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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

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THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO GUERRERO,

Defendant and Appellant.

C069296

(Super. Ct. No.  
11NCR08658)

A jury convicted defendant Antonio Guerrero of conspiracy to commit robbery (Pen. Code, §§ 182, subd. (a)(1), 211, count I; unspecified section references that follow are to the Penal Code), attempted robbery (§§ 664/211, count II), and simple assault (§ 240, count III, lesser). Defendant's motion for acquittal was granted on counts of burglary (§ 459, count VI) and conspiracy to commit burglary (§§ 182, subd. (a), 459, count VII).

Defendant was sentenced to state prison for an aggregate term of five years in state prison: five years on count I, a concurrent term of 18 months on count II, and a concurrent term of six months on count III. Defendant was awarded 273 days' custody credit and 273 days' conduct credit.

Defendant contends there is insufficient evidence to support his conviction on either count I or count II. We disagree. Defendant further contends, and the Attorney General concedes, the sentences on counts II and III must be stayed pursuant to section 654. We will modify the judgment.

#### FACTS AND PROCEEDINGS

On an evening in November 2010, defendant and codefendant Enrique Madera, who is not a part of this appeal, approached R.H. and his girlfriend outside of their motel room. The duo walked by R.H. without speaking. A few minutes later, defendant reappeared and asked R.H. for the time. R.H. gave defendant the time; defendant thanked R.H. and left. After a few more minutes, Madera repeated what defendant had done: he approached R.H. and asked for the time. R.H. gave Madera the time.

Instead of walking away as defendant had done, Madera just stood there looking at R.H. and his girlfriend. Madera ignored R.H.'s request to move away from what was intended to be a private conversation. Instead, Madera moved closer to R.H. and said, "Where's my ten" or "Give me my ten." R.H. told Madera that he did not know him, did not owe him \$10, and did not know what he was talking about. Madera persisted and became more

aggressive. Defendant punched R.H.; R.H. grabbed defendant and started hitting him.

As R.H. defended himself against defendant, Madera started hitting R.H. as well, striking him eight or nine times. R.H.'s friends, D.B. and A.G., emerged from the motel and tried to push Madera away from R.H. Madera chased R.H., D.B. and A.G. with a knife. R.H.'s girlfriend observed blood on R.H. He soon realized that Madera had cut him on the head. Madera and defendant fled.

## DISCUSSION

### I

#### *Sufficiency of the Evidence*

Defendant contends there was insufficient evidence to convict him of attempted robbery or conspiracy to commit robbery.

"On appeal, the test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. [Citations.] Evidence meeting this standard satisfies constitutional due process and reliability concerns. [Citations.] [¶] While the appellate court must determine that the supporting evidence is reasonable, inherently credible, and of solid value, the court must review the evidence in the light most favorable to the prosecution, and must presume every fact the jury could reasonably have deduced from the evidence. [Citations.] Issues

of witness credibility are for the jury. [Citations.]” (*People v. Boyer* (2006) 38 Cal.4th 412, 479-480, disapproved on another ground by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) As this court has noted, before we can set aside a verdict for insufficiency of the evidence, “it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].” [Citation.]” (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

*A. There is Sufficient Evidence to Establish Attempted Robbery*

To establish the crime of attempted robbery, the prosecution must prove a specific intent to commit robbery and a direct overt act toward its commission. (*People v. Medina* (2007) 41 Cal.4th 685, 694; *People v. Dillon* (1983) 34 Cal.3d 441, 452-453, abrogated as stated in *People v. Chun* (2009) 45 Cal.4th 1172, 1186.) “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.)

Defendant argues there is no evidence that either he or Madera “made a demand for cash or any other property, and neither tried to take anything.” He claims Madera’s “drunken statement, ‘Where’s my ten,’ is far too ambiguous to constitute a robbery demand.”

Defendant misconstrues the evidence at trial. It is evident from the victim’s testimony, as well as his girlfriend’s, that they both believed Madera’s demand for his

"ten" was a demand for money. Neither knew what defendant was talking about because the victim did not know Madera and he did not owe Madera any money. Based on this testimony, the jury could reasonably infer that Madera was attempting to take money from the victim.

Defendant suggests the jury could also infer from this same testimony that he and Madera were "stupidly starting a drunken fight." The inferences reached by the jury, however, need not be the only ones the evidence support. (*People v. Wharton* (1991) 53 Cal.3d 522, 546; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) On appeal, all conflicts in the evidence are resolved in favor of the judgment and all reasonable inferences are drawn in its favor. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Neely* (2009) 176 Cal.App.4th 787, 793.) Accordingly, we find there was sufficient evidence to sustain the conviction for attempted robbery.

*B. There is Sufficient Evidence to Establish Conspiracy to Commit Robbery*

"The crime of conspiracy is defined in the Penal Code as 'two or more persons conspir[ing]' '[t]o commit any crime,' together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance thereof. [Citation.] 'Conspiracy is a "specific intent" crime. . . . The specific intent required divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the

conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements of that offense.' [Citation.]" (*People v. Swain* (1996) 12 Cal.4th 593, 600, italics omitted.)

Defendant argues there is no evidence of an agreement between he and Madera to rob R.H.

"'In proving a conspiracy, . . . , it is not necessary to demonstrate that the parties met and actually agreed to undertake the unlawful act or that they had previously arranged a detailed plan. The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. Therefore, conspiracy may be proved through circumstantial evidence inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy.'

[Citation.] 'The agreement in a conspiracy may be shown by . . . conduct of the defendants in mutually carrying out an activity which constitutes a crime.' [Citations.] "'The general test is whether there was 'one overall agreement' to perform various functions to achieve the objectives of the conspiracy. . . ." [Citation.]'" (*People v. Gonzalez* (2004) 116 Cal.App.4th 1405, 1417, disapproved on other grounds in *People v. Arias* (2008) 45 Cal.4th 169, 182.)

The conduct of defendant and Madera outside the motel support the inference that defendant and Madera conspired to rob R.H. Together, defendant and Madera walked past R.H. and his

girlfriend. They each returned separately and asked R.H. for the time. Then, Madera made his demand and when R.H. refused, defendant returned to the scene and attacked R.H. The two fought R.H. and his friends, then fled the scene together. Madera brought a knife to the scene.

Again, on appeal, all inferences are drawn in favor of the judgment. (*People v. Rodriguez*, supra, 20 Cal.4th at p. 11; *People v. Neely*, supra, 176 Cal.App.4th at p. 793.) Based on this evidence, it was reasonable for the jury to infer defendant and Madera came to a mutual understanding they would rob R.H., and orchestrated their plan for doing so, prior to the attempted robbery.

## II

### *Section 654*

Defendant also contends and the Attorney General concedes, the count I conspiracy, count II attempted robbery and count III simple assault all involve the same course of conduct against the same victim, R.H. Thus, the imposition of sentence on count I requires that the sentences on counts II and III be stayed pursuant to section 654. (E.g., *People v. Deloza* (1998) 18 Cal.4th 585, 591-592.) We accept the People's concession.

We shall modify the judgment to stay imposition of sentence on counts II and III pursuant to section 654. We shall direct the trial court to correct its minutes to reflect section 654 stays on counts II and III and to prepare an amended abstract of judgment reflecting the correction and modification.

## DISPOSITION

The judgment is modified to stay imposition of sentence on counts II and III pursuant to section 654. As so modified the judgment is affirmed. The court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

\_\_\_\_\_ HULL \_\_\_\_\_, Acting P. J.

We concur:

\_\_\_\_\_ ROBIE \_\_\_\_\_, J.

\_\_\_\_\_ DUARTE \_\_\_\_\_, J.