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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.

JOSE FRANCISCO MENDEZ et al.

Defendants and Appellants.

E053116

(Super.Ct.No. FSB1001397)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster,
Judge. Affirmed.

David L. Kelly, under appointment by the Court of Appeal, for Defendant and
Appellant Jose Francisco Mendez.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and
Appellant Dustin Donald Smith.

I. INTRODUCTION

Defendant Jose Francisco Mendez appeals from his conviction of attempted murder (Pen. Code,¹ §§ 664, 187, subd. (a), count 1); residential robbery (§ 211, count 2); burglary of an inhabited dwelling place (§ 459, count 3); and assault with a deadly weapon (§ 245, subd. (a), count 4), with associated enhancements for inflicting great bodily injury (§ 12022.7, subd. (a)); a prior serious felony conviction (§ 667, subd. (a)(1)); and a prior strike conviction (§ 1170.12, subds. (a)-(d), § 667, subd. (b)-(i)). Mendez contends the evidence was insufficient to prove attempted murder, (2) the trial court erred in failing to instruct the jury on unanimity as to counts 1 and 4, and (3) his waiver of his constitutional rights as to his prior offense was not knowing, intelligent, and voluntary.

Defendant Dustin Donald Smith appeals from his conviction of the same counts as Mendez, plus receiving stolen property (§ 496, subd. (a), count 5), with associated enhancements for inflicting great bodily injury (§ 12022.7, subd. (a)) and for four prison priors (§ 667.5, subd. (b)). Smith contends the evidence was insufficient to prove attempted murder and the trial court failed to advise him properly before he admitted his prior convictions.

We find no prejudicial error, and we affirm.

¹ All further statutory references are to the Penal Code.

II. FACTS AND PROCEDURAL BACKGROUND

In April 2010, William Blackham was living in a friend's cabin in Twin Peaks. Blackham had a medical marijuana card, and he was growing about 100 marijuana plants in the cabin; the plants were about a foot and a half tall. He testified the marijuana was for his own use, and he was "pretty much a heavy user."

On April 5, 2010, Blackham was awakened by a knocking on the door at about 11:30 p.m. He looked out through a peephole in the door and saw a man wearing a jacket with a hood. The man said his car was broken down, and he asked to use Blackham's telephone. Blackham told him either that he did not have a phone or that his phone was out of minutes, and he told the man to go to the sheriff's office about a 20-minute walk away. The man kept knocking, and Blackham picked up a hammer and opened the door. When he did so, the man sprayed him in the face with Mace. The man "bull rushed" Blackham, rammed the door open, and kicked him.

Blackham described the man as being young with dark hair and blue eyes; about Blackham's own height (five feet eight inches tall); and having a medium build. Blackham identified Smith in court as the man who attacked him. However, Blackham had not been able to identify Smith in a photographic lineup in April 2010, and Smith has green eyes.

Blackham hit Smith in the head with the hammer and the two men started wrestling. Mendez entered the cabin and began hitting Blackham on the head with something like a brick. Smith got the hammer out of Blackham's hand. Several of Blackham's teeth were knocked loose and he was bleeding. He gave up struggling.

Blackham had met Mendez through a mutual friend and knew him as “JR.” Blackham recognized him during the struggle and said, “Oh, man, JR, you come to kill me[?]” Mendez appeared to be “really bummed out” that he had been recognized, and he yelled at Blackham to get on the ground. Mendez began to shove a piece of bamboo “up [Blackham’s] ass.” Blackham started struggling again, and Mendez pummeled and hit him again with a rock or brick.

Smith held Blackham while Mendez looped a piece of bale wire around his neck and started choking him. Defendants used more bale wire to tie Blackham’s hands behind his back. They hogtied him by wrapping the wire around his hands, feet, neck, and ankles, and dragged him about 20 feet across the room. Defendants gathered up Blackham’s wallet containing about \$120, a computer, identification, credit cards, car keys, cell phone, some tools, and his marijuana plants. Every time they passed Blackham, they hit him on the head again, and they stepped on him. Defendants left around 1:00 a.m., and Blackham heard them say they would come back to kill him. They left the front door open, although the outside temperature was only 28 degrees.

