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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.

RODOLFO GUZMAN, JR. et al.,

Defendants and Appellants.

E053843

(Super.Ct.No. RIF10001986)

OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge.

Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant Rafael Diaz Morales.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant Rodolfo Guzman, Jr.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lynne G. McGinnis, and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION<sup>1</sup>

Defendant Rodolfo Guzman, Jr., with support from codefendant Rafael Diaz Morales, committed an armed carjacking and other crimes against three men. A jury convicted Guzman of nine criminal offenses: count 1, carjacking (§ 215, subd. (a)); count 2, vehicle theft (Veh. Code § 10851, subd. (a)); counts 4 through 6, false imprisonment by force (§ 236); count 7, criminal threats (§ 422) and counts 8 through 10, assault with a firearm (§ 245, subd. (a)(2).) The jury also found true the firearm allegations for counts 1 and 4 through 10. The jury convicted Morales of vehicle theft.

The court found true the allegations that Guzman had two prison priors. The court sentenced Guzman to a total prison term of 30 years. The court imposed a two-year sentence on Morales which, with credit for time served, was a paper commitment only.

On appeal, Guzman argues there was insufficient evidence on count 1 for the allegation of discharge of a firearm during the carjacking and the trial court committed constitutional error when it did not give an instruction on after-acquired intent regarding the discharge of a firearm. Morales argues the court abused its discretion in denying him probation. We reject defendants' contentions and affirm the judgment.

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

## II

### FACTUAL BACKGROUND

#### *A. Prosecution Evidence*

On March 26, 2010, Fernando Arias and his two friends, brothers Javier and Jose Cisneros, spent the evening at the Islas Maria's, a Corona restaurant, where defendants were also having dinner and drinking. Arias thought defendants were drunk. Arias had parked his 2007 Chevrolet Silverado truck in the restaurant parking lot near the dumpster.

Defendants left the restaurant about 8:30 p.m. When Arias and the Cisneros brothers left about five minutes later, defendants were engaged in some activity near the truck's passenger side. Arias asked what defendants were doing and Guzman replied, "Nothing, taking a piss." The ground, however, was dry. Arias asked defendants to step away from the truck so he could leave. Morales began acting crazily and warned Arias, "[you] don't know who [you are] messing with." Morales extended his hand toward Guzman, saying "[g]ive me that, give me that." Guzman told Morales to calm down. One of the defendants told Arias and the brothers to get in the truck.

After Arias and the brothers got in the truck, Guzman then ordered them out. Jose said Guzman threatened the three men with a gun. Guzman pointed the gun at the brothers on the truck's passenger side. Arias said he did not want any trouble but Morales argued with him. Morales blocked Arias's access to the truck and punched him in the face. Meanwhile, Guzman ordered the brothers to get on the ground and fired a shot in the air. The brothers were scared and complied.

After hearing the gunshot, Arias saw Guzman pointing the gun at him. Guzman warned Arias to get on the ground in three seconds or he would shoot. In mortal fear, Arias complied. Arias threw down the truck keys at Guzman's request. Guzman took the keys and kept his gun trained on the three men, threatening to shoot them, as defendants got in the truck. Morales drove the truck away at a high speed. Arias called the police. The jury was shown a surveillance video of the events.

The police recovered the truck at a Riverside location about 10 minutes away from the restaurant. The truck had been damaged in a collision. Defendants were hiding in a garage two blocks away. Morales was so drunk he had to be assisted at a curbside lineup. Arias identified both defendants. The gun used by Guzman in the carjacking was not found.

#### *B. Defense Evidence*

Morales testified he and Guzman had been drinking all day. Morales did not remember going to the restaurant. He only recalled being at his uncle's house and then waking up in jail.

