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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ISAAC MITCHELL MCCUAN,

Defendant and Appellant.

A140425

(Contra Costa County
Super. Ct. No. 51209428)

This is an appeal from judgment after a jury convicted defendant Isaac Mitchell McCuan of first degree murder and attempted first degree residential robbery, and found true allegations that he personally used and intentionally discharged a firearm and acted for the benefit of a criminal street gang in the commission of these offenses. On appeal, defendant challenges the admission of evidence of a statement he made to his cousin about a week after the crime to the effect that “this wasn’t my first time,” and the sufficiency of the evidence supporting his attempted robbery conviction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 8, 2012, a criminal information was filed charging defendant with first degree murder (Pen. Code, § 187) (count one), and attempted first degree residential robbery (Pen. Code, §§ 664, 211, 212.5, subd. (a) (count two)).¹ Both counts were alleged to have been committed by means of defendant’s personal use and intentional discharge of a firearm (§ 12022.53, subs. (b)-(d)), and for the benefit of a criminal street gang

¹ Unless otherwise stated, all statutory citations herein are to the Penal Code.

(§ 186.22, subd. (b)(1)). A trial by jury began June 5, 2013, at which the following evidence was presented.

I. The Prosecution's Case

A. The Shooting.

On July 31, 2010, defendant shot and killed the victim, Giovanni Bey, in the garage of the Pittsburg residence of the victim's brother-in-law, Earl Wyatt.² Just before this murder, defendant and Wyatt, friends for many years and members of the Norteño or Northerner street gang, were playing chess and drinking alcohol in the garage in the presence of several others, including Gabriel Moran and John Demus.³ The men were discussing certain negative things that were being said in the community about the victim and defendant's concern about how this situation reflected on Wyatt. More specifically, while defendant was a mid-level and respected Norteño gang member, the victim appeared to have fallen out of good graces with the gang after developing a reputation as a snitch and failing to obey a gang order that he assault another person in the Martinez Detention Center, where the victim had been serving time. The men agreed the victim was cocky and smart-mouthed.

At some point during the men's conversation, the victim entered the garage and, according to the witnesses present, tension quickly arose between the victim and defendant. The victim asked defendant, "what's up," acting "[e]xtra happy" to see him; yet defendant was dismissive towards him, stating: "I don't want to see you right now. Just go. Pass me." The victim responded: "I ain't trying to talk to you, nothing right now, mother fucker." Defendant then told the victim to stop looking at him, at which point the victim sarcastically told him, "this is my house" and if he "don't like it," he

² Wyatt was provided use immunity in connection with his testimony. At first, Wyatt refused to talk to the police, and insisted he did not see anything and was not in the garage at the time of the shooting. Eventually, however, he agreed to talk. Wyatt explained that he was reluctant to testify against defendant because he was a friend; however, he loved the victim and had been persuaded by his wife (the victim's sister) to cooperate in the investigation.

³ Demus and Moran also received use immunity in connection with their testimony.

should stop coming over. Wyatt, sensing things were escalating, warned the victim: “Stop. Just like period. Stop.” However, defendant and the victim continued arguing and, at some point, rather than stopping, the victim approached defendant at the chess table. Defendant told him to get out of his face, and the victim repeated that it was his house and his garage. As Wyatt described it, the victim kept “talking shit” and would not “shut up,” and, eventually, defendant stood up, knocking over the chess table. Again, Wyatt warned the victim to stop and to apologize. Defendant, in turn, said: “I’m out of here.” However, the victim continued to goad him, and defendant then said, “I’m not moving,” followed by, “you think I’m playing? My status is impeccable out here.” Defendant then added, “this fool think I’m playing with him.” The victim said something in response, and defendant told Wyatt to move, as he wanted to leave before he did something to the victim. Defendant then picked up his belongings and started towards the door, before he then turned around, holding a gun, and told the victim, “break your pockets, fool.” Then, when the victim refused and advanced toward defendant, defendant fired a .22 caliber long rifle bullet, piercing the victim’s heart. Or, as Wyatt described it: “The guy came out. [Bey] swung him. The gun went off. Period. End of story.”⁴

Defendant immediately left the scene, as did Moran and Demus. Wyatt, in turn, called 911 and attempted CPR on the victim to no avail.