Blackham squirmed his way across the cabin, got some wire cutters, and managed to cut the wire holding his neck to his ankles. Because his hands were still bound behind his back, he was unable to cut the other wires; one of the wires around his neck had been attached to something in the house so he could not get out.

At sunrise, Blackham sat by the open door of the cabin and yelled for help. A road worker finally heard him and summoned assistance. At 10:37 a.m., a sheriff’s deputy found Blackham leaning in the doorway of the cabin, bleeding from the head and

screaming or moaning in pain. His wrists were bound behind his back with bale wire and a leather belt, his ankles were bound together, and he had bale wire wrapped around his neck. Blackham first told the deputy that he did not remember what had happened, and then said two men had come to the house, told him their vehicle was broken down, and robbed him. Blackham said he knew one of his assailants as JR.

Paramedics cut the wire off Beckham and transported him to the hospital. While en route, he told the paramedics that two men had broken into his home and assaulted him, including hitting him in the head with a brick. Blackham had multiple lacerations to his face and head; his face was swollen, and his right eye was swollen shut. He had scratches and cuts up and down his legs and a red mark on his buttock. After the bale wire was removed, his hands remained swollen for several days. Multiple lacerations to his head were stapled and other wounds were sutured. He was suffering from hypothermia, with a body temperature of only 93.5 degrees. He was also in extreme pain. He spent 50 hours in the hospital.

A neighbor testified that he had seen an El Camino with distinctive body damage parked late at night at a turnout near defendant's house, and he saw two people walking nearby wearing black clothing with hoods. The next day, he saw deputies at the same location, and he described the vehicle to them.

Blackham told a detective that Mendez was one of the assailants, and he gave the detective Mendez's address. Detectives went to Mendez's house and arrested him. His truck had a strong odor of marijuana, and small pieces of marijuana plants were in the back. Mendez had injuries on the side of his face back into his hairline. The detectives

located an El Camino in the back yard of a house in Hesperia. The El Camino had blood stains on the outside and on the passenger seat headrest. Boxes containing marijuana plants were located in a travel trailer next to the El Camino. In addition, paperwork in Mendez's name was found in the trailer.

Smith's home was searched, and detectives found Blackham's wallet containing \$116, computer cable, and sport memorabilia binder with dried blood on it. When he was arrested, Smith had bruising on his face. Smith was interviewed, and the jury was provided with a transcript and audio recording of the interview. Smith said he did not know where the property found in his room had come from or why it had blood on it.

The jury found both defendants guilty of attempted murder (§§ 664, 187, subd. (a), count 1); residential robbery (§ 211, count 2); burglary of an inhabited dwelling place (§ 459, count 3); and assault with a deadly weapon (§ 245, subd. (a), count 4) and found true great bodily injury allegations (§ 12022.7, subd. (a)) as to each of those counts. In addition, the jury found Smith guilty of receiving stolen property (§ 496, subd. (a), count 5). Mendez admitted the allegations that he had a prior strike (§ 1170.12, subd. (c)(1), § 667(e)(1)) and a prior serious felony (§ 667, subd. (a)(1)). Smith admitted the allegations that he had four prior prison term felonies (§ 667.5, subd. (b)).

The trial court sentenced Mendez to 26 years in prison, comprising the aggravated term of nine years for count 1, doubled to 18 years under section 1170.12, subdivision (c)(1), and section 667, subdivision (e)(1); a consecutive three-year enhancement for the great bodily injury enhancement; and a consecutive five years for the prior serious felony

conviction. The court imposed a concurrent term for count 2 and stayed sentence as to counts 3 and 4 under section 654.

The trial court sentenced Smith to 16 years in prison, comprising the aggravated term of nine years for count 1, a consecutive three-year enhancement for the great bodily injury allegation, and four consecutive one-year enhancements for the prior prison terms. The court imposed concurrent terms for counts 2 through 5 and stayed the term for counts 3 and 4 under section 654.

III. DISCUSSION

A. Sufficiency of the Evidence

Both defendants contend the evidence was insufficient to establish attempted murder.