Morales's uncle testified that Morales, Guzman, and a woman came to his house between 5:00 and 6:00 p.m. Morales was very drunk before they all left to go to the restaurant. Morales was so drunk he had trouble eating. The uncle had never seen him that drunk. The uncle thought Guzman was sober. At one point, when the uncle went outside to use his phone, he saw Guzman and Morales drinking beer but the uncle did not see Morales again that night.

In a police interview at the scene, the Cisneros brothers described how defendants had been fiddling with the door latch or doing something on the passenger side of the truck. But they did not mention Morales saying to Guzman, “[g]ive me that.” They also did not say Guzman pointed a gun at them as the truck drove off.

### *C. Rebuttal Evidence*

Javier testified Morales directed them to get in the truck before Guzman pulled out the gun. Morales appeared serious and spoke in an angry tone. Javier remembered Morales saying, “[g]ive me that.”

## III

### DISCHARGE OF FIREARM DURING CARJACKING BY GUZMAN

Guzman contends there was not sufficient evidence to support the gun enhancement allegation as part of count 1, the carjacking offense. At trial, defense counsel conceded that Guzman was guilty of carjacking but denied that Guzman had formed the intent to commit a carjacking at the time he fired the gun. (§ 12022.53, subd. (c).) Guzman contends the witnesses offered so many different, inconsistent versions that the only reasonable inference was that Guzman fired his gun to break up a fight or argument and that taking Arias’s truck was an afterthought.

In evaluating a claim based on sufficiency of evidence, the appellate court must defer to the jury’s findings on issues of credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Even if the evidence could reasonably support a different finding, it is not rendered insufficient. (*People v. Frausto* (2009) 180 Cal.App.4th 890, 897.) Any discrepancy in the testimony is resolved by the jury. (*People v. Watts* (1999) 76

Cal.App.4th 1250, 1259.) The reviewing court disregards contrary or equivocal evidence. (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1316.)

A specific intent to commit the carjacking was not an element of the firearm enhancement. Instead, the prosecution only had to prove that defendant intentionally discharged the gun in committing the offense. (§ 12022.53, subd. (c); CALCRIM No. 3148.) The phrase “in the commission of” for purposes of weapon-use enhancement statutes must be read expansively and broadly construed: “[T]he discharge of a gun before, during, or after the felonious act may be sufficient if it can fairly be said that [it] was a part of a continuous transaction.” (*People v. Frausto, supra*, 180 Cal.App.4th at p. 902; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007.) The gun use may aid in committing a crime and intimidating a victim. (*Masbruch*, at pp. 1012-1013; *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1053, 1069.)

On this record it is undisputed that Guzman fired his gun into the air before ordering the victims out of the truck and onto the ground and demanding the keys to the truck. In fact, firing the gun was instrumental to accomplishing the carjacking because it persuaded the terrified victims to leave the truck, lie on the ground, and relinquish the truck keys.

Substantial evidence showed that Guzman fired the gun and committed the carjacking as part of a continuous transaction. He fired his gun to insure their compliance. Guzman ordered the victims to get out of the truck so he could steal it. Because Guzman discharged the gun to facilitate commission of the carjacking, we reject his claim for insufficient evidence.

In a related claim of instructional error, Guzman asserts the court failed to modify CALCRIM No. 3148 to instruct the jury that Guzman did not discharge a firearm within the meaning of section 12022. 53, subdivision (c), if he did not form the intent to take the truck until after firing the gun. Guzman makes this argument without citing any authority that is specifically relevant to the proper instruction for a gun enhancement allegation. A trial court must only instruct on the general principles of law relevant to the facts of the case. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047; *People v. Valdez* (2004) 32 Cal.4th 73, 112, fn. 13.) As already discussed, specific intent to commit the underlying offense is not an element of an enhancement for personal discharge of a firearm. If the jury had been instructed as proposed by Guzman, it would have been an error. (*People v. Ashmus* (1991) 54 Cal.3d 932, 1004-1005.) Furthermore, because ample evidence established Guzman intended to steal the truck when he fired his weapon, any error in not instructing on after-acquired intent was harmless.