B. Defendant’s Actions Before and After the Shooting.

Angelica Forige, a friend of both the victim and defendant (among others), drove defendant to Wyatt’s home on the night in question. Forige and defendant were together at a friend’s house, and defendant asked Forige to drive him to his grandmother’s house. However, he later changed his mind after realizing he had smoked too much methamphetamine, so they instead went to Jessica and Ced’s home, where they smoked more methamphetamine and drank alcohol before leaving for another friend’s home. When they got to Forige’s car, she asked whether defendant had anything illegal on his person, warning that she did not have a driver’s license. Defendant acknowledged having

⁴ Wyatt did not see the gun fire, but was “right there to catch [the victim].”

a firearm (an automatic with a clip) and agreed to return to the apartment to leave it with Ced. However, after driving off, defendant told Forige he left behind his methamphetamine, so she returned to the apartment so he could retrieve it. Forige later realized defendant must have also retrieved his firearm before reentering her car and driving with her to a friend's home on Ventura Drive.

Eventually, after several other stops, they arrived at Wyatt's home. A short while later, Forige began hanging out with the victim, a close friend, in a bedroom. They decided to smoke methamphetamine, so the victim left to get a pipe in the garage while Forige remained in the bedroom applying makeup. While waiting for the victim to return, Forige heard noises and shouting. Forige saw someone (Donald Zrout) run out of the garage yelling, "he's got a gun." Flustered, Forige grabbed her belongings and ran outside to her car. After Forige started her car, defendant jumped in the backseat and told her, "Drive. Get the fuck out of here. Drive." Hitting her on the back of the head, he repeated, "drive, bitch, drive." Forige, scared and in shock, complied. Defendant, meanwhile, began "freaking out," saying, "I think I killed him." Forige remained silent and drove. At some point defendant threw his sweater out of the car. She drove defendant to an apartment in Antioch at his request, where she wanted to leave him. However, defendant insisted she remain with him, which she reluctantly did. Eventually, Forige promised defendant that "Danny" would come over to take care of things, and she was able to leave. Forige thereafter left town for about a year.

Defendant, meanwhile, also left town. A few days after the shooting, defendant appeared at the home of his cousin, Dawn Weger, in Oklahoma with a few other males. Weger was surprised by defendant's visit, as she had not seen him in several years. Defendant stayed for about a week. At some point during his visit, Weger learned defendant was wanted for murder. Weger confronted defendant telling him that he should straighten out his life and that she was on probation and trying to stay clean. Before defendant left Weger's house, he told her certain details about the night in question. Specifically, defendant told Weger that he had taken out and fired his gun during an altercation. Defendant explained that the victim had antagonized him, walking

towards him and asking, “what are you going to do about it?” When defendant took out his gun, the victim rushed towards him to grab it, and defendant then shot him in the chest. Weger had the impression that defendant had felt threatened by the victim; however, defendant did not use the words “self-defense” or “defending myself.” When Weger asked defendant how he felt about this situation, defendant said, “It’s not my first time.” Weger left the subject alone, as she was not sure what defendant meant by his comment and did not want to talk about it further.

On August 26, 2010, Weger spoke to the police. Weger acknowledged being a severe alcoholic and on probation. Weger told police that she and defendant were quite drunk on whisky when they discussed his crime, and that she did not retain a lot of information from their discussion due to her intoxication. Later, at trial, Weger said she told police what she thought they wanted to hear so they would leave her alone, including some information that was not true. Weger also testified that the police had warned her that if she failed to cooperate, she could be found in violation of her probation and could face charges as an accessory to murder. The police also told Weger that her daughter could be jailed and her boyfriend found in violation of his probation for having a felon in the house.

C. The Police Investigation.

Several officers responded to Wyatt’s home on San Remo Way around 1:00 a.m. on August 1, 2010. They found Wyatt performing CPR on the victim, however, he was pronounced dead once medical personnel arrived. A police investigation later confirmed that the victim’s cause of death was a .22 caliber bullet fired from more than two feet away that entered his chest cavity, passed through the heart and aorta, hit the spinal column, and, after being deflected downward, lodged in the liver. As Officer Edgar Sanchez, a gunshot residue expert, explained, when a bullet makes contact with something, the burning gunpowder can burn the surface, causing “stippling.” A cartridge fired from a distance of between 12 and 18 inches will cause stippling. Here, however, there was no stippling, indicating it was a loose contact gunshot from about two feet away. The gunpowder created a little push and a grey soot ring, but no stippling.

