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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ISLAS,

Defendant and Appellant.

2d Crim. No. B250095
(Super. Ct. No. BA363982)
(Los Angeles County)

An information charged appellant Jose Islas with attempted, premeditated and deliberate murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a)),¹ assault with a firearm (§ 245, subd. (a)(2)), and second degree robbery (§ 211).² It was alleged that in committing the attempted murder appellant personally used and discharged a firearm causing great bodily injury (§ 12022.53, subs. (b), (c), (d)) and that he committed all of the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)). Following a jury trial, appellant was convicted of attempted murder and assault with a firearm and acquitted of second degree robbery. The jury found that the attempted murder was

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

² A second count of second degree robbery was deleted by interlineation and dismissed by the trial court in the furtherance of justice. (§ 1385.)

willful, deliberate, and premeditated and that the firearm use and gang enhancement allegations were true.

Appellant was sentenced to state prison for an aggregate term of 47 years to life. On the charge of attempted murder, the trial court imposed an indeterminate term of 15 years to life plus 25 years to life for the firearm use enhancement. On the charge for assault with a firearm, the court imposed a consecutive term of two years plus five years for the gang enhancement. The court imposed a \$2,500 restitution fine (§ 1202.4, subd. (b)), a suspended \$2,500 parole revocation restitution fine (§ 1202.45), an \$80 court security fee (§ 1465.8), and a \$60 criminal conviction assessment (Gov. Code, § 70373). Appellant was awarded 825 days of presentence custody credits.

Appellant contends that there was insufficient evidence that he had the specific intent to kill the attempted murder victim, the trial court sua sponte should have instructed the jury on assault with a firearm as a lesser included offense of attempted murder with an enhancement for firearm use, and the court should not have allowed the jury to continue deliberating on count two after 11 out of the 12 jurors expressed their belief that further deliberations would be unlikely to produce a unanimous verdict. We affirm.

FACTS

Prosecution Evidence

On September 26, 2009, Luis Flamenco went shopping at JONS Market.³ On his way into the store, people in an apartment building across the street were talking through a window. At the time, he did not think they were talking to him and paid no attention. When Flamenco left the store, one of the men from the apartment building walked up to him, grabbed his shirt and told him to "pull it up." Three more people from the building approached Flamenco, and one of them grabbed his baseball cap and

³ The reporter's transcript inconsistently refers to this location as Jones Market, John's Market, and Jon's Market. We will refer to it as JONS Market. (See JONS International Marketplace, <http://www.jonsmarketplace.com/LA2.aspx>.)

knocked it on the ground. Flamenco took off running. He noticed another group of three people from the building crossing the street towards him.

Flamenco felt a blow to his head with a bottle. The group pursuing him tried to surround him, but he moved so they could not. He could no longer see his cap on the ground. Three passersby urged Flamenco to go with them so that the individuals pursuing him would not hit him. Flamenco heard one of the pursuers yell, "we see you again[,] [w]e're going to kill you." When Flamenco turned around, one of the pursuers gestured as if he had some kind of weapon under his shirt. Flamenco left with the passersby and went home.

The following evening, Flamenco went back to JONS Market with a friend. Inside, he saw appellant with a woman and child. Flamenco recognized appellant from the previous day's incident and from seeing appellant in the area around the apartment building almost every day, usually with the other individuals from the incident. Flamenco approached appellant to ask about his hat and to tell appellant that he did not want any problems with appellant and his friends.

Flamenco took a call on his cell phone and walked towards the door. Appellant walked outside, telling Flamenco he would be right back. A minute later, appellant returned with another man. Appellant said to Flamenco, "[t]his is my neighborhood[], and here in my neighborhood, you are not going to come and cause any shit and problems." Appellant and the other man started beating appellant. A third man joined in. Flamenco dropped his phone on the ground. The beating lasted about a minute. Afterwards, appellant could not find his phone.

On October 11, 2009, around 10:00 p.m., Flamenco was walking down James Wood Boulevard with a friend, Jose Flores, and an acquaintance, Francisco Garcia.⁴ It was very dark. Flamenco saw appellant ahead of them, hugging a woman. Appellant and the woman were walking in Flamenco's direction. Flamenco turned his

⁴ Flamenco knew Flores as "Fernando" and Garcia as "Uncle."

face away from appellant because he was scared that appellant would recognize him. Appellant yelled something at Flores in English.

After appellant and the woman passed Flamenco's group, Flores stopped and called out in Spanish to appellant, who was then about 15-50 feet away. Flores said something like, "hey, I want to talk to you," or "[c]ome, come," in a normal tone of voice.⁵ Flamenco continued walking. Appellant stopped. The woman tried to grab him to prevent him from turning around. He pulled out a gun from underneath his shirt, cocked it, pointed it at Flores's chest, and fired. The shot hit Flores in the shin halfway between the knee and ankle. Flores fell to the ground. Appellant then pointed the gun at Flamenco, but the woman yelled "no" and pulled him away. Appellant and the woman ran off.