1. *Standard of Review*

When a criminal defendant challenges the sufficiency of the evidence to support his conviction, we ““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.”” [Citations.]” (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) The same standard applies when a conviction rests primarily on circumstantial evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

2. *Analysis*

“Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citation.]” (*People*

v. Superior Court (Decker) (2007) 41 Cal.4th 1, 7.) Direct proof of the defendant's intent is rare, but intent may be inferred from the defendant's actions and other circumstances. (See, e.g., *People v. Lee* (1987) 43 Cal.3d 666, 679 [intent to kill established when the defendant fired an automatic pistol at a pursuing officer and attempted to fire a second shot at close range, but the gun jammed].) However, specific intent to kill "cannot be inferred merely from the commission of another dangerous crime. For example, intent to murder cannot be inferred from commission of the crime of assault with a deadly weapon, and a charge of assault-with-a-deadly-weapon-with-intent-to-murder requires proof of specific intent to murder above and beyond proof of the assault with a deadly weapon. [Citations.]" (*People v. Belton* (1980) 105 Cal.App.3d 376, 380.)

At trial, the prosecutor argued the jury could infer an intent to kill from Blackham's testimony that defendants sprayed him in the face with Mace, struck him repeatedly in the head with a brick, hogtied him with bale wire, left him in his cabin with the front door open when the outside temperature was approximately 28 degrees, and threatened to come back and kill him. Defendants argue, however, that Blackham's testimony indicated that no intent to kill was formed. Defendants stopped beating him when he initially ceased fighting. They bound him with bale wire only after he resumed struggling when Mendez began prodding his rectal area with a bamboo stake. Even though the outside temperature was below freezing, he was inside the cabin. During the robbery, defendants kept telling him to shut up, and as they were leaving, Blackham

heard them say they would come back and kill him. Defendants argue that if they intended for him to die, they would have had no reason to threaten to return to kill him.²

Nonetheless, if the circumstances reasonably justify the jury’s findings—and here they undoubtedly do—our opinion that the circumstances might support a contrary conclusion does not warrant reversal of the judgment. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) Rather, we reverse only when it appears that “upon no hypothesis whatever is there sufficient substantial evidence” to support the conviction. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

In *People v. Cudjo* (1993) 6 Cal.4th 585, 630, the court held that a systematic and prolonged assault committed by multiple blows to the head of the victim who was bound and gagged was consistent with intent to kill. In *People v. Johnson* (1993) 6 Cal.4th 1, overruled on another ground in *People v. Rogers* (2006) 39 Cal.4th 826, 879-880, the defendant killed one victim by kicking her 10 to 12 times in the face and head. (*People v. Johnson, supra*, at p. 47.) The court held that “the methodical method of execution would preclude any inference the killing was accidental or unintentional. [Citations.]” (*Ibid.*) In *People v. Osband* (1996) 13 Cal.4th 622, the court observed that “[t]he brutality of the assault, which involved force far in excess of that needed to complete any of the other crimes committed against [the victim], also evince[d] an intent to kill. [Citation.]” (*Id.* at pp. 682-683.) In that case, the frail and elderly victim had been

² Smith also argues Blackham’s cabin was close enough to other residents and people that they could hear him yelling for help. The record in fact indicates that Blackham yelled for help for hours before road workers arrived in the area, apparently fortuitously, and summoned assistance.

severely beaten about the face and suffered broken ribs and facial bones in addition to being stabbed in her neck. (*Id.* at p. 654.) Here, although the murder was only attempted, not completed, the jury could reasonably conclude that the brutal and prolonged nature of the attack on Blackham demonstrated an intent to kill him. The fact that Blackham did not actually die does not detract from our conclusion.

B. Jury Instructions

Mendez contends the trial court erred in failing to instruct the jury on unanimity as to the attempted murder and assault with a deadly weapon charges. It appears that Smith has joined that argument. Mendez argues the prosecutor was required to select which act of violence constituted the crime of assault and which constituted the crime of attempted murder.