Based on the trajectory of the bullet and size of the victim's shirt,⁵ the victim was leaning forward at a 45 degree angle when shot. Given the angle of the bullet's path, if the victim was not leaning forward, the shooter would have had to fire "a pretty good distance as far as heighth [sic] ways."

D. Evidence Relating to Defendant's Gang Involvement.

When Officer Conaty interviewed Wyatt on August 1, 2010, Wyatt told him the shooting was gang-related. Wyatt said defendant had confronted the victim, telling him that he was no good, that defendant did not want the victim near him, and that the victim should leave. However, rather than obey defendant's command, the victim refused, which further agitated defendant, prompting the instruction to the victim to "break his pockets."

At trial, Detective Charles Blazer, an expert in the Norteño and Northern street gangs, opined that, when a higher level Norteño tells a lower level Norteño he is no good and should leave, and the lower level Norteño refuses, the higher level gang member's subsequent shooting of the lower level member was likely an act in furtherance of the Norteño gang. Detective Blazer explained that the only thing gang members have is respect and, if a lower ranking gang member disrespects a higher ranking member or undermines his authority, the higher ranking member will need to earn back his respect through violence. Without respect, a gang will fall apart.

Detective Blazer had known defendant throughout his 15-year police career. Detective Blazer opined that defendant, while not a Latino, was Norteño or Northerner with a high level of respect (also known as an "OG" or "original gangster"). His opinion was based on the following information: (1) defendant had several tattoos associated with the Norteño gang; (2) he had self-admitted that he was a Norteño or Northerner when processed in jail in 2011, 2009 and 2007; (3) he was housed in jail with Norteños;

⁵ Officer Edgar Sanchez, a Pittsburg Police Department Crime Scene Investigator, explained that the victim was wearing a size 4X shirt, which would have been very baggy on him, and the extra fabric caused the outer garment to stretch out at the time it was in contact with the muzzle.

and (4) he was with other Northerners on the night in question. According to Blazer, defendant had been affiliated with the Norteños for at least 13 years, which would, in turn, impart upon him a high level of respect and standing in the gang.

Deputy Matthew Mayette confirmed that defendant had been housed with other Norteños during his 2010 incarceration. Deputy Mayette further noted that the Norteños often met as a group during free time in jail, during which time higher level Norteños often addressed the group. Deputy Mayette had seen defendant address the group two or three times, and, more generally, had seen other Norteños listen to defendant and treat him with respect.

Sheriff Deputy Tyler Radcliffe likewise testified that, when he processed defendant in jail in October 2007, defendant stated that he affiliated with the Norteño gang.

II. The Defense Case.

Defense counsel did not dispute that defendant shot the victim. Rather, the defense theorized that defendant acted in self-defense, and disputed that he attempted to rob the victim or that he acted for the benefit of a street gang. Among other witnesses, the defense called expert Diego Garcia, a violence prevention specialist and former Sureño gang member, who opined that defendant, a non-Latino, was probably a mid-level Norteño, respected but not highly ranked. According to Garcia, it is unlikely that a non-Latino or a homeless person would be a high ranking Norteño. Further, while usually a mid- or high-level member would address a group of Norteños, it is possible that a lower level member would be asked to do it. Garcia added that not everything a gang member does is for the benefit of the gang, and that he had never heard of a gang member robbing another gang member. A gang member rarely commits a crime against another gang member. Usually, if a gang member shoots another gang member it is not for the benefit of the gang.

Garcia acknowledged that gang members who work for the gang for many years would gain status within the gang. He further admitted that a gang member who has been disrespected by another gang member would need to do something about it to avoid

losing his status. Thus, if a mid-level Norteño was disrespected by a low ranking Norteño, he would need to do something about it, such as an act of violence, to “avoid being a punk.” Further, if a low ranking member was a snitch who failed to obey an order in jail, the member could face violence from other members. Norteños do not allow snitching and reprimand members who snitch. Norteños have been known to kill snitches. Garcia would expect a mid-level Norteño to tell a snitch to leave because he does not want him around, and would expect a mid-level member to get mad if the snitch refuses to leave.

Garcia testified that the letter found in the victim’s pocket after his death indicated that the letter’s author failed to obey an instruction to attack someone in jail. This failure to act would have placed a lower ranking Norteño in bad standing.