Appellant admitted that he is a member of the Marasalvatrucha gang (MS-13). According to Officer Robert Chiu, the prosecution's gang expert, MS-13 claims as its territory the area around JONS Market and the section of James Wood Boulevard where the shooting occurred. Officer Chiu explained that territories are an important part of gang culture. Gang members usually have known each other for years and identify their gangs by the common turf where they grew up and continue to live. They protect this territory from outside gangs that try to take over. Reputation is important to gang members because a bad reputation might cause a gang member's rivals to think he is a coward. A gang member establishes his reputation by committing crimes for the gang. The more violent the crime, the more favorable the gang member's reputation will be. On cross-examination, appellant acknowledged that as an MS-13 member, he would deal with rival gang members in his territory violently—using a gun and killing them if necessary.

⁵ Both Flamenco and Roberto Garcia, an uninvolved witness to the shooting, testified consistently on this point. The account Flores gave at the preliminary hearing, which was read to the jury because he was found unavailable at trial, differed somewhat. According to Flores, he did not say anything to appellant. Appellant confronted Flores by yelling something in English and moving his hands. Flores stepped out of the way to let appellant pass by.

Defense Evidence

Appellant testified that on September 27, 2009, he went to JONS Market with his wife and son. Flamenco came in and followed appellant around the store, saying, "What a dumb shit. Now he's here. You don't remember me?" He appeared drunk. When appellant got to the cashier, Flamenco said to him, "I'm going to wait for you outside to break your face." As appellant was exiting the store, he saw Flamenco arguing with two other men. Flamenco approached appellant. Appellant accidentally knocked Flamenco down with his leg. One of the men with whom Flamenco was arguing pulled Flamenco and the other hit Flamenco in the face. Appellant did not hit Flamenco. Appellant did not see Flamenco the day before or take his hat.

Appellant claimed that at the time of the shooting he was at home with his wife, their children, and his wife's friend Tatiana Sandoval. He was downloading music by Andrea Bocelli. Sandoval provided corroborative testimony that appellant was home all day and was using the computer in the evening.

DISCUSSION

Sufficiency of the Evidence of Attempted Murder

Appellant contends that the evidence of attempted, deliberate and premeditated murder was insufficient to satisfy federal due process.⁶ In reviewing claims of insufficient evidence, we examine the entire record in the light most favorable to the judgment to determine whether there is substantial evidence—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. (*People v. Maciel* (2013) 57 Cal.4th 482, 514-515.) We do not reweigh the evidence or reassess the credibility of witnesses. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.) We accept the logical inferences that the jury might have drawn from the evidence even if we would have concluded otherwise. (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) If the trier of fact's findings

⁶ Appellant claims to challenge the sufficiency of the evidence of specific intent, but then discusses factors relevant to whether the evidence is "sufficient to sustain a finding of premeditation and deliberation." (*People v. Anderson* (1968) 70 Cal.2d 15, 25-26.) We consider the evidence of both, but focus on the latter.

are reasonably justified by the circumstances, the opinion of the reviewing court that a contrary finding might also reasonably be reconciled with the circumstances does not warrant reversing the judgment. (*People v. Jones* (2013) 57 Cal.4th 899, 961.)

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citation.] Attempted murder requires express malice, that is, the assailant either desires the victim's death, or knows to a substantial certainty that the victim's death will occur.' [Citation.]" (*People v. Houston, supra*, 54 Cal.4th at p. 1217.) The punishment for attempted murder is increased when the murder attempted was "willful, deliberate, and premeditated." (§ 664, subd. (a); *People v. Chiu* (2014) 59 Cal.4th 155, 162.) An attempted murder is premeditated and deliberate if it resulted from the defendant's ""careful thought and weighing of considerations"" rather than an ""unconsidered or rash impulse."" (*People v. Banks* (2014) 59 Cal.4th 1113, 1153.)

""[T]he 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.] [Citation.]" (*People v. Watkins* (2012) 55 Cal.4th 999, 1026; see also § 189 ["To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act"].) In reviewing the sufficiency of a finding of premeditation and deliberation, courts often consider evidence of the defendant's planning, motive, and method, although these factors "need not be present in some special combination or afforded special weight, nor are they exhaustive." (*People v. Booker* (2011) 51 Cal.4th 141, 173.)

Appellant's decision to arm himself with a gun that he concealed under his shirt as he walked around his neighborhood is substantial evidence that he planned to use it to kill any rival gang members whom he encountered. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1081-1082.) Moreover, the fact that appellant passed Flores on the street and then walked a short distance before turning around and shooting him strongly

indicates that he planned to surprise Flores with lethal force. (See *People v. San Nicolas* (2004) 34 Cal.4th 614, 658 [brief period between time when defendant saw victim in mirror and turned around to stab her was sufficient to show planning].)

Appellant argues that he had no motive to kill Flores because the two had no prior relationship. However, the gang expert provided evidence that gang members use violence to defend their territory in order to maintain their reputation. Appellant admitted that he would use violence and shoot to death any rival gang member who invaded his gang's territory. Just two weeks earlier, he and his friends beat up Flamenco for coming into their neighborhood and threatened to kill him if they saw him again. This evidence supports the inference that appellant believed Flamenco to be a rival gang member and, when he saw Flores walking with Flamenco, believed that Flores was also a rival gang member who needed to be killed. That appellant's motive was to murder rival gang members generally rather than Flores specifically is of no consequence. "[A] person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind." (*People v. Stone* (2009) 46 Cal.4th 131, 140.)

