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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.

DARREN LYNDON BAPTISTE,

Defendant and Appellant.

B246023

(Los Angeles County
Super. Ct. No. VA119158)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael A. Cowell, Judge. Affirmed with directions.

Ronald White for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Darren Lyndon Baptiste (appellant) appeals from the judgment entered upon his conviction by jury of two counts of willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 664/187, subd. (a), counts 1 & 2),¹ two counts of assault with a semiautomatic firearm (§ 245, subd. (b), counts 3 & 4), and attempted second degree robbery (§§ 664/211, count 5). As to counts 1 and 2 the jury found true the allegations that a principal personally and intentionally used and discharged a firearm (§§ 12022.53, subds. (c) & (e)(1)). As to counts 3 and 4 the jury found true the allegations that a principal was armed with a firearm (§ 12022, subd. (a)(1)). The trial court sentenced appellant to a life term with the possibility of parole, plus 20 years for the firearm enhancement for count 1. The trial court sentenced appellant to a life term with the possibility of parole plus 20 years for count 2, and a two-year sentence on count 5, both to run concurrently with count 1. Pursuant to section 654, the court imposed and stayed sentence on counts 3 and 4. The trial court imposed various fines and court fees and awarded appellant 631 days of presentence custody credit.

Appellant contends there was insufficient evidence to sustain his convictions for attempted murder and attempted robbery. He also maintains the abstract of judgment must be corrected to reflect the trial court's oral pronouncement of judgment. We direct the trial court to correct the abstract of judgment but otherwise affirm the judgment.

FACTUAL BACKGROUND

Prosecution Evidence

On March 28, 2010, at approximately 1:00 a.m., Isidro Polanco ("Isidro") and his brother Rene Polanco ("Rene") went to Five Star Liquor to purchase "some drinks and some beer." Isidro's wife Vanessa Flores, and Rene's girlfriend Gloria Loya, stayed outside in their SUV while Isidro and Rene went inside the liquor store. Rene purchased some energy drinks and went outside to put them in the SUV. While Isidro was purchasing some beer, appellant, John Luna, and Anastacio Lopez stood behind him.

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

Isidro glanced at the three men and he heard appellant state “18th Street” and “green light.” Luna also stated “18th Street” and started displaying “gang signs.”²

Rene came back inside the liquor store to help Isidro “carry stuff out or see what he was up to.” Isidro purchased the beer and appellant and Luna followed Isidro and Rene out of the liquor store. Appellant told Isidro, “That fucking beer is going to go in my fucking trunk.” Isidro ignored him at first but then appellant told Isidro he “better make sure” to put the beer in appellant’s trunk. Isidro refused to do so. Appellant and Luna continued to state “18th Street” and demanded that Isidro hand over the beer. Appellant pointed to his car and told Isidro to put the beer in the trunk of appellant’s car. Isidro placed the beer in the trunk of his own SUV and walked to the driver’s side of his vehicle. Appellant stated, “You think this shit’s funny?” Isidro opened the driver’s door and attempted to get into his vehicle. Appellant approached Isidro and punched him in the face.³ Isidro punched appellant and knocked him into Lopez. Flores called 911. An audio recording of the 911 call was played for the jury and admitted into evidence. Flores told the 911 operator that three men attempted to steal Isidro’s beer and she provided a description of the assailants and their car.

Appellant was running around the cars screaming, “Get it. Get it.” Isidro and Rene chased appellant, Luna, and Lopez to their car. Luna got inside the car while Isidro and Lopez continued to fight. Rene grabbed appellant and attempted to pull him out of the car and detain him until the police arrived. Lopez, who was driving the car, ran over Rene’s left foot. As Lopez drove away, Luna fired from the front passenger side of the car five to six gunshots at Isidro and Rene.

Los Angeles County Deputy Sheriff Jody Napuunoa responded to the Five Star Liquor location and interviewed Isidro and Rene. Isidro and Rene told Deputy Napuunoa that they went to the liquor store to purchase beer. They were approached by one

² Luna and Lopez were members of the 18th Street criminal street gang.

³ Isidro received a split lower lip that required two stitches.

African-American and two Hispanic males who informed them it was 18th Street territory. As Isidro placed the beer in his SUV he was punched by the African-American male and a fight ensued between the three men and Isidro and Rene. The African-American man was wearing a bandana, and during the fight he stated “Grab the piece. Grab the piece.” The three men got into their vehicle, drove away, and fired approximately six gunshots at Isidro and Rene. Deputy Napuunoa collected six .40-caliber shell casings and a black bandana at the scene.

Detective Dan Liecht was a veteran of the Operation Safe Streets Unit of the Los Angeles County Sheriff’s Department. He viewed surveillance video from the cameras at Five Star Liquor and identified John Luna from the video based in part on his gang tattoos. Appellant lived “right across the street” from Luna. DNA consistent with appellant’s DNA was found on the bandana that was recovered at the scene by Deputy Napuunoa. Lopez was arrested and the car and firearm used in the shooting were discovered in a search of his residence. The surveillance video from the liquor store which showed the altercation as well as Luna firing the gun from the vehicle was admitted into evidence and played for the jury.

Defense Evidence

Eathan Baptiste, appellant’s brother, testified that on March 27, 2010, he was “hanging out” all day with appellant. Later that night appellant left the house to go to the store with John Luna. Approximately 20 minutes later, appellant called Eathan and asked Eathan to pick him up. Appellant appeared to be in shock “like disbelief” when Eathan picked him up.