In addition, defendant’s brother-in-law, John Humphries, a former Norteño gang member, testified that defendant was not a ranked Norteño in 2010 because he was homeless and on drugs. Around 2010, defendant lived with Humphries and his wife for about three weeks, during which Humphries knew him to be more into drugs than gang life. Humphries added that non-Latinos, like defendant, have a harder time moving up the Norteño ranks than do Latinos. Humphries stated that Norteños frown upon violence committed against fellow gang members; however, he acknowledged that Norteños would investigate members, like the victim, who snitch. Humphries believed that, even though defendant admitted being a Norteño, he was more likely a Northerner.⁶

The defense also read portions of the transcript from Wyatt’s preliminary hearing testimony. Among other things, Wyatt testified that he had been smoking crank (to wit, methamphetamine) on the night of the shooting. Wyatt also testified that the victim was under investigation by the Norteño gang for snitching, and that he and defendant had been discussing this situation. Wyatt, who was associated with the Norteños when imprisoned from 2002 and 2008, believed the issue between defendant and the victim was personal rather than gang-related.

⁶ According to Humphries, a “Northerner is somebody who lives their life maybe . . . outside of the law, but at the same time, does not hold [any] rank in a Norteño gang.”

Wyatt testified at the preliminary hearing that, when the victim entered the garage on the night in question, defendant told him to leave, and the victim sarcastically responded, “maybe you should stop coming to my house.” Wyatt insisted he had lied, however, when telling police that defendant told the victim to “break your pockets.” Defendant did not try to rob the victim. Rather, he pulled out a firearm when arguing with the victim, and then accidentally shot him when the victim lunged at him. At that point, Wyatt himself blacked out, so was not certain what transpired.

III. The Verdict, Sentence, and Appeal.

On July 9, 2012, the jury found defendant guilty as charged, and found true all enhancements. On November 1, 2013, the trial court sentenced defendant to a total prison term of 60 years to life. On December 2, 2013, defendant filed a timely notice of appeal.

DISCUSSION

Defendant raises two issues on appeal. First, defendant challenges as prejudicial error the trial court’s admission of evidence relating to a statement he allegedly made to his cousin in mid-August 2013, shortly after the shooting. Second, defendant challenges the sufficiency of the evidence supporting the jury’s guilty verdict on count two, attempted first degree residential robbery. We address each issue in turn below.

I. Admission of Evidence as Relevant to Defendant’s State of Mind.

On appeal, defendant reasserts the following arguments previously raised during motions in limine before the trial court. Defendant contends it was an abuse of discretion and a violation of his constitutional due process rights to admit into evidence the statement he allegedly made to Weger in mid-August of 2010 when discussing the shooting that, “it wasn’t my first time.” Specifically, defendant reasons that admission of the evidence was barred under Evidence Code section 352 (section 352) because the evidence was highly inflammatory and neither relevant nor probative. Finally, defendant contends admission of the evidence was so prejudicial as to deprive him of a fair trial in violation of Fifth and Fourteenth Amendments of the United States Constitution.

“The trial court is vested with wide discretion in determining the admissibility of evidence. Its exercise of discretion under [section 352] will not be disturbed on appeal absent a clear abuse, i.e., unless the prejudicial effect of the evidence clearly outweighs its probative value. [Citation.] Moreover, the record must affirmatively show that the trial court did in fact weigh the prejudicial effect of the evidence against its probative value.” (*People v. Karis* (1988) 46 Cal.3d 612, 637.) The trial court’s exercise of discretion in this regard will not be overturned on appeal absent a showing that the “court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Here, the trial court admitted the evidence as relevant to defendant’s state of mind. In doing so, the trial court initially expressed reluctance to admit the statement, noting that its meaning was unclear and that the jury could “automatically associate ‘it’s not my first time’ with the fact that he shot somebody else.” However, ultimately, the court allowed the evidence to come in, noting that “[w]hatever he meant by [the statement] is obviously up for the jury to decide.”

Following the court’s ruling, Weger testified that she had two conversations with defendant about his crime when he stayed with her for about a week just after it occurred. During their second conversation, Weger asked defendant how he felt about the situation, and he responded to the effect that, “It’s not my first time.” Weger did not ask defendant to explain his comment and, when asked why at trial, she said, “I didn’t want to talk after that anymore because I wasn’t sure if he was talking about having a gun or being on the run or what he was talking about. And I didn’t want to go into any more details.” Nor did Weger know how defendant interpreted her question.

When further asked about this conversation at trial, Weger stated that she interpreted defendant’s comment about “not the first time” as referring to the shooting and killing or shooting someone or just “that he shot a gun.” She had the impression that defendant “either had the gun or shot a gun.”