Appellant claims that the method by which he shot Flores—in the shin halfway between the knee and ankle—belies an intent to kill because "[a] shot directed towards this part of the body was not likely to cause death." The specific intent required to show attempted murder "does not require a showing that the intended act would be effective in completing the target crime." (*People v. Chandler* (2014) 60 Cal.4th 508, 517; see also *People v. Houston, supra*, 54 Cal.4th at p. 1218 ["That defendant may have fired once and then abandoned his efforts does not compel the conclusion he lacked the intent to kill in the first instance"].)

Notwithstanding the location of the gunshot wound, the jury could have inferred that appellant was shooting at Flores's chest but simply missed the mark. It was likely difficult for appellant to aim accurately given the dark conditions, the necessity of turning around to fire, and the distance between appellant and his target. When asked whether appellant was pointing the gun "down" or "up" at Flores, Flamenco thought it was "up." Roberto Garcia expected the bullet to hit Flores in the chest based on the

direction in which appellant was pointing the gun. A single shot directed at an area of the body likely to cause death can support an inference that the defendant had a deliberate intent to kill. (See *People v. Mendoza* (2011) 52 Cal.4th 1056, 1071.)

Although it is true, as appellant argues, that he could have accomplished his goals merely by shooting to injure rather than shooting to kill, it is beside the point. There was no reason for the jury to assume that appellant sought to inflict the minimum damage necessary to intimidate Flores and establish respect for his gang. To the contrary, the gang expert testified that by using more violence, a gang member earns a more formidable reputation. Thus, appellant had an incentive to kill rather than injure Flores.

We conclude that the evidence was sufficient to support the jury's findings that appellant had the specific intent to kill Flores and that his attempt to do so was willful, deliberate, and premeditated.

Instruction on a Lesser Included Offense

Appellant next contends that the trial court erred by not instructing sua sponte on assault with a deadly weapon (§ 245, subd. (a)(2)) as a lesser included offense of attempted murder when combined with a gun use enhancement. He concedes that assault with a deadly weapon is not a lesser included offense of attempted murder. (See *People v. Parks* (2004) 118 Cal.App.4th 1, 6.) He further concedes that under *People v. Wolcott* (1983) 34 Cal.3d 92, a gun use enhancement allegation in an accusatory pleading cannot be used to establish that assault with a deadly weapon is a lesser included offense of a charged crime. (*Id.* at pp. 100-102.) Nonetheless, he argues that we need not follow *Wolcott* because it has been undermined by a line of federal cases beginning with *Apprendi v. New Jersey* (2000) 530 U.S. 466. This court has previously rejected appellant's argument (*People v. Alarcon* (2012) 210 Cal.App.4th 432, 436-439), and we do so again here.

Deadlocked Jury

Appellant claims that the jury was deadlocked on the assault charge and should have been discharged rather than allowed to continue deliberating. "A trial court

faced with a reportedly deadlocked jury is permitted to declare a mistrial if, 'at the expiration of such time as the court may deem proper, it *satisfactorily appears* that there is *no reasonable probability* that the jury can agree.' (§ 1140, italics added.) A court must be permitted to undertake some inquiry about the state of deliberations to determine if, despite the report of a stalemate, there is a reasonable probability of future agreement." (*People v. Bryant* (Aug. 25, 2014, S049596) 60 Cal.4th 335 [2014 WL 4197804, *81].) The court should do so ". . . without coercion of the jury, so as to avoid displacing the jury's independent judgment "in favor of considerations of compromise and expediency." (*People v. Lucas* (2014) 60 Cal.4th 153, 718.) We review a claim that the jury was pressured into reaching a verdict for abuse of discretion, which depends on the particular circumstances of the case. (*Ibid.*)

Here, after deliberating for approximately 40 minutes on a Friday afternoon and four hours on the following Monday, the jury reached a verdict on counts one and three. It indicated on the verdict form for count two that it was hung on the assault charge. Both the prosecution and defense counsel agreed that the trial court should question the jurors about their reported inability to reach a verdict. The court polled each juror, asking whether he or she felt there was a reasonable probability that the jury could arrive at a verdict if deliberations continued. One juror answered affirmatively. The court sent the jurors back to deliberate.

After resuming deliberations, the jury requested a readback of testimony from two witnesses and a clarification on a jury instruction. The court then brought the jury back to the courtroom to read the verdicts on counts one and three, after which it sent the jurors home for the night. The next morning, after the jurors heard the requested testimony and received a response to their question, they resumed their deliberations and reached a verdict.

The trial court did not abuse its discretion in allowing the jury to continue deliberating until it reached a verdict. The jury had been deliberating only a short time when it announced it was deadlocked on count two. The jurors were not unanimous in feeling they had reached an impasse. Moreover, the fact that they then requested

additional information from the court once they resumed deliberations showed that they were deliberating in earnest.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

William C. Ryan, Judge
Superior Court County of Los Angeles

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