1. Additional Background

Mendez's counsel requested the trial court to instruct the jury on unanimity with CALCRIM No. 3500 because the prosecution was "relying on numerous blows to show attempted murder." The trial court held that the unanimity instruction was unnecessary because there was "one continuous course of action," and the jurors "d[id] not need to agree on the basis whereby the defendant is guilty."

2. Analysis

A defendant has the right to a unanimous jury verdict. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Thus, when a defendant commits multiple acts that could have been charged as separate offenses, but were not, and the jurors could disagree as to which act the defendant committed, the trial court should instruct the jurors that they must agree as

to the same act on which to base the defendant's conviction. (*People v. Beardslee* (1991) 53 Cal.3d 68, 92-93.) However, when the evidence shows only a single crime, but leaves room for disagreement as to how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the theory under which the defendant is guilty. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1024-1026.)

As the court explained in *People v. Dieguez* (2001) 89 Cal.App.4th 266, 275, “[N]o unanimity instruction is required when the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct. ‘The “continuous conduct” rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.’ [Citations.]”

Here, defendants did not assert any defense specific to each act. Rather, Smith's counsel argued he was wrongly identified and did not engage in any of the charged conduct, and there was no evidence of intent to murder. Mendez's counsel argued that Blackham lied about everything, and his identification of Mendez was fabricated. Because both defendants denied committing *any* of the criminal acts, “any juror believing one act took place would inexorably believe all acts took place” (*People v. Crawford* (1982) 131 Cal.App.3d 591, 599 [Fourth Dist., Div. Two].) Thus, the unanimity instruction was unnecessary to the jury's understanding of the case.

Mendez argues, however, that the jurors could have believed only part of the evidence, so that some jurors could have believed the choking constituted the attempt to kill, whereas, other jurors could have believed that leaving Blackham in freezing cold

was such an attempt. With respect to the assault with a deadly weapon count, he argues some jurors could have believed that choking Blackham with bale wire constituted use of a deadly weapon, whereas, other jurors could have believed beating him with a brick was the basis for the conviction.

This case is unlike *People v. Diedrich* (1982) 31 Cal.3d 263, in which the evidence showed discrete acts of bribery in two unrelated transactions, but the defendant was charged with and convicted of a single count of bribery. The court held that the trial court had prejudicially erred in failing to instruct the jury on unanimity because the “continuous crime” exception did not apply, and the defendant’s defenses differed as to each of the transactions. (*Id.* at pp. 282-283.) As the court explained in *People v. Zavala* (2005) 130 Cal.App.4th 758, “the continuous crime exception to the unanimity instruction requirement applies to two types of offenses: where the statutory offense contemplates a continuous course of conduct by a series of acts over a period of time [citation], or those crimes consisting of acts so closely connected in time or location to form a single transaction. [Citation.] In those cases, there is no need for a unanimity instruction as to individual acts within the course of conduct, because the jury need only agree on whether the defendant committed acts the net effect of which constitutes the statutory offense. [Citation.]” (*Id.* at p. 769.)

Here, the acts that formed the basis for the charges formed a single transaction, as the trial court recognized when it stayed punishment for count 4 under section 654. We conclude there was no error in the trial court’s instructions to the jury.

C. Waivers of Rights

1. Additional Background

After the prosecution rested its case, the trial court expressly advised defendants, “Now, Mr. Smith and Mr. Mendez, each of you have a right to testify. You each have a right to testify on your own behalf, to take the stand and to testify and to tell the jury your side of the story. You have a constitutional right to do that. You also have a right to remain silent and to stand on the evidence that’s been presented and basically not testify at all, just remain silent, and the jury will be instructed that they’re not to consider that adversely to you. [¶] You should be advised that if you take the stand and testify you’re waiving your right against self-incrimination and you’re subject to cross-examination which means that the district attorney can cross-examine you on any subjects that are germane to your testimony. At the same time you also—if you remain silent, she can’t comment on your refusal to testify and election to stand on your constitutional rights.” Both defendants confirmed they understood those rights, and their respective attorneys confirmed that both defendants had chosen not to testify, and the defense rested.

