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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT SILVAS,

Defendants and Appellants.

B242738

(Los Angeles County
Super. Ct. No. BA386790)

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie A. Swain, Judge. Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Albert Silvas (defendant) appeals from his conviction of attempted murder. (Pen. Code, §§ 664/187, subd. (a).)¹ Defendant contends there was insufficient evidence to support the jury's finding that the attempted murder was deliberate and premeditated. Defendant requests that this court strike the finding and remand the matter for a new sentencing hearing. We affirm the judgment.

BACKGROUND

Procedural history

The information charged defendant with the attempted murder of Manuel Garcia (Garcia) and further alleged defendant committed the crime willfully, deliberately, and with premeditation. In addition, it was alleged that a principal was armed with a handgun (§ 12022, subd. (a)(1)) and that defendant personally used and intentionally discharged a firearm (§ 12022.53, subds. (b) & (c)). Defendant was also alleged to have three prior prison terms (§ 667.5, subd. (b)). The jury found defendant guilty as charged and found true the allegations of willfulness, premeditation, and deliberation as well as the gun use allegations. On July 10, 2012, the trial court imposed a term of life in prison plus a 20-year enhancement for firearm use and three one-year enhancements for prior convictions, which defendant admitted. The trial court stayed the enhancements as to sections 12022, subdivision (a)(1), 12022.53, subdivision (b) and 667.5, subdivision (b) pursuant to sections 654 and 1385. Defendant filed a timely notice of appeal.

Statement of facts

At trial, the evidence showed that defendant and a man identified as Jose visited Garcia's jewelry store about noon on July 21, 2005. Defendant asked Garcia whether he repaired men's watches. Garcia said he did, and defendant and Jose left the store indicating they would return later in the day with a watch for Garcia to repair.

Defendant and Jose returned to the jewelry store approximately two and a half hours later. Defendant carried a loaded gun concealed in his waistband and a backpack.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Garcia let defendant and Jose into the store, and defendant handed Garcia a watch to inspect. As defendant showed Garcia the watch, Jose put on gloves, and defendant told Jose to hurry up and start what they had planned to do. Garcia instructed both men to leave the store. Defendant pulled the loaded gun from his waistband, pointed it at Garcia, and told him to be quiet, that defendant and Jose were going to take everything, and that if Garcia did not comply defendant would kill him. Garcia testified that defendant stated "Shut up, otherwise I'm going to kill you. We're going to take everything anyway."

Garcia told defendant that Garcia had already activated a silent alarm and that law enforcement was en route. Defendant told Garcia to shut up and that he did not care. Garcia repeatedly asked defendant to leave, to not shoot him, and said he did not want any trouble.

Defendant ran toward Garcia with his gun pointed. Garcia then grabbed a gun he kept nearby and pointed it at defendant. Defendant continued to point his gun at Garcia. The men were approximately six feet from each other.

Garcia briefly turned toward Jose who was breaking the glass display cases and defendant struck Garcia once in the head with defendant's gun. Garcia partially blocked defendant, but the blow caused Garcia to bleed from his head and to feel dizzy.

A struggle between Garcia and defendant ensued. Defendant then released Garcia and ran toward the store's entrance. When defendant was approximately 10 feet from Garcia, Garcia heard a gunshot coming from defendant's gun. Garcia then fired approximately nine shots at defendant. Defendant fell as he moved toward the store's exit, but continued to drag himself while firing multiple shots at Garcia.

The shooting lasted a few seconds, during which defendant communicated to Jose that he had been hit.

Defendant and Jose fled using a minivan they had parked around the corner from the store. The minivan had been reported stolen prior to the robbery.

Law enforcement officers arrived shortly after defendant and his companion had fled. They recovered the backpack and its contents, including a roll of duct tape and a

watch. Many blood samples were recovered from the scene along with 17 expended cartridge casings. Garcia gave the officers a description of each of the perpetrators. Nonetheless the case was not solved until it was reopened in 2011. At that time a criminalist examined the DNA taken from the blood samples and compared it to defendant, his fraternal twin brother and Garcia. Defendant's blood was found outside the store.

