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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

OTILIO DIAZ RUIZ,

Defendant and Appellant.

F062315

(Super. Ct. Nos. F10906162 &
CF02901585)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick, Judge.

Barbara Michel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In 2004, appellant Otilio Ruiz was working as a security guard at Los Arcos Nightclub when Jane Doe, his former girlfriend, arrived. Jane Doe had ended the relationship two years earlier, but appellant became angry when he saw her dancing closely with an unknown man that night. Appellant shot both Jane and the man she happened to be dancing with, identified as John Doe. Both victims were wounded in the head but survived. John Doe did not know appellant or Jane; he simply asked her to dance that night and ended up being shot in the head.¹

Appellant was not arrested for the shootings until 2009. In 2011, after a jury trial, appellant was convicted of counts I and II, attempted murder of Jane and John (Pen. Code,² §§ 664, 187, subd. (a)); counts III and IV, assault with a firearm on Jane and John (§ 245, subd. (a)(2)); and count V, corporal injury to the mother of his child, Jane (§ 273.5). The jury found true enhancements as to count I, that appellant personally and intentionally discharged a firearm (§ 12022.53, subd. (c)); as to count II, that appellant personally and intentionally discharged a firearm causing great bodily injury to John (§ 12022.53, subd. (d)); as to counts III and IV, appellant personally inflicted great bodily injury to John (§ 12022.7, subd. (a)); and as to all counts, that appellant personally used a firearm (§ 12022.5, subd. (a)). Appellant was sentenced to 18 years plus 25 years to life.

On appeal, appellant contends there is insufficient evidence to support his conviction in count II for attempted murder of John Doe because he did not know John Doe and he did not intend to kill him. He also contends there is insufficient evidence to

¹ The information identified the shooting victims as Jane Doe and John Doe (they are not related). At trial, both victims testified under their own names. On appeal, however, both appellant and respondent have identified the victims as Jane Doe and John Doe, and we will also do so.

² All further statutory citations are to the Penal Code unless otherwise indicated.

support the great bodily injury enhancements as to count II, and argues that John Doe merely suffered a graze wound that did not satisfy the definition of great bodily injury. We will affirm.

FACTS

Jane Doe was 14 years old when she started dating appellant. She ran away from home, moved in with appellant, and had his child. Jane testified that she lived with appellant even though he had encountered legal trouble because he was living with a 14-year-old girl.

Jane testified that appellant was physically abusive toward her during their relationship, he hit her more than 10 times, and she was afraid of him. Appellant was jealous and threatened to harm Jane or her parents if she looked at another man or went somewhere by herself. Appellant also threatened to take their child to Mexico if she reported the assaultive incidents to the police.

Jane broke up with appellant when she was 16 years old. Jane was upset because appellant would not let her go to school and he was very jealous. Jane and the child moved away from appellant, she returned to school, and she did not contact him again.

On one occasion after they broke up, Jane was walking from school and realized that appellant had followed her to the bus stop. Another time at the bus stop, he emerged from the bushes and tried to grab her. On another occasion, in June 2001, Jane was carrying her daughter to a bus stop and appellant drove by. She continued walking. Appellant appeared behind her, slapped her face, and tried to hit her. Jane reported this incident to the police.

In August 2003, appellant was convicted of the infliction of corporal injury to a parent of a child, based on an assaultive incident he committed on Jane in February 2002.

A protective order was issued against appellant that prevented any contact with Jane, effective until August 2006.³

In 2004, at the time of the shooting in this case, Jane was 18 years old. In 2011, at the time of appellant's trial, Jane was 25 years old.

Appellant's new job

In 2004, appellant was sharing an apartment with Albert Merino. Merino worked as a security guard for a private company which provided guards for the Los Arcos Nightclub in Fresno. Appellant obtained a job with the same security company, using the name "Diego Sandoval."

On the evening of March 19, 2004, appellant and Merino reported to Los Arcos Nightclub in Fresno for their shifts as security guards. It was appellant's second time on the job and he was still being trained. Appellant and the other guards were dressed in identical uniforms and they did not carry guns. Merino had never seen appellant with a gun.

Jane arrives at Los Arcos Nightclub

Around 9:00 p.m. on March 19, 2004, just by happenstance, Jane and two girlfriends went to Los Arcos Nightclub for dancing. She was startled to see appellant enter the nightclub, wearing a security guard's uniform. She had no idea that appellant worked there.

