows that such provocation was not such as to reduce the offense to attempted voluntary manslaughter, and you find that the offense was attempted murder, you may consider the evidence of provocation for such bearing as it may have on the question of whether the attempted murder was premeditated and deliberate."

The record on appeal does not reveal the reason defense counsel failed to request the trial court instruct the jury with a modified version of CALJIC No. 8.73. Any claim of ineffective assistance with respect to the asserted deficiency is better suited to a petition for writ of habeas corpus. (People v. Mendoza Tello, supra, 15 Cal.4th at p. 267.)

### DISPOSITION

The judgment is affirmed.

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We concur: ARMSTRONG, Acting P. J. KRIEGLER, J.

1. All statutory citations are to the Penal Code unless otherwise noted.

2. "We do not distinguish between attempted murder and completed first degree murder for purposes of determining whether there is sufficient evidence of premeditation and deliberation. (See, e.g., People v. Brito (1991) 232 Cal.App.3d 316, 323-324 [283 Cal.Rptr. 441] [analyzing the sufficiency of evidence of deliberation and premeditation to support a conviction of attempted premeditated murder is the same as murder, using the three-prong test of People v. Anderson, supra, 70 Cal.2d at pp. 26-27].)" (People v. Herrera (1999) 70 Cal.App.4th 1456, 1462-1463, fn. 8.)

3. Unmodified, CALJIC No. 8.73 provides: "If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or



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without deliberation and premeditation."