The prosecution later played for the jury a recording of Weger’s August 26, 2010 police interview. During this interview, Weger stated: “Yeah the guy that he shot and

killed was getting mouthy with – anyway [defendant] was telling him to shut up, you know, quit running [his] mouth or whatever. And the guy stood up, you know, what are you going to do and [defendant] had the gun, you know, pointed at him and, um, the guy tried to take the gun from him and he went like that and the trigger pulled and shot him in the chest.” When Weger asked defendant about what happened, “he said it wasn’t his first time.” Weger “told him that made me sick to my stomach to think that he would take someone else’s life.” When the officer asked Weger whether she believed that defendant, by his comment, meant it was not the first time he killed somebody or shot somebody, she replied, “well I don’t know. It could have went either way. It could have went either way.”

After this recording was played, the trial court instructed the jury as follows: “Ladies and gentlemen, in regards to the statement, quote, ‘It wasn’t my first time,’ unquote, that statement is admitted only as evidence of the defendant’s state of mind at the time he said it. You may not consider it for any other purpose.” The trial court then reiterated and expanded upon this instruction at the close of evidence. (See p. 14, *post.*)

During closing arguments, defense counsel warned the jury to view defendant’s alleged statement with caution as an unrecorded extrajudicial admission. (CALCRIM, No. 358.) Defense counsel also reminded the jury that Weger and defendant were “plastered” during their conversation, and that is unclear what Weger was asking and what defendant said or thought he was saying. The prosecution, in turn, urged jurors to consider the statement “clear evidence of his guilt, of what he did that night, and his mental state.”

On appeal, defendant contends the evidence should never have been admitted because his alleged statement, made a week or more after the shooting, was irrelevant to his state of mind at the time of the shooting. He further contends the statement was manifestly ambiguous and nonresponsive, such that the jury should never have been permitted to consider it. Further, with respect to prejudice, defendant argues the statement “would have likely caused the jury to view [him] as a trigger-happy and callous criminal, bad character evidence that would be viewed as inconsistent with a response of

fear to [the victim's] aggressive conduct.” Finally, defendant argues the trial court’s instruction limiting the jury’s consideration of this evidence merely added to the prejudice because it failed to direct the jury not to consider it as evidence of his criminal disposition, which Evidence Code section 1101, subdivision (a) forbade.⁷ We, however, conclude admission of this evidence was properly within the trial court’s discretion.

First, we agree with the People that the statement was admissible as both an admission against defendant’s interests within the meaning of Evidence Code section 1220, and as evidence of his state of mind within the meaning of Evidence Code section 1250. Indeed, defendant’s primary defense was self-defense. As such, his mental state at the time of the shooting was undoubtedly relevant. (*People v. Peau* (2015) 236 Cal.App.4th 823, 834 [“a defendant with an actual belief in the need for self-defense cannot form the requisite mind state to commit murder”]; see also *People v. Hovarter* (2008) 44 Cal.4th 983, 1009-1010 [“defendant’s comment to A.L. that he knew what he was doing suggested he had raped and killed before, it was relevant and thus admissible to show his state of mind”].) And, while defendant insists the temporal lapse between the shooting and his statement (to wit, about 10 days) stripped his words of relevance, both the facts and the law suggest otherwise. As the California Supreme Court has explained: “When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule” (*Whitlow v. Durst* (1942) 20 Cal.2d 523, 524. See also Evid. Code, § 1250, subd. (a) [“evidence of a statement of the declarant’s then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily

⁷ “Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person’s character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person’s character or disposition.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.)

health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant’s state of mind, [or] emotion . . . *at that time or at any other time when it is itself an issue in the action*; or [¶] (2) . . . is offered to prove or explain acts or conduct of the declarant”].) Here, the record reflects that, according to Weger’s police interview, defendant made this statement when discussing the shooting at issue and, in particular, when she asked him about what happened and how he felt about it. As such, defendant’s statement is indeed probative of what he may have felt or believed at the time he fired his gun at the victim.

Second, while we accept that defendant’s statement, as described by Weger, is indeed ambiguous, ambiguity alone does not render evidence inadmissible. Rather, as the trial court recognized in this case, ambiguity goes to the weight of the evidence. (*People v. Hovarter, supra*, 44 Cal.4th at p. 1009 [“Although defendant’s comments were somewhat vague, the trial court was within its discretion in concluding that they permitted the inference he had committed a similar crime in the past”]; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 437.) Defense counsel in this case had ample opportunity to address the weaknesses in Weger’s testimony, eliciting in cross-examination and emphasizing in closing arguments the facts that she and defendant were quite intoxicated when he made the statement, and that she herself was unclear what the statement meant or what defendant believed she was asking.

