

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO VELASQUEZ,

Defendant and Appellant.

F063254

(Super. Ct. No. VCF227947)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Brett R. Alldredge, Judge.

Athena Shudde, 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, Julie A. Hokans and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

A jury convicted Ricardo Velasquez of attempted murder of a peace officer (Pen. Code, §§ 664, 187, subd. (a);<sup>1</sup> count 1), assault on a peace officer with a semiautomatic

---

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

firearm (§ 245, subd. (d)(2); count 2), shooting from a motor vehicle (§ 12034, subd. (c); count 8), and 10 counts of second degree robbery (§ 211; counts 3-7, 9-13). The jury found the following allegations true: (1) the attempted murder was committed willfully, deliberately, and with premeditation; (2) in committing counts 1 and 2, Velasquez personally discharged a firearm within the meaning of section 12022.53, subd. (c); and (3) in committing the robbery counts, Velasquez personally used a firearm within the meaning of section 12022.53, subdivision (b). The trial court sentenced him to a total prison term of 33 years, plus 15 years to life, consecutive, comprised of: (1) count 1 – 15 years to life, plus 20 years for the gun use; (2) count 3 – three years, plus 10 years for the gun use. The court imposed concurrent or stayed terms on the remaining counts and enhancements.

On appeal, Velasquez contends the attempted murder conviction must be reversed because there is insufficient evidence of a specific intent to kill. In the alternative, he contends there is insufficient evidence to sustain the finding that the attempted murder was committed with premeditation and deliberation. We disagree and affirm the judgment.

### **STATEMENT OF FACTS**

Shortly after midnight on October 3, 2009, four Hispanic young men entered a bar and grill in Tulare; at least two had guns and all wore masks. Gunshots were fired into the ceiling and the men threatened patrons, pointed guns at their heads and ordered them around. Some patrons dropped to the floor while others ran for cover. One patron ran out through a door and called the police. Inside, the men robbed patrons at gunpoint of wallets, jewelry and other possessions, and took about \$1,200 from the cash register. The robbers fled the bar and drove away in two vehicles. Two of them got into a gray sports utility vehicle (SUV), while the other two got into a smaller car.

Tulare Police Officer Justin Rich, who was alone in his marked patrol unit, followed the SUV after he saw it about a half mile from the bar. The SUV was quite a

few car lengths ahead, so Rich accelerated to approximately 60 miles per hour to try to catch up and initiate a traffic stop. As Rich was closing in on the SUV, he activated his overhead lights and siren, but the SUV failed to yield and instead accelerated away from Rich, who continued the pursuit.

After going around a curve in the road, the SUV abruptly stopped in the middle of the road. Rich slammed on his brakes to avoid hitting the SUV and came to a stop about 20 feet directly behind it. The rear passenger-side door of the SUV started to crack open. At the same time, Velasquez stood up inside the SUV and emerged from the open sunroof. Velasquez, who was visible from the waist up, was holding a black handgun, which he pointed directly at Rich. Without hesitation, Velasquez began shooting in a downward direction, firing a total of five or six shots. Rich heard two shots hit the patrol car. As soon as he realized Velasquez was shooting at him, he turned to the left and accelerated into a U-turn. As Rich did so, he continued to look at Velasquez, who was still firing at him. After completing the U-turn, Rich looked back to his left and saw the SUV accelerate away. Rich radioed for assistance as he made another U-turn and resumed the pursuit. Rich, however, smelled smoke and thought the car was shaking, so he stopped while other officers took over the pursuit.

The officers lost sight of the SUV. An hour or so later, officers found the abandoned SUV parked against a fence in a residential area. Inside officers found property belonging to some of the robbery victims, a shotgun, a spent .380-caliber casing, live .380-caliber rounds and live Winchester shotgun shells. At the scene of the shooting at Rich, officers found six expended .45-caliber shells and a black ski mask on the road. The patrol car was hit twice in the front, as shown by bullet holes in the following places: (1) in the front bumper on the bottom part of the grill, just above the license plate; and (2) in the middle of where the hood meets the front portion of the vehicle and closes onto the frame. There was also a bullet hole on the lower portion of the front passenger door. A

bullet was found in the engine compartment and bullet fragments were found in the middle area of the lower front passenger door panel.

At around 4:30 that morning, officers found Velasquez hiding in a garbage can with a wad of cash in his pocket and a cell phone in his hand. A loaded .380-caliber automatic pistol was found inside the garbage can. In an interview at the police station, Velasquez admitted he possessed guns and that the robbery was his idea, but denied shooting at Rich. Velasquez refused to name the shooter. Velasquez also said he was driving the SUV when Rich was chasing him, and admitted seeing the patrol car's lights. He did not stop because he panicked and was scared.

## **DISCUSSION**

### ***Intent to Kill***

Velasquez argues that insufficiency of the evidence of intent to kill requires reversal of the attempted murder conviction in count 1.

The elements of attempted murder are (1) a specific intent to murder a human being and (2) a direct but ineffectual act done toward its commission. (*People v. Koontz* (1984) 162 Cal.App.3d 491, 495.) Express malice, of course, is another term for specific intent to kill. (*People v. Lee* (1987) 43 Cal.3d 666, 671.) Reliance on implied malice to sustain a charge of attempted murder is logically impossible since implied malice cannot coexist with express malice. (*Id.* at p. 670.) On those premises, Velasquez argues there was nothing about the nature and circumstances of the shooting that demonstrated an intent to kill Rich, as he did not aim directly at Rich's body and Rich was not in the likely path of any of the bullets. In response, the Attorney General characterizes the record as one of strong circumstantial evidence of Velasquez's intent to kill Rich based on his actions when robbing the bar and that during the ensuing police pursuit, he stopped to fire multiple shots at Rich.

