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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO ORNELAS,

Defendant and Appellant.

D057631

(Super. Ct. No. SCD217689)

APPEAL from a judgment of the Superior Court of San Diego County, Lisa Foster, Judge. Affirmed with directions.

A jury convicted Francisco Ornelas of attempted premeditated murder (Pen. Code,<sup>1</sup> §§ 664/187, subd. (a); 189); mayhem (§ 203); assault with a deadly weapon and by means likely to produce great bodily injury (§ 245, subd. (a)(1)); and attempted robbery (§§ 664/211).

The jury found true enhancement allegations that the attempted murder was premeditated (§189), Ornelas personally used a deadly weapon (§§12022, subd. (b)(1);

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<sup>1</sup> All statutory references are to the Penal Code.

1192.7, subd. (c)(23)), and inflicted great bodily injury on the victim, who was not an accomplice (§§ 12022.7, subd. (a); 1203.075, subd. (a)). In separate proceedings, the court found true that Ornelas had a serious felony prior conviction (§§ 243, subd. (d); 667, subd. (a)(1); 668; and 1192.7, subd. (c)) and a strike prior (§§ 667, subds. (b)-(i); 1170.12 and 668).

The court sentenced Ornelas to an aggregate determinate term of nine years in state prison and an indeterminate term of life with parole.<sup>2</sup> The court stayed all other prison terms under section 654.

Ornelas's sole contention is that there was insufficient evidence that he acted with deliberation and premeditation; therefore, the attempted murder conviction should be reversed. We affirm the judgment.

#### FACTUAL BACKGROUND

On July 9, 2008, Ornelas rented a room at a San Diego motel that Mukesh Desai managed.<sup>3</sup> Ornelas complained of bedbugs and therefore Mukesh refunded him and he checked out of the motel. Ornelas returned the next day, requesting \$3,000 for treatment for bedbug bites his son had suffered. Mukesh gave him \$1,000. Ornelas returned to the

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<sup>2</sup> Although the court orally pronounced a determinate sentence of nine years and that is reflected in the minute order, the abstract of judgment states the determinate sentence is five years. The oral pronouncement of judgment controls over any discrepancy with the minutes or the abstract of judgment. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070.) We direct the trial court to amend the abstract of judgment to conform to its oral pronouncement.

<sup>3</sup> We refer to Mukesh Desai and his son Pratik Desai by their first names to avoid confusion, and not out of disrespect.

motel approximately one month later and Mukesh gave him \$100. Approximately six times afterwards, Ornelas telephoned the motel requesting more money from Mukesh, who refused the requests.

On November 13, 2008, at around 10:00 p.m., when Mukesh was showing a bedroom to potential guests, a man wearing a mask ordered the guests outside, closed the bedroom door and pointed a pair of scissors at Mukesh's chest, saying, "Give me the money or else I'll kill you." Mukesh was shaking, nervous and feared for his life. He recognized the voice as Ornelas's, and told him he had no money. Ornelas stabbed Mukesh on the forehead and chest, cutting off a portion of Mukesh's ear. Mukesh screamed for help and tried to run but Ornelas continued stabbing him.

Pratik heard the screams and tried to separate Ornelas from Mukesh. Mukesh managed to remove the mask and both he and Pratik saw Ornelas's face. The struggle continued in the parking lot, where Ornelas again stabbed Mukesh on his right arm. Mukesh pulled off Ornelas's sweatshirt and Ornelas ran away. Pratik saw his father was bleeding profusely, and called 911.

That night, Mukesh gave a copy of Ornelas's photo ID to police. Mukesh and Pratik identified Ornelas in a photo lineup the next day. Mukesh again identified Ornelas in a later photo lineup. Ornelas's DNA was found on a sweatshirt and tank top that were recovered at the scene.

Mukesh was hospitalized for three or four days and received treatment for injuries, including surgery on his arm. At the time of trial, Mukesh still suffered from hearing loss in his left ear and reduced movement in his fingers.

When arrested on December, 12, 2008, Ornelas told San Diego Police Detective Dewayne Glazewski about Mukesh's handling of the bedbug incident and Ornelas's subsequent returns and phone calls to the motel requesting more money. Ornelas denied going to the motel on November 13, 2008, claiming that had he spent the day and night with his girlfriend, Prisila Martinez, watching movies. Detective Glazewski testified he contacted Martinez, who said Ornelas had asked her to lie by saying he had spent the day and night watching movies with her. She refused to lie on his behalf. Martinez testified at trial accordingly.

The defense did not present any trial testimony or evidence.

## DISCUSSION

In challenging the sufficiency of the evidence supporting his conviction, Ornelas maintains that the totality of the evidence shows he intended to rob but not to kill Mukesh. He explains, "At most, the stabbing of Mukesh was, as the jury determined and the defense conceded, an assault with a deadly weapon in conjunction with an ineffectual attempted robbery that resulted in mayhem." He contends "the evidence shows an impulsive act by someone who wanted money coupled with a subsequent struggle where Mukesh was badly injured."