#### IV

#### DENIAL OF PROBATION FOR MORALES

The court's denial of probation is reviewed for an abuse of discretion which is arbitrary, capricious, or exceeds the bounds of reason. (*People v. Downey* (2000) 82 Cal.App.4th 899, 909; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) Otherwise, the reviewing court presumes the trial court acted properly. (*People v. Hubbell* (1980) 108 Cal.App.3d 253, 260.)

The probation report recommended that Morales, who was 28 at the time of the offense, should be placed on a three-year grant of formal probation. Morales was born in

Mexico and came to California when he was a toddler. He is a legal resident of the United States. He lived with his parents and was employed as a heavy machine operator, earning \$4,800 a month. He drank alcohol regularly. He had a negligible criminal history. He expressed remorse for his crime although he claimed to have been very drunk. He expressed concern about the effect of a conviction on his immigration status.

Arias described the trauma he had suffered and requested \$1,000 as compensation for his insurance deductible.

The probation report stated the factors supporting a grant of probation were Morales's willingness and ability to comply with probation, the serious adverse collateral consequences, and his remorse. (Cal. Rules of Court, rule 414(b)(3), (4), (6) & (7).) The factors supporting a denial of probation were the comparative seriousness of the crime, the infliction of physical or emotional injury, the monetary loss to the victim, defendant's active participation, and the criminal sophistication or professionalism demonstrated in the execution of the crime. (Cal. Rules of Court, rule 414(a)(1), (4), (5), (6) & (8).)

The aggravated sentencing factors were the planning, sophistication, or professionalism of the crime and the attempted or actual taking or damage of great monetary value. (Cal. Rules of Court, rule 421(a)(8) & (9).) The mitigating sentencing factors were that defendant had an insignificant criminal record. (Cal. Rules of Court, rule 421(b)(1).)

The probation officer concluded: "Taking into account the defendant's lack of a criminal record, the notion that he was a contributing citizen, his apparent problem with

alcohol, and his remorse and empathy toward the victim, probation supervision appears more appropriate.”

At the sentencing hearing the court commented that it was surprised at the recommendation for probation: “[T]his was a much more serious case than run-of-the-mill grand theft auto. [¶] This was not a person using a slide hammer stealing a car in the absence of any victims around. This was an actual taking of the vehicle from the presence of the owner and other individuals. And even though [defendant] was not found guilty of any of those other crimes, he certainly participated. . . . [¶] Moreover, the Court found that [defendant] was less than candid when he testified. . . . [¶] . . . [¶] . . . But this certainly could have been a much more significantly dangerous incident, obviously, if the gun had been used in any way . . . . [Defendant] certainly could have hit a pedestrian or a parked car containing an individual or a moving vehicle that contained an individual, that could have also made it more serious as well. [¶] So this is not the run-of-the-mill kind of vehicle theft case that the Court typically sees . . . this was a serious case, and the Court is going to treat it that way.” The court found the circumstances warranted denying the grant of probation and imposed a middle term of two years.

The trial court did not abuse its discretion by denying Morales probation. The truck was stolen after an armed confrontation with the owner. Morales helped initiate the incident and facilitated the other crimes. The manner of the crime demonstrated sophistication. Additionally, the victim suffered ongoing trauma from the incident. The monetary loss included the \$1,000 deductible and the additional insurance payment of \$2,720.24. The mitigating factors were not sufficient enough to render the trial court’s

decision arbitrary, capricious, or unreasonable. (*People v. Downey, supra*, 82 Cal.App.4th at p. 909; *People v. Superior Court (Du)*, *supra*, 5 Cal.App.4th at p. 831.)

V

DISPOSITION

Guzman discharged a firearm during the commission of a carjacking. The trial court did not abuse its discretion in denying Morales probation. We affirm the judgment against defendants.

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CODRINGTON  
J.

We concur:

McKINSTER  
Acting P. J.

RICHLI  
J.