Jane immediately told her girlfriends that appellant was there, and said she wanted to leave because she was afraid of him. Jane's friends refused to leave and assured her

³ At trial, appellant admitted that he went to jail because he was living with Jane when she was a minor, but claimed that he did not know she was 14 years old. Appellant denied that he threatened or hit Jane during their relationship. He admitted that he was convicted of committing corporal injury to Jane, but it was because "she passed me by with another person" while they were still living together. Appellant also admitted that after they broke up, he used to follow her as she walked home from school because he wanted to be with her.

that he would not do anything. Jane had to stay at the nightclub because she did not have another ride home.

Appellant leaves the nightclub

Merino testified that appellant approached him and said he was uncomfortable because his girlfriend was at the nightclub. Appellant asked to leave. Merino told appellant to call their supervisor.

Jose Rivera, the security company's supervisor, testified that appellant called him between 9:15 p.m. and 9:30 p.m. Appellant said his girlfriend was at the nightclub, he had problems with her, and it was probably better for him to leave. Rivera told appellant he could leave. Merino gave appellant the keys to his car, and Merino saw appellant drive away from the club.

In the meantime, Jane approached the security guard at the front door, and told him that she was concerned about appellant's presence. The security guard later told her that appellant had left the nightclub.

Appellant returns to the nightclub

Elizabeth Maciel was also working as a security guard that night, and she was stationed by the dance floor. She had seen appellant leave the nightclub earlier that evening. About an hour later, however, she saw appellant return. Appellant was still wearing his security guard's uniform, and Maciel thought he had been recalled to work.

Jane was sitting at a table with her girlfriends when she saw appellant inside the nightclub. Jane became nervous and told her friends that she was afraid. Her friends reacted by getting up and going to the restroom as soon as they saw appellant, and they left Jane alone at their table.

Jane remained at the table by herself for a few minutes. Appellant looked at her with a mean and angry face, similar to how he looked on previous occasions when he was angry at her.

Jane testified that a man approached her table and asked if she wanted to dance. Jane did not know this man and had never seen him before. Jane agreed to dance with him because she did not want to sit by herself, and she was afraid appellant was going to approach and talk to her.

Appellant fires the gunshots

Jane and the man, later identified as John Doe, went to the dance floor and danced together for a short period of time. The music was for a slow dance, and they held each other. There were other couples on the dance floor.

Elizabeth Maciel was still monitoring the dance floor. Maciel testified that appellant stood near the dance floor and seemed to be looking at the dancers. Maciel realized appellant was not on duty, and advised the security officer at the front door that appellant should remove his uniform to avoid confusion.

Maciel suddenly heard a loud popping sound and saw sparks from the dance floor. She heard a second pop and realized that a weapon was being fired. The two pops were fired fairly quickly together.

Maciel looked at the dance floor and saw appellant pointing a gun at Jane's head. Appellant was standing within three feet of Jane. Jane was still dancing with John Doe when the shots were fired. Maciel did not see appellant point the gun at John Doe.

Maciel testified everyone started to run from the dance floor. Maciel then heard more pops. Jane ran to Maciel and tried to hide behind her. Jane was crying and covered with blood. Appellant appeared in front of Maciel as Jane was hiding behind her, and he pointed a small black gun at Maciel. Appellant moved the gun from side to side and tried to aim it at Jane. Appellant told Maciel to move, but Maciel refused and continued to shield Jane. Appellant did not fire any more gunshots and he ran out of the nightclub.

Hortencia Garcia was at the nightclub with some friends, and also saw the shooting. Garcia testified that appellant approached Jane and John while they were

dancing. Appellant stood behind the couple, appeared to say something to them, and the couple turned to face him. He was four to five feet away from them.

Garcia testified appellant raised his right hand and pointed something shiny at Jane. Jane and John were standing next to each other, and appellant was right in front of them. John raised both his hands in front of his body. Garcia heard a pop, and Jane ran away from appellant and passed Garcia's table. Garcia did not notice what happened to John.

Garcia testified that appellant ran after Jane and he was holding a gun. Garcia heard additional pops and one of the dance floor lights shattered. Garcia saw Jane hide behind Maciel, and then appellant ran out the front door.

Jane Doe's testimony about the gunshots

Jane testified that she was dancing with John Doe when she saw appellant holding a gun. He was standing about eight feet away from them, and he was pointing the gun directly at Jane's head as she danced with John. Jane and John stopped dancing. Jane immediately ran away from appellant, John, and the dance floor. She heard gunshots and realized she was wounded in the head. She did not know what happened to John.