### I. *Standard of Review*

When sufficiency of the evidence is challenged on appeal our role in reviewing the evidence is limited. We do not reweigh the evidence and substitute our judgment for that of the jury. (*People v. Escobar* (1996) 45 Cal.App.4th 477, 481.) Instead, we must determine whether any rational trier of fact could find the defendant guilty beyond a

reasonable doubt. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) We view the entire record in the light most favorable to the judgment and presume the existence of every fact the trier of fact could reasonably deduce from the evidence in support of the judgment. (*People v. Abrego* (1993) 21 Cal.App.4th 133, 136.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) This court's authority begins and ends with a determination of whether any substantial evidence, disputed or not, supports the verdict. Thus, where the record discloses substantial evidence — that is reasonable, credible and of solid value — we accord due deference to the trier of fact. (*People v. Jones, supra*, 51 Cal.3d at p. 314.)

## II. *Applicable Law*

"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.) An intent to kill means express malice, which is the desire that one's act result in death or the substantial certainty that it will do so. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) "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." (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) "[A] defendant's statement of intention to kill a person has been found sufficient to prove intent to kill in the context of attempted murder." (*People v. Morales* (1992) 5 Cal.App.4th 917, 925-926.) "Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact. While reasonable minds may differ on the resolution of that issue, our sole function is to determine if *any* rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946.)

" ' "Generally, there are three categories of evidence that are sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method.

[Citations.] When evidence of all three categories is not present, 'we require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.' [Citation.] But these categories of evidence, borrowed from *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 [(*Anderson*)], 'are descriptive, not normative.' [Citation.] They are simply an 'aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' " ' " (*People v. Prince, supra*, 40 Cal.4th 1179, 1253.)

" 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The 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." ' ' " (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

### III. *Analysis*

Here, the evidence adduced to support the attempted murder conviction was that Ornelas announced his intent to kill Mukesh if he did not give him more money. The presence of the motel guests did not deter Ornelas from starting the attack, and he

persisted despite Mukesh's resistance and profuse bleeding or Pratik's intervention.

Ornelas carried out his intent by stabbing Mukesh multiple times with a pair of scissors, slicing his ear and inflicting other injuries requiring Mukesh's hospital stay and surgery.

Further, the jury reasonably could have concluded Ornelas exhibited consciousness of guilt by his flight and attempt to persuade Martinez to lie on his behalf. We conclude this evidence sufficed to support the conviction.

In reviewing the evidence to assess whether it supports the inference Ornelas acted with premeditation as opposed to rash impulse, we note Ornelas concedes "there was evidence of planning and motive, the first two *Anderson* factors." Proof Ornelas planned the attack is that he elected to go to the motel that night and bring along and use a mask to conceal his identity. He also was armed with a pair of scissors, which he used to stab Mukesh. Ornelas's motive was tied to Mukesh's refusal to give him more money for the bedbug incident. Ornelas concedes, "The evidence established that the motive for the assault on Mukesh [w]as that of robber [*sic*], an issue the defense conceded and the prosecution certainly didn't dispute."

With regard to the method of attack, Ornelas argues that "far from taking careful aim or stabbing according to some *preconceived design* as noted by *Anderson* and [other case law], the evidence disclosed that Mukesh had been attacked multiple times that included his forehead, his chest, his arm, and his ear, indiscriminately, almost in a blind rage with some if not most of the wounds occurring while [Mukesh] was attempting to get away and take flight." Even if the evidence regarding the method was weak, we note that "[i]n reviewing sufficiency of evidence claims, each case of necessity must turn on

its own particular facts." (*People v. Smith*, (2005) 37 Cal.4th 733, 745.) Further, "[e]vidence of all three elements is not essential, however, to sustain a conviction." (*People v. Edwards* (1991) 54 Cal.3d 787, 813.) Rather, "[t]hese three categories are merely a framework for appellate review; they 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.) Here, the evidence of planning was strong and, along with evidence of motive, sufficed to show Ornelas deliberated.

We reject Ornelas's claim that Mukesh received more attacks because he tried to stop Ornelas from escaping. The California Supreme Court has stated: "The existence of possible exculpatory explanations, whether they are simply suggestions not excluded by the evidence or even where they could be reasonably deduced from the evidence, could not justify this court's rejecting the determination of the trier of fact that defendant is guilty unless on appeal it 'be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the [trial court.]" (*People v. Redrick* (1961) 55 Cal.2d 282, 290.) As set forth above, sufficient evidence supports the jury's verdict.

DISPOSITION

The judgment is affirmed. The trial court is directed to amend the abstract of judgment to specify that Ornelas's determinate sentence is for a total of nine years, and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

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O'ROURKE, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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McDONALD, J.