In addition, while defendant insists the prejudice arising from this admission of evidence substantially outweighs any probative value, the prejudice he identifies – to wit, that his purported statement paints him as a “trigger-happy” and “callous” criminal – is nothing more than that which normally flows from relevant, highly probative evidence damaging to a defendant’s case. As such, it fails to tip the balance of prejudice to probative value in favor of reversal. (*People v. Karis, supra*, 46 Cal.3d at p. 638 [“ [All] evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is “prejudicial.” The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on

the issues. In applying section 352, “prejudicial” is not synonymous with “damaging” ’ ”].) This is particularly true given the trial court’s instructions to the jury regarding the restrictions placed on its consideration of this evidence. Indeed, the trial court’s instruction with respect to Weger’s description of defendant’s statement was by all means extensive:

“You have heard evidence that the defendant made an oral statement before the trial. You must decide whether the defendant made any such statement in whole or in part.

“If you decide that the defendant made such a statement, consider the statement along with all the other evidence in reaching your verdict.[¶] It is up to you to decide how much importance to give the statement.

“Consider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded.

“In the recording of Dawn Weger’s interview she states that the defendant said, quote, ‘It wasn’t my first time,’ unquote. [¶] Whether or not he made such a statement and what it related to is for you to decide. The statement has been admitted solely as evidence of the defendant’s state of mind at the time he allegedly made the statement. You may not consider it for any other purpose.

“The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant’s out-of-court statements to convict him if you conclude that other evidence shows that the charged crime or a lesser included offense was committed.

“That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.”

Defendant insists the court’s special instruction was inadequate because it failed to specify that the statement could not be considered as evidence of his bad character or criminal disposition. We disagree. As the excerpt from above makes clear, the jury was instructed that the statement was admitted “solely as evidence of the defendant’s state of mind at the time he allegedly made the statement” and could not be considered “for any

other purpose.” Nothing more was required. (See *People v. Frye* (1998) 18 Cal.4th 894, 957 [a jury instruction is adequate where there is no reasonable likelihood the jury applied the instruction in a way that violated the Constitution]; see also *People v. Avila* (2006) 38 Cal.4th 491, 574 [the jury is presumed to follow the court’s instructions].)

Finally, we reject defendant’s reliance upon the United States Constitution as a basis for reversing the judgment against him. It is well-settled that “routine application of state evidentiary law does not implicate [a] defendant’s constitutional rights.” (*People v. Brown* (2003) 31 Cal.4th 518, 545.) Defendant presents no argument on appeal that there is reason in his case to stray from this general rule. Accordingly, we proceed to the next issue.

II. Sufficiency of Evidence on Count Two, Attempted Robbery.

Defendant’s remaining contention is that the evidence is insufficient to support his conviction for attempted robbery.⁸ The governing legal principles are well-established.

“Robbery is ‘the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.’ (§ 211.) . . . [A]n attempt to commit a robbery is [also] a crime, and is punishable as such under section 213, subdivision (b). . . . In order to constitute such an attempt, the prosecution was required to prove (1) the specific intent to commit robbery, and (2) an act — described in section 21a as a ‘direct but ineffectual act done toward its commission.’ ” (*People v. Watkins* (2012) 55 Cal.4th 999, 1018.)

Where, as here, the defendant challenges the sufficiency of the evidence supporting a finding of guilt, the reviewing court must examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which the jury could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-77.) “Substantial evidence” is defined as

⁸ Defendant moved for a new trial on the ground that the evidence was insufficient to support a guilty verdict on the attempted robbery count; however, the trial court denied this motion, noting that the jury was “in the best position to evaluate the credibility of the witnesses.”