Jane heard more gunshots and realized appellant was following her. "I was running and we were in between tables. And he was, like, trying to get close to me to shoot. He wanted to shoot me closer . . ." Jane ran to Maciel and asked for help, and tried to hide behind her. Appellant stood in front of Maciel and he still had the gun. Jane eventually saw appellant leave the nightclub.

John Doe's testimony about the gunshots⁴

John Doe testified that he was at the nightclub by himself. He did not know Jane Doe. He asked her to dance with him. She agreed and they went to the dance floor.

John testified he was dancing when someone fired a gun and he was shot. Just before the shooting, he saw a man and woman standing next to each other and arguing; they were about five to six feet away from John. The man seemed to be arguing with the woman. He did not look or talk to John. John saw the man raise his right arm, and he was holding a black handgun, possibly a revolver. After the gunshots, the woman had blood on her face. John went toward the woman to help her. John was not sure if the woman was the same person he had asked to dance.

John testified the man was about two to three feet away from him when he heard the gunshots. John testified he felt something on the top right side of his head, and thought he was hit by a BB shot. There was "just a little spurt of blood that came out" from the right side of his upper forehead, and the blood went down his face.

The investigation

Fresno Police Officer Bowling responded to the nightclub and briefly spoke to Jane, who was bleeding, crying, and upset. Jane said appellant, her former boyfriend, pointed a gun at her and fired several shots. Bowling also spoke to John, who was holding the top of his head and said he had been shot. Bowling saw redness, a bump, and some blood on John's head.

A deformed lead bullet fragment was found on the nightclub's dance floor. There were no casings, which was consistent with the gunman using a revolver.

⁴ John admitted he had prior convictions for corporal injury to a spouse in 2009, and driving under the influence in 2010.

The victims' injuries

Jane testified the bullet hit the right side of her forehead. It did not penetrate her skin or enter her scalp. The wound was cleaned and she did not need stitches. She was treated and released from the hospital that night.

John was also treated at the hospital and released that night. John testified the hospital staff took something out of his head, and he received stitches on the top right side of his head. A police officer showed him “a little ball” which had been removed from his head. He did not suffer any residual pain and did not need additional treatment.

Officer Bowling spoke to John while he was being treated at the hospital. Bowling saw a laceration and bump on the top right side of John's head. John told Bowling that he had been dancing with Jane. A man approached Jane, and he was holding a black revolver-type handgun. John said the man pointed the gun at Jane, fired one round, and hit her in the head. John said the man “then fired one round at him and he ducked to avoid being hit, but [he] was struck in the head.” John said the man was two to three feet away from him when he fired at John.

Dr. Marc Shalit participated in the treatment that John received in the emergency room for a gunshot wound to the scalp. John was alert and did not lose consciousness. There was “scant bloody drainage to right temple area.” John's head wound was irrigated and forceps were used to remove shrapnel. It was a .22-caliber bullet and it was not deformed. John received a staple to bring the skin together and repair the wound. A CT scan was performed and it was negative for any neurological injury. John was not given any pain medication.

Dr. Shalit reviewed John's medical records and testified that a nurse initially classified his head wound as a probable graze wound, which would be defined as a “minor gunshot wound that has not sustained much damage.” After reviewing John's records, however, Dr. Shalit explained that John's wound was “a bit more than a graze

wound, because foreign body and material was removed from the wound,” and a bullet was actually located under the skin on his head.

Recovery of Merino’s car

On the night of the shooting, appellant apparently left the nightclub in Merino’s car and did not return to their apartment. Merino’s car was found a week later, parked at a supermarket in Parlier. The vehicle contained a security guard’s uniform. There were two expended .22-caliber casings in the front center console.

An arrest warrant was issued for appellant in 2004. He was arrested in 2009.

APPELLANT’S TRIAL TESTIMONY

Appellant testified that at the time of the shooting, he had broken up with Jane but he thought they still had feelings for each other. Appellant was surprised when he saw Jane at the nightclub. Jane tried to talk to him but he ignored her. Appellant believed Jane was taunting him and trying to make him jealous. Appellant called his boss and said that his former girlfriend was causing him problems, and asked for an assignment at another club. However, his boss refused.

Appellant walked outside the club and told Merino about his problem with Jane. Merino gave appellant his car keys so he could leave. Appellant stayed in the parking lot but he did not leave the area.