Defendant testified at trial that he and a man named Jose had attempted to rob Garcia's jewelry store on July 21, 2005. The robbery was Jose's idea and it was Jose who gave defendant the gun that he used after Garcia pulled his gun on the two robbers. Defendant denied both threatening or intending to kill Garcia or anybody else that day.

DISCUSSION

Defendant challenges the sufficiency of the evidence supporting the jury's finding that the attempted murder was premeditated and deliberate.

I. Standard of Review

When reviewing a criminal conviction for sufficient evidence, this court must examine the whole record in the light most favorable to the trial court's judgment. (*People v. Brady* (2010) 50 Cal.4th 547, 561.) The record must contain "substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid.*) Whether the jury relied on circumstantial or direct evidence to reach its conclusion, this court must make all reasonable inferences in favor of upholding the conviction. (*Ibid.*) "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]" (*People v. Robillard* (1960) 55 Cal.2d 88, 93, disapproved of on other grounds by *People v. Morse* (1964) 60 Cal.2d 631.)

"An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. [Citation.]" [Citation.]" (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) The appropriate test is

not whether the evidence proves guilt beyond a reasonable doubt, but whether the evidence supports the jury's conclusions. (*People v. Wright* (1985) 39 Cal.3d 576, 592.)

II. Substantial evidence of premeditation and deliberation

Defendant argues that the evidence indicates he premeditated and deliberated with respect to the attempted robbery, not the attempted killing. He contends that “[i]f the plan going in was to shoot Mr. Garcia there would have been no discussion after the gun was drawn and pointed.” Further, defendant asserts that he only shot his gun after he started to leave the store, which indicates “a rash, panicked, and unconsidered impulse rather than preexisting reflection, which lasted only a few seconds.”

Defendant's argument fails because there is no requirement that he consider the killing prior to entering the jewelry store. Premeditation and deliberation do “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. Bolin* (1998) 18 Cal.4th 297, 332.) Defendant brought a loaded gun to the jewelry store and threatened to kill Garcia if he did not follow defendant's instructions. From that the jury could reasonably infer that defendant rapidly decided to kill Garcia once Garcia brandished his own gun and threatened the success of the heist and defendant's life. The fact that defendant's decision happened within a matter of seconds is unavailing.

Moreover, by arguing that the evidence shows that defendant premeditated and deliberated with respect to the robbery, but not the attempted murder, defendant inappropriately urges this court to reweigh the evidence and draw a different conclusion from the jury. (See *People v. Whisenhunt* (2008) 44 Cal.4th 174, 200 [appellate courts do not reweigh evidence or question witness credibility].) As the reviewing court, we must assume the jury concluded that the circumstances under which defendant fired amounted to premeditation and deliberation. (*Ibid.*) The fact that the evidence may support a contrary finding does not merit reversal. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170.)

Finally, defendant contends that the jury's finding of premeditation and deliberation should be reversed because there is no evidence that defendant planned to kill, or had a motive to kill, Garcia. Defendant cites *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*) in which the California Supreme Court used evidence of planning, motive, and manner of killing to evaluate whether the record supported the jury's true finding of premeditation and deliberation. While probative of premeditation and deliberation, the *Anderson* factors "are descriptive and neither normative nor exhaustive, and . . . reviewing courts need not accord them any particular weight. [Citations.]" (*People v. Halvorsen, supra*, 42 Cal.4th at p. 420.) The *Anderson* factors merely help an appellate court determine whether the evidence supports an inference that the attempted killing "was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse. [Citation.]" (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) Nonetheless, this record contains sufficient evidence of all three *Anderson* factors. We discuss each factor.