During closing arguments, the trial court asked Smith’s attorney if Smith was going to waive jury trial on his priors. The court stated, “It’s my understanding, Mr. Smith, that in talking with your attorney . . . that he has discussed with you whether or not you want to waive a jury for the—if it becomes necessary, for the bifurcated portion of the trial, that would be the priors. [¶] It’s my understanding and his discussions with me is that he indicated that’s what you were going to do, you were going to submit to a court trial. [¶] Is that correct?” Smith’s attorney replied that he was not

sure he had “discussed it completely” with Smith. He then stated: “But you understand you have a right to a jury trial. If the jury finds you guilty of anything, you have a right to a jury trial on the issue of your five prior one-year priors. You have no such idea of having this jury decide that, you want the Judge to decide that; is that correct?” Smith responded, “Right,” and stated that he agreed with that. The court then stated, “You understand you have a constitutional right to have the jury decide that portion. [¶] Do you understand that?” Smith responded, “Yes.” The court asked, “You want to waive that right and just submit it to the Court?,” and Smith replied, “If we get to that point.”

While the jury was deliberating, Mendez’s counsel informed the court that Mendez would waive jury trial on his prior as well. The court stated: “Mr. Mendez, you have the right to have a jury determine whether or not the jury—if in fact you’re convicted whether or not you committed the prior offenses that you’re charged with. You have a right to have the jury determine that. I don’t know what the jury is going to come in with this, whether they’re going to find you guilty or not guilty. [¶] If they do find you guilty, I have to know whether or not you’re going to waive your right to a trial and have this jury decide that issue or whether you’re going to waive it and allow the Court to decide it or admit the priors. I have to know that so I know whether or not I can excuse the jury. What is your intent?” The following colloquy took place:

“MR. MENDEZ: I’ll waive.

“THE COURT: Okay. You waive your right to a trial in that issue?

“MR. MENDEZ: Yes, sir.

“[Mendez’s counsel]: And I join in that.”

2. Analysis

Before a trial court accepts a defendant's admission of prior felony convictions, the court must advise him of the so-called *Boykin-Tahl*³ rights, which include the right against compulsory self-incrimination, the right to confrontation, and the right to a jury trial. (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1420.) In *People v. Mosby* (2004) 33 Cal.4th 353, the court distinguished between silent record cases, those in which the record "show[s] no express advisement and waiver of the *Boykin-Tahl* rights before a defendant's admission of a prior conviction" (*Mosby, supra*, at p. 361) and incomplete advisement case, those in which a defendant admits priors after being advised of the right to a jury trial, but not of the rights to confront witnesses or against self-incrimination. (*Mosby, supra*, at p. 365.)

As to silent record cases, the *Mosby* court held that it could not be inferred that a defendant had knowingly and intelligently waived the right to a jury trial as well as the rights to silence and to confront witnesses, and reversal was therefore required. (*Mosby, supra*, 33 Cal.4th at p. 362.) We reject defendants' arguments that this is a silent record case. Defendants were advised of their right to a jury trial on their priors and during trial had expressly been informed of their rights to confront witnesses and to remain silent.

As to incomplete advisement cases, the *Mosby* court applied a totality of the circumstances approach to determine whether the defendant had knowingly and intelligently waived his rights. Under that approach, the court considers the actual

³ *Boykin v. Alabama* (1969) 395 U.S. 238, 243; *In re Tahl* (1969) 1 Cal.3d 122, 132.

advisements given, the defendant’s prior experience with the criminal justice system, and whether or not the defendant has just “participated in a jury trial where he had confronted witnesses and remained silent” (*Mosby, supra*, 33 Cal.4th at p. 365.)

The People concede that the trial court failed to inform defendants of each and every right before accepting their admissions to their prior offenses, but argue that under the totality of the circumstances, the advisements given were adequate, and defendants’ admissions were knowing and intelligent. We agree. As in *Mosby*, defendants had just undergone a jury trial where they confronted witnesses and exercised their rights to remain silent. Here, moreover, the trial court *expressly* advised defendants of their rights after the prosecution rested, and both defendants had extensive prior contacts with the criminal justice system. Under that the totality of the circumstances, defendants knowingly and voluntarily waived their constitutional rights.

IV. DISPOSITION

The judgments are affirmed.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

KING

J.