Appellant went back inside the club and saw Jane dancing with an unknown man. Appellant thought Jane was “showing off to him, sort of like to provoke me, to make me upset.” Appellant became even more upset when he saw that Jane and the man were dancing close together and hugging. Appellant did not know the man, but he thought Jane was embarrassing him in front of his friends.

Appellant testified that he had obtained a loaded .22-caliber revolver when he was outside the nightclub; he did not have the gun when he initially reported for work. Appellant pointed the gun at Jane and shot her in the forehead. Appellant claimed he was

not angry at the man who was dancing with Jane, but admitted the man was standing right by Jane's side when he fired the gun. Appellant admitted that after he fired the first shot, he chased and followed Jane through the nightclub. He later left in Merino's car and went to a friend's house.

Appellant testified that he did not want to kill Jane when he shot her that night: "If I wanted to do it, I would have done it a long time ago. Even up until now."

Appellant was asked if he shot the man with whom Jane was dancing. He replied: "If you saw it yourself, yes." When asked to explain his answer, appellant said, "Well, if she saw it, yes, and if not, not."

DISCUSSION

I. Appellant's Conviction For Attempted Murder Of John Doe Is Supported By Substantial Evidence.

Appellant contends there is insufficient evidence to support count II, attempted murder of John Doe, because he did not know John, he did not intend to kill him, and he did not even intend to shoot him.

In assessing the sufficiency of the evidence to support a conviction, "we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) "[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

“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. Booker* (2011) 51 Cal.4th 141, 177-178 (*Booker*)). “The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices. [Citation.]’ [Citation.] . . . Hence, in order for defendant to be convicted of the attempted murder of the [victim], the prosecution had to prove he acted with specific intent to kill that victim. [Citation.]” (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*)).

“Attempted murder requires express malice, that is, the assailant either desires the victim’s death, or knows to a substantial certainty that the victim’s death will occur. [Citation.]” (*Booker, supra*, 51 Cal.4th at p. 178.) “Malice is express when the killer harbors a deliberate intent to unlawfully take away a human life.” (*People v. Lasko* (2000) 23 Cal.4th 101, 104, italics omitted.) “Intent to unlawfully kill and express malice are, in essence, ‘one and the same.’ [Citation.]” (*Smith, supra*, 37 Cal.4th at p. 739.) “... [I]ntent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant’s acts and the circumstances of the crime. [Citation.]” (*Id.* at p. 741.)

Appellant contends the evidence of his specific intent to kill John was “slim to non-existent” because his “rage was directed” against Jane Doe, he aimed the gun at Jane’s head, he did not know John and never threatened him, no one saw him aim the gun at John, and there was “scant to no evidence” that he intended to kill John.

To the contrary, there was substantial evidence of appellant’s express malice and specific intent to kill John. “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. [Citation.] *The act of firing toward a victim at a close, but not*

point blank, range “in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill” [Citation.]’ [Citations.]” (Smith, supra, 37 Cal.4th at p. 741, italics added.)

Such circumstances are present in this case. While most of the witnesses saw appellant initially aim his weapon at Jane rather than John, such evidence does not negate the other evidence in support of appellant’s conviction for the attempted murder of John. The shooting occurred as Jane and John danced to slow music and remained close together. Hortencia Garcia and Elizabeth Maciel testified that Jane and John were still dancing together when appellant aimed the gun at Jane’s head. Maciel thought appellant was standing just three feet behind Jane when he raised the gun and aimed it at her head. Garcia testified that appellant stood four to five feet behind them, raised his right hand and pointed the gun at Jane. John raised his hands, as if to protect himself, and appellant fired the two shots.

Jane similarly testified that appellant pointed the gun at her head as she was dancing with John, and she was wounded from one of his first shots. John testified appellant was about two to three feet away from him when he heard the gunshots, and he realized he was wounded in the head. John told Officer Bowling that the gunman aimed and fired at Jane, and then the gunman “fired one round at him and he ducked to avoid being hit, but [he] was struck in the head.”

While appellant now claims that his animosity was solely directed at Jane, appellant testified at trial that his anger was provoked when he saw Jane dancing closely together with a man. Indeed, appellant admitted John Doe was standing right by Jane’s side when he fired the gun, and gave an evasive answer when asked if he had shot John Doe. He replied: “If you saw it yourself, yes.” When asked to explain his answer, appellant said, “Well, if she saw it, yes, and if not, not.”