DISCUSSION

I. Substantial Evidence Supported Appellant’s Convictions for Attempted Murder and Attempted Robbery

Appellant contends that insufficient evidence supported his convictions for the two attempted murders and the attempted robbery.

When a criminal conviction is challenged as lacking evidentiary support, “the court must review the whole record in the light most favorable to the judgment below to

determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We do not reweigh the evidence and will not reverse a judgment even if a different verdict could reasonably have been reached. (*People v. Proctor* (1992) 4 Cal.4th 499, 529.) The testimony of a single witness is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

A. Attempted Murder

Appellant was convicted of two counts of willful, deliberate and premeditated attempted murder under the theory that he aided and abetted Luna.⁴ Appellant contends there was no evidence that Luna had a specific intent to kill Isidro and Rene because “[i]f there had been an intent to kill, the two brothers would have been killed or shot.” Appellant concedes the bullets were fired in the direction of the Polancos but argues that they were not carefully aimed because Lopez did not stop the car and Luna did not carefully aim the gun.

“Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.” (*People v. Lee* (2003) 31 Cal.4th 613, 623.) ““There is rarely direct evidence of a defendant’s intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant’s actions. [Citation.]”” (*People v. Smith* (2005) 37 Cal.4th 733, 741.) Although reasonable minds may differ as to whether a defendant had the intent to kill, “[o]ur role is to determine the legal sufficiency of the found facts and not to second guess the reasoning or wisdom of the fact finder.” (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946.)

⁴ The prosecutor argued to the jury “[appellant] is guilty through the aiding and abetting theory” and the trial court instructed the jury on aiding and abetting principles.

In the present case, there was sufficient evidence from which a rational juror could have found beyond a reasonable doubt that Luna harbored the requisite specific intent to kill Isidro and Rene. The jury viewed a surveillance video that showed Luna firing the shots at Isidro and Rene from the car driven by Lopez. Rene testified that within seconds of the car driving off he heard the gunshots. Isidro testified that the shots were fired from the car while it was “still on the little sidewalk” and had not yet reached the street. A rational jury could find that Luna intended to kill Isidro and Rene because he fired at them from close range immediately following a physical altercation. The fact that Isidro and Rene escaped death because of Luna’s “poor marksmanship [does not] necessarily establish a less culpable state of mind.” (*People v. Lashley, supra*, 1 Cal.App.4th at p. 945.)

B. Attempted Robbery

Appellant specifically contends that insufficient evidence supported his attempted robbery conviction because “there was never any attempt to take the property (the beer) from either men” and “no force was used to attempt the robbery.”

“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.) An attempted robbery requires the specific intent to commit robbery and a direct yet ineffectual act that went beyond mere preparation toward its commission. (*People v. Lindberg* (2008) 45 Cal.4th 1, 24.) A defendant’s intent is rarely susceptible of direct proof, and may be inferred from the facts and circumstances surrounding the offense. (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207–1208.) Although a definitive test has proved elusive, courts have long recognized that “[w]henver the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt.” (*People v. Anderson* (1934) 1 Cal.2d 687, 690 [attempted robbery]; see also *People v. Dillon* (1983) 34 Cal.3d 441, 455 [attempted robbery].)

Substantial evidence supports the jury’s finding that appellant’s actions demonstrated a direct but ineffectual act toward accomplishing his intent to rob Isidro of

the beer. Appellant initially tried to intimidate Isidro into giving him the beer. Appellant, Luna, and Lopez stood behind Isidro as he purchased the beer. Appellant and Luna followed Isidro as he left the liquor store. Appellant told Isidro, “That fucking beer is going to go in my fucking trunk.” When Isidro ignored appellant, appellant pointed to his car and told Isidro he “better make sure” to put the beer in appellant’s trunk. Appellant repeatedly demanded that Isidro hand over the beer to him. Viewing the entirety of appellant’s conduct we find sufficient evidence from which a rational jury could conclude that appellant had gone beyond mere preparation to an attempt at committing the target crime.

Similarly, appellant’s contention that there was insufficient evidence that he used force or fear is without merit. The force necessary for robbery is subjective. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 946.) Thus, the requirement is that the victim, in fact be afraid. Here, referring to appellant, Luna, and Lopez, Isidro testified that he was “very afraid” because “you got three individuals that want something from me that I don’t plan on giving it up.” In any event, appellant resorted to physical violence to prevent Isidro leaving with the beer when he failed in his attempt to intimidate him. Appellant stated, “You think this shit’s funny?” and punched Isidro in the face when Isidro placed the beer inside his own SUV.

Substantial evidence supported appellant’s conviction for attempted robbery.

II. Abstract of Judgment

Appellant contends that his sentences for assault with a semiautomatic firearm in counts 3 and 4 must be stayed pursuant to section 654.

The trial court stayed appellant’s sentences on count 3 and 4 when it orally pronounced sentence, stating, “The court will, however, as to counts 3 and 4 invoke section 654, which the People concede.” However the minute order and the abstract of judgment reflect that appellant was sentenced to concurrent terms for counts 3 and 4.

Respondent agrees with appellant that the abstract of judgment must be corrected, as does this Court. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [when there is a discrepancy between the oral pronouncement of a sentence and the minute order or the

abstract of judgment, the oral pronouncement controls].) We therefore order the abstract to be amended.

DISPOSITION

The trial court is ordered to correct its minutes from the sentencing hearing of December 13, 2012, and the abstract of judgment, so that it properly reflects that the sentences on counts 3 and 4 were stayed pursuant to section 654. The trial court is further ordered to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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_____, J. *

FERNS

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ

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