Even without evidence of motive, the rule is "well settled that intent 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 circumstances of the crime.” (*People v. Smith* (2005) 37 Cal.4th 733, 741.) Together, circumstantial and direct evidence shows that, while being pursued by Rich, Velasquez's SUV stopped in the road and when, to avoid a collision, Rich came to a stop within 20 feet of the SUV, Velasquez popped up through the SUV's sun roof facing Rich, pointed the gun “directly at” Rich, and began firing shots, two of which hit the front of the patrol car. As Rich made a U-turn, Velasquez continued to fire, with at least one shot hitting the lower front passenger side door. From Velasquez's actions and Rich's testimony that Velasquez pointed the gun “directly at me,” the jury could infer that Velasquez intended to fire at, and kill, Rich. When a defendant does a direct but ineffectual act towards accomplishing a killing with the intent to kill a human being, the completed crime of attempted murder has been committed. As stated in *Smith*, “The act of firing toward a victim at 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. . . .”” (*Smith, supra*, 37 Cal.4th at p. 741.)

Nonetheless, Velasquez argues that because the bullets hit the front of the patrol car, as opposed to the patrol car's window or roof, he was shooting not to kill Rich, but to disable the patrol car so he could escape apprehension. Velasquez likens this case to *People v. Leon* (2010) 181 Cal.App.4th 452 (*Leon*). There, the Court of Appeal found the defendant, who fired one shot at a vehicle containing three people, killing one of them, was properly convicted of the attempted murder of one of the two other occupants of the car, who was directly in the line of fire, but not of the third person, who was out of the line of fire. (*Leon, supra*, 181 Cal.App.4th at p. 465.) Based on *Leon*, Velasquez reasons that because Rich was not in the line of fire of the bullets that hit the patrol car, he could not have intended to kill Rich. The difference between *Leon* and the present case, however, is that here Velasquez fired multiple shots at a single person, not a single shot at multiple persons. Rich testified he saw Velasquez point the gun “directly at” him

and fire. Velasquez continued to fire even after Rich turned his vehicle around to head the other way. The fact that the shots missed is of no consequence; the issue of intent is a factual one for the jury. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946.)

Our duty on a challenge to the sufficiency of the evidence is to review the whole record in the light most favorable to the judgment for substantial evidence – credible and reasonable evidence of solid value that could have enabled any rational trier of fact to have found the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318; *People v. Prince* (2007) 40 Cal.4th 1179, 1251.) That standard, which applies to circumstantial and direct evidence alike, requires us to presume in support of the judgment the existence of every fact a reasonable trier of fact reasonably could have deduced from the evidence. (*Prince, supra*, at p. 1251.) By that standard, our review of the record persuades us that a sufficiency of the evidence of intent to kill is in the record. (*Ibid.*) Velasquez’s insufficiency of the evidence argument simply asks us to reweigh the facts. That we cannot do. (*People v. Bolin* (1998) 18 Cal.4th 297, 331-333 (*Bolin*).

#### *Premeditation and Deliberation*

Velasquez contends the jury’s finding that the attempted murder of Rich was committed with premeditation and deliberation must be reversed because it is not supported by substantial evidence.

When reviewing a finding that a defendant’s actions were done deliberately and with premeditation, we apply well-established standards. As explained by our Supreme Court: “In *People v. Anderson* [(1968) 70 Cal.2d 15, 26–27], we identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing. However, as later explained in *People v. Pride* (1992) 3 Cal.4th 195, 247: ‘*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court’s

assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]’ Thus, while premeditation and deliberation must result from “‘careful thought and weighing of considerations”” [citation], we continue to apply the principle that ‘[t]he 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....”’” (*Bolin, supra*, 18 Cal.4th at pp. 331–332.)

While Velasquez admits he had a motive to shoot Rich, namely to complete the robbery and avoid arrest, he argues that does not equate to premeditation and deliberation in light of the insufficient evidence of planning activity or the manner of the attempted killing. He argues there was no evidence he planned the shooting in advance and the manner of the attempted killing belied premeditation and deliberation.

Velasquez’s argument, however, ignores the standard of review, which requires us to review the evidence in the light most favorable to the judgment, drawing all inferences the jury reasonably could have drawn from the evidence. Applying the correct standard of review, it is clear substantial evidence supports the finding. While, as Velasquez asserts, he may not have planned to have the police pursue him after completing the robbery at the bar, there was ample evidence from which the jury logically could have concluded he planned on shooting Rich after Rich began to pursue the SUV. When Velasquez saw that Rich was pursuing the SUV, instead of continuing his flight, he abruptly stopped the SUV in the road knowing Rich would have to stop behind him in the patrol car, popped out of the sunroof, and deliberately began firing shots at Rich. While the shooting was not done execution style, a jury reasonably could infer the manner of the shooting suggested deliberation and premeditation, as Velasquez popped out of the sunroof holding the gun, pointed the gun at Rich, and deliberately shot at him at least six times, continuing to fire even after Rich turned in retreat.

In sum, there is sufficient evidence of premeditation and deliberation to support the jury's finding.

**DISPOSITION**

The judgment is affirmed.

---

Gomes, Acting P.J.

WE CONCUR:

---

Kane, J.

---

Poochigian, J.