“evidence which is reasonable, credible, and of solid value.” (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

A reviewing court must accept logical inferences the jury might have drawn from the circumstantial evidence. (*People v. Maury, supra*, 30 Cal.4th at p. 396.) ‘ “A reasonable inference, however, “may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.’ ” [Citations.]’ [Citation].)” (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1416-1417. See also *People v. White* (1969) 71 Cal.2d 80, 83 [“elements may be established by circumstantial evidence and any reasonable inferences drawn from such evidence”].) In determining whether substantial evidence exists, we do not reweigh the evidence, resolve conflicts in the evidence or reevaluate the credibility of witnesses. (*People v. Jones* (1990) 51 Cal.3d 294, 314; see also *People v. Cortes* (1999) 71 Cal.App.4th 62, 71.) “Although it is the duty of the [trier of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [trier of fact], not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. ‘ “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” ’ ” (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

Here, the record, viewed in a light most favorable to the judgment below, reveals the following evidence supporting defendant’s conviction on the attempted robbery count. Wyatt, the prosecution’s key eyewitness, testified that, after the victim continued to antagonize defendant during their altercation, defendant stated, “I should break your pockets,” which, according to Wyatt, is slang for “give me what’s in your pockets” or “show me what’s in your pockets.” In response, the victim said, “Giovanni Bey don’t break his pockets for nobody.”

Demus, in turn, testified at trial that he did not recognize defendant and that he did not recall much about the night in question. However, at the preliminary hearing, Demus testified that defendant appeared familiar to him, may have been in Wyatt's garage on the night in question, and may have said to the victim "either something about the pockets or what you got on you." Supporting this earlier testimony, the prosecution played for the jury an excerpt from Demus's police interview in which he stated that defendant pulled out a gun "after he tried to rob [the victim]." Demus also told police that "he was like . . . give me what's in your pockets then. Then, um, . . . he's [Bey] like nah, I ain't about to give you what's in my pocket or something like that." Finally, Demus told the officers that, "after . . . [defendant] was like give me – give me what's in your pockets or whatever . . . that's when . . . things got more intense."

Likewise consistent with the prosecution's theory, Officer Kirk Sullivan testified that, during one of his interviews with Moran in August 2010, Moran told him that "[the victim] said, uh, fucking, um, break your pockets or something like that." Officer Kirk Sullivan also testified that, when he first interviewed Moran, the witness claimed not to recall defendant saying, "break your pockets."⁹

In the face of this record, defendant nonetheless challenges the evidence as insufficient, reasoning that the witnesses' testimony was "divergent" with respect to whether he commanded the victim to, "break your pockets." Defendant also argues that the phrase, "break your pockets," could mean several different things, and it is unclear in his case that it was intended to convey his intent to rob the victim.

We disagree with defendant's arguments. Two eyewitnesses – to wit, Demus and Moran – independently stated that defendant instructed the victim to "break your pockets" and pulled out his firearm. Similarly, Wyatt testified that defendant told the victim, "I should make you break your pockets." Wyatt also explained that this phrase is commonly used to mean, "give me what's in your pockets," and when defendant told it to the victim, the victim responded: "Giovanni Bey don't break his pockets for nobody."

⁹ Subsequently, at trial, Moran again said he did not recall defendant telling the victim to empty his pockets.

Further, both Demus and Moran indicated to the police their belief that defendant, with these words, was indicating his intent to rob the victim.

During deliberations, the jury requested to review the witness testimony regarding, “break your pockets.” The jury was also instructed on the topics of both witness credibility and evidentiary conflicts, among others. Thereafter, the jury found that defendant committed attempted robbery.

On this record there is no basis to disturb the jury’s decision. As stated above, on appeal, we presume the jury followed the court’s instructions when reaching its verdict. We also presume in support of the judgment the existence of every fact the trier of fact could have reasonably deduced from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 916.) The law is quite clear that, “ ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] 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.) Here, based on the record set forth above, there is indeed a hypothesis, supported by substantial evidence, by which the jury could have properly found against defendant on the attempted robbery count: Defendant commanded the victim to “break your pockets,” evidence of his intent to commit robbery, and then directed a .22 caliber pistol towards him, evidence of an act by defendant in furtherance of this intended robbery. No further showing is required. (*Id.* at p. 358 [“Where the circumstances reasonably justify the trier of fact’s findings, a reviewing court’s conclusion the circumstances might also

reasonably be reconciled with a contrary finding does not warrant the judgment's reversal"].¹⁰ The judgment must stand.

DISPOSITION

The judgment is affirmed.

Jenkins, J.

We concur:

McGuinness, P. J.

Pollak, J.

¹⁰ Given this conclusion, we need not address the People's alternative argument that, independent of the sufficiency of the evidence supporting attempted robbery, the judgment should nonetheless be affirmed based upon the evidence that defendant committed first degree murder (as opposed to felony murder).