Based on the entirety of the record, appellant's act of raising his gun at the level of Jane's head, and firing two shots at nearly point-blank range as Jane and John danced and remained close together, provides substantial evidence of his express malice and specific intent to kill John, and supports his conviction for the attempted murder of John.⁵

II. Substantial Evidence That Appellant Inflicted Great Bodily Injury On John.

As to count II, attempted murder of John, the jury found appellant personally and intentionally discharged a firearm causing great bodily injury to John (§ 12022.53, subd. (d)); and that appellant personally inflicted great bodily injury to John (§ 12022.7, subd. (a)). Appellant contends the jury's great bodily injury findings for both enhancements are not supported by substantial evidence because John suffered "only a scalp wound so minor that it caused no pain and required no hospitalization."

For purposes of both challenged enhancements, great bodily injury is defined as "a significant or substantial physical injury." (§ 12022.7, subd. (f), § 12022.53, subd. (d).) It is an injury which is "not insignificant, trivial or moderate. [Citation.]" (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066.) There is no specific requirement that "the victim suffer 'permanent,' 'prolonged' or 'protracted' disfigurement, impairment, or loss of bodily function." (*People v. Escobar* (1992) 3 Cal.4th 740, 750.) "Abrasions, lacerations, and bruising can constitute great bodily injury. [Citation.]" (*People v. Jung*

⁵ Appellant further contends the jury may have improperly convicted him of attempted murder of John based on his transferred intent to kill Jane. In making this argument, appellant correctly notes that "[u]nder the common law doctrine of transferred intent, 'a person maliciously intending to kill is guilty of the murder of all persons actually killed' [Citation.] The doctrine does not apply to attempted murder. 'To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else.' [Citation.]" (*People v. Souza* (2012) 54 Cal.4th 90, 120.) In this case, however, the jury was not given the instruction on transferred intent (CALCRIM No. 562) and the prosecutor did not argue that theory to the jury.

(1999) 71 Cal.App.4th 1036, 1042.) “[T]he damage need not be permanent. [Citations.]” (*People v. Harvey* (1992) 7 Cal.App.4th 823, 827.)

“Proof that a victim’s bodily injury is ‘great’ . . . is commonly established by evidence of the severity of the victim’s physical injury, the resulting pain, or the medical care required to treat or repair the injury. [Citations.]” (*People v. Cross* (2008) 45 Cal.4th 58, 66.) However, “[a]lthough any medical treatment obtained by the victim is relevant to determining the existence of ‘great bodily injury’ [citation],” the statutory definition and relevant case authorities “do not *require* a showing of necessity of medical treatment.” (*People v. Wade* (2012) 204 Cal.App.4th 1142, 1150, italics in original.) For example, in *People v. Lopez* (1986) 176 Cal.App.3d 460, the court upheld great bodily injury findings where one victim was shot in the right buttock and a second victim in the left thigh; there was no evidence either victim sought or received medical attention. (*Id.* at pp. 463-465.) In *People v. Wolcott* (1983) 34 Cal.3d 92, the court upheld the great bodily injury finding where the victim was shot in the calf and the bullet fragmented. The treating doctor removed one fragment but left the others to “work their way out naturally.” The victim lost little blood, no sutures were required, and the victim went to work the next day. (*Id.* at p. 107.) *Wolcott* concluded the victim’s “penetrating wounds” could not be “described as ‘superficial’” (*Id.* at p. 108.)

“[D]etermining whether a victim has suffered physical harm amounting to great bodily injury is not a question of law for the court but a factual inquiry to be resolved by the jury. [Citations.] “A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description.” [Citations.] Where to draw that line is for the jury to decide.” (*People v. Cross, supra*, 45 Cal.4th at p. 64.)

The jury’s great bodily injury findings are supported by substantial evidence. John Doe was wounded in the head by a gunshot likely fired from a .22-caliber revolver. The wound was not insignificant, trivial or moderate. While the emergency room nurse

initially classified it as a minor gunshot wound, and the bullet did not penetrate John's scalp, Dr. Shalit explained that the wound was more serious than a graze wound since the bullet lodged under the skin of his head, shrapnel from a .22-caliber bullet was removed, and a staple was used to bring the skin together and repair the wound. As in *Lopez* and *Wolcott*, appellant suffered a significant or substantial physical injury, and the jury's great bodily injury findings are supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

LEVY, Acting P.J.

WE CONCUR:

POOCHIGIAN, J.

FRANSON, J.