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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BEREMUNDO REYES REYES,

Defendant and Appellant.

E052749

(Super.Ct.No. INF062190)

OPINION

APPEAL from the Superior Court of Riverside County. David B. Downing, Judge. Affirmed in part; reversed in part.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Beremundo Reyes Reyes is serving a life sentence with the possibility of parole, plus 25 years to life, after a jury convicted him of torture (Pen.

Code, § 206, count 1)¹ and other charges for shooting a convenience store clerk in the leg during a robbery attempt. Defendant contends the torture conviction is not supported by substantial evidence that he acted with the requisite intent. As discussed *post*, we conclude substantial evidence supports the torture conviction. However, the parties agree that the conviction for attempted robbery (count 3) should be reversed because defendant was also convicted of completed robbery during the same course of conduct. Thus, we reverse the attempted robbery conviction but affirm the judgment in all other respects.

FACTS AND PROCEDURE

About 3:20 a.m., on May 24, 2008, defendant and his accomplice, Cameron Bell, entered a gas station convenience store. They were both wearing masks. Defendant pointed a gun at the clerk, and Bell told the clerk to get the money. The clerk attempted to open the cash register “many times,” about “30 times,” by punching in a four-digit code, but he was unable to do so because he was nervous. He kept saying, “Please don’t kill me.” The accomplice demanded money and also tried to calm the clerk. The clerk was “very nervous.” Defendant was “freaking out” and “getting a little frustrated because it wasn’t working out as he planned.” Defendant shot off one bullet to scare the clerk, which just made him more nervous. About 10 seconds later, defendant shot the clerk in the right leg. The clerk fell to the ground because he had lost his left leg in wartime. Defendant went behind the counter, crouched above the clerk pointing his gun at the clerk’s head, and kept screaming at the clerk to give him the money. Defendant

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

also screamed at his accomplice to “get the money.” The accomplice attempted to open the cash register but could not. The men left the store without taking anything from the cash register, but defendant took a pack of cigarettes. Defendant and his accomplice were in the store for about two minutes.

The clerk was in surgery for six hours. One of his leg bones was damaged, as well as some blood vessels. The clerk was in the hospital for 17 days, in a wheelchair for another two months, and used a walker for several more months. He never recovered the feeling in his right foot.

On December 30, 2008, the People charged defendant with torture (§ 206) in count 1, robbery (§ 211) in count 2, attempted robbery (§§ 664, 211) in count 3, assault with a deadly weapon (§ 245, subd. (b)) in count 4, and burglary (§ 459) in count 5. As to each count, the People alleged defendant personally inflicted great bodily injury. (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8).) As to counts 1, 2, 4 and 5, the People alleged defendant personally used a firearm. (§§ 12022.5, subd. (a), 1192.7, subd. (c)(8).) As to counts 1, 2 and 3, the People alleged defendant personally discharged a firearm causing great bodily injury. (§§ 12022.53, subd. (d), 1192.7, subd. (c)(8).)

On September 23, 2009, a jury convicted defendant on all counts and found each of the enhancement allegations to be true.

On January 15, 2010, the trial court sentenced defendant to life with the possibility of parole on the torture conviction and 25 years to life for the discharge of a firearm enhancement. The trial court stayed the sentences for each of the other convictions and enhancements pursuant to section 654. This appeal followed.

DISCUSSION

1. *Substantial Evidence Supports the Torture Conviction.*

Defendant argues the torture conviction should be reversed because the record does not contain substantial evidence to establish that he shot the victim with the requisite specific intent to cause “ ‘cruel and extreme pain and suffering’ ” for the purpose of extortion. As discussed *post*, we find the evidence more than sufficient to establish that defendant had the requisite intent to cause the clerk extreme pain and suffering for the purpose of persuading the clerk to open the cash register.

Our review of any claim of insufficiency of the evidence is limited. “ ‘ “When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.” ’ ’ ” (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) We must presume in support of the judgment the existence of every fact the trier of fact could have reasonably deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Before we may set aside a judgment for insufficiency of evidence, it must clearly appear that there is no hypothesis under which we could find sufficient evidence. (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1765.) This is quite a high bar for defendant to reach.

The crime of torture is defined in section 206: “Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section

12022.7 upon the person of another, is guilty of torture. [¶] The crime of torture does not require any proof that the victim suffered pain.” As section 206 indicates, torture has two elements: “ ‘(1) the infliction of great bodily injury on another; and (2) the specific intent to cause cruel or extreme pain and suffering for revenge, extortion or persuasion or any sadistic purpose.’ ” (*People v. Burton* (2006) 143 Cal.App.4th 447, 451-452.)

Here, the evidence is clear that defendant intentionally shot the clerk in the leg for the express, if misguided, purpose of persuading him to open the cash register.

Defendant entered the gas station convenience store, with gun drawn, while his accomplice instructed the clerk to get the money out of the cash register. Defendant first fired a warning shot when the clerk was too frightened to successfully open the register, and then shot the clerk in the leg. Even as the clerk lay on the floor, unable to stand on the injured leg, defendant continued to frantically urge him to open the register while pointing the gun at the clerk’s head.

Defendant further argues that the evidence is insufficient to show that he shot the clerk with the specific intent to inflict “ ‘cruel and extreme pain and suffering.’ ” In doing so, defendant compares the single, gratuitous gunshot to the leg that he inflicted on the clerk with the gruesome, sadistic and often methodical actions of defendants in the case law on this subject. Defendant also compares the injury he inflicted on the clerk with the horrific injuries inflicted on the victim in *People v. Singleton* (1980) 112 Cal.App.3d 418, the relatively slight punishment for which motivated proponents of the 1990 ballot proposition that enacted section 206. (See *People v. Jung* (1999) 71 Cal.App.4th 1036, 1044 (dis. opn. of Armstrong, J.)) While we agree that defendant’s

attack on the clerk here was not as lengthy, brutal, or coolly calculated as were some of the facts set forth in the relevant case law, sufficient evidence supports the jury's conclusion that the attack fulfilled each required element of the crime of torture. The evidence justified the jury's inference that defendant intended to inflict "cruel and extreme pain and suffering" on the clerk from the mere fact that defendant purposefully pointed a gun at the clerk's leg and pulled the trigger, and that he did this not in self defense, but as part of his efforts to bully the clerk into opening the cash register. This was no "explosion of violence" or "act of animal fury" (*People v. Mincey* (1992) 2 Cal.4th 408, 432), but part of a steady escalation of violence (first gunshot in the air, then gunshot to leg, then threat of gunshot to head) intended to persuade the clerk to cooperate by opening the cash register. A jury may infer from the circumstances that the defendant acted with the requisite intent (*People v. Misa* (2006) 140 Cal.App.4th 837, 843), which is what the jury did here.

2. *The Attempted Robbery Conviction Should be Reversed.*

Defendant argues, and the People agree, that his conviction for attempted robbery (for attempting to steal money from the cash register) should be reversed because it occurred during the same course of conduct as his conviction for completed robbery (for taking the pack of cigarettes). Both parties cite *People v. Bailey* (1961) 55 Cal.2d 514, *People v. Brito* (1991) 232 Cal.App.3d 316, and *People v. Irvin* (1991) 230 Cal.App.3d 180. We agree and reverse the attempted robbery conviction.

DISPOSITION

The judgment is reversed as to the attempted robbery conviction (count 3); the judgment is affirmed in all other respects.

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RAMIREZ
P. J.

We concur:

RICHLI
J.

KING
J.