A. Planning

Defendant argues the record contains no evidence that defendant planned to kill Garcia. Planning is evidenced by a defendant's actions prior to the attempted murder that indicate an intent to kill. (See *Anderson, supra*, 70 Cal.2d at pp. 26-27.) The jury may infer planning from evidence that defendant armed himself with a firearm prior to the attempted killing. (See, e.g., *People v. Caro* (1988) 46 Cal.3d 1035, 1050; see also *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224 [defendant's possession of a loaded gun at the time of the incident evidenced planning].)

Defendant brought a loaded gun into Garcia's jewelry store, which he used to facilitate the robbery. From this evidence alone, the jury could reasonably infer that defendant anticipated the possibility of killing Garcia and that defendant brought the loaded gun to kill Garcia if necessary to complete the robbery. However, here the jury also had Garcia's testimony that defendant told Garcia to "Shut up, otherwise I'm going to kill you. We're going to take everything anyway." Certainly this is a clear statement

of a plan to kill Garcia as part of the robbery. Either inference supports the jury's finding of premeditation and deliberation.

B. Motive

Defendant argues the record shows defendant had a motive to rob Garcia, not to kill him. Evidence of a defendant's prior interactions with the victim establish motive to kill (*Anderson, supra*, 70 Cal.2d at p. 27), and the jury could also infer motive from evidence that defendant attempted to kill to escape arrest. (*People v. Bloyd* (1987) 43 Cal.3d 333, 348.) Both types of evidence are present here.

Defendant visited the jewelry store and interacted with Garcia earlier on the day of the robbery. Based on this prior interaction, it is reasonable to conclude that Garcia could identify defendant to law enforcement and that defendant had a motive to kill Garcia to prevent Garcia from identifying him. Further, during the robbery, but before the shooting commenced, Garcia brandished his own gun and warned defendant the store alarm had been activated and law enforcement was on the way. Garcia also fired multiple shots at defendant as defendant attempted to exit the store, impeding defendant's safe escape. This evidence supports an inference that defendant was motivated to kill Garcia to escape arrest and to stop Garcia from interfering with defendant's escape from the jewelry store.

Defendant also asserts that his actions do not indicate a motive to kill Garcia to cover up the crime because he initially chose to hit Garcia in the head rather than shoot him. However, the jury could reasonably infer that defendant hit Garcia to incapacitate him, but because that action proved unsuccessful, defendant was motivated to use deadly force as a more effective means of incapacitating Garcia. The record supports the latter inference. A reversal is not merited simply because the record justifies an inference that supports a contrary finding. (See *People v. Livingston, supra*, 53 Cal.4th at p. 1170.)

C. Manner

The manner of the attempted killing also supports the jury's finding of premeditation and deliberation. Manner may be inferred from the nature of the attempted murder to the extent it suggests an intent to kill according to preconceived design. (*Anderson, supra*, 70 Cal.2d at p. 27.) Evidence that defendant fired a gun at close range

in a manner that could have inflicted a mortal wound supports an inference of intent to kill. (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) Defendant fired multiple shots at Garcia from a short distance away after he had already struck Garcia in the head with the gun causing substantial bleeding. Defendant did not hit Garcia with any of the gunshots, but poor marksmanship does not mitigate a defendant's culpable state of mind. (See *People v. Lashley* (1991) 1 Cal.App.4th 938, 945.) As such, the evidence of manner also supports a finding of premeditation and deliberation.

For the aforementioned reasons, we conclude that the record contains substantial evidence to support the jury's finding that the attempted murder was premeditated and deliberate.

III. Due process

Defendant argues that his due process rights under the Fourteenth Amendment of the United States Constitution were violated because his sentence was based on an unsupported finding of premeditation and deliberation. Because we conclude that there was substantial evidence to support the jury's finding of premeditation and deliberation, defendant's due process argument fails on its face. (See *People v. Jennings* (2010) 50 Cal.4th 616, 649.)

DISPOSITION

The judgment is affirmed.

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We concur: _____, J.
CHAVEZ

_____, P. J. _____, J.*
BOREN FERNES

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.