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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BRANDON CARL SUTTER, Defendant and Appellant.	F076910 (Super. Ct. No. F17904754) **OPINION**

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Alvin M. Harrell, III, Judge.

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Franson, J. and Smith, J.

A jury convicted appellant Brandon Carl Sutter of attempted first degree murder (Pen. Code, §§ 664 & 187, subd. (a)/count 1)[1] and possession of a firearm by a felon (§ 29800, subd. (a)(1)/count 2). In count 1, the jury found true a personal discharge of a firearm enhancement (§ 12022.53, subd. (d)), a personal use of a firearm enhancement (§ 12022.5, subd. (a)), and a great bodily injury enhancement (§ 12022.7, subd. (a)). In a separate proceeding, Sutter admitted the prior convictions that were alleged in count 2.

Following an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Around June 2016, Francisco Martinez's mother allowed Sutter, whom Martinez had known for at least two years, to move into a house she owned on Mayfair Drive in Fresno. Although Sutter was supposed to keep other people out of the house and maintain it, he "thrashed" it and he allowed people to come and go all the time. Sometime after December 2016, Martinez began telling Sutter he had to move, but Sutter did not move.

On the evening of August 14, 2017, Martinez received a text from Sutter stating that he wanted to get some boxes and he wanted Martinez to go to the Mayfair Drive house. Martinez, however, did not go to the house until the next morning at approximately 7:00 a.m. Martinez knocked on the door, but nobody answered. He then went to the window of the room where Sutter stayed and knocked on the window. Eventually someone inside told Martinez to go to the front of the house. Martinez went to the front door and pulled on it, but it did not open. The door then opened, and Sutter pointed the barrel of a homemade shotgun at Martinez's face and ordered him to shut up,

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[1] All further statutory references are to the Penal Code.

get in the house, and sit down.[2] Martinez turned around and was about to step off the porch when he heard a gunshot that struck him on the back and he fell to the ground. Sutter came out of the house with his father and he began saying Martinez had threatened his family, that he should stomp Martinez, and that it was a good thing he did not kill him. Although Martinez's legs were paralyzed he managed to turn himself over and he pleaded with Sutter not to kill him. However, at that point, Sutter no longer had the shotgun. When Martinez stated, "God, don't let me die," Sutter told him there was no God and that after he let Martinez bleed to death, Sutter was going to kill Martinez's mother if she did not sign the house over to him. Despite his injuries, Martinez was able to call 911 on his cell phone.

Diana Perez heard the gunshot and called 911. She also saw a bald man walk into the yard and look at something on the ground that was not visible to her because her vision was partially obstructed, and a second man carry away a black backpack.

Fresno County Sheriff's Deputy Manuel Chavez responded to the scene at approximately 7:15 a.m. As Chavez and two other deputies approached the house, he saw Martinez lying on the ground and Sutter start running away from the deputies. Sutter complied with the deputies' commands to get on the ground and they handcuffed him.

During a warrant search of the house on Mayfair Drive, the deputies found a black backpack in a refrigerator. The backpack contained a homemade shotgun that was made from two metal tubes and that contained an expended shotgun shell in one end and a live round in the shotgun's vertical grip. Three to four additional live shotgun rounds were found in a nylon bag that was inside the backpack.

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[2] Approximately a month earlier, Martinez had gone to the house and told Sutter he had to move and if he did not, Martinez was going to get the police involved. Sutter got upset and "pulled" a gun on Martinez.

The shotgun blast severed Martinez's spinal cord, leaving him paralyzed from the chest down. He also suffered internal bleeding in his chest cavity and into one of his lungs.

On December 11, 2017, the Fresno County District Attorney filed an information charging Sutter with the counts he was convicted of and the enhancements and other allegations that were found true or admitted.

On December 11, 2017, Sutter admitted the prior convictions alleged in count 2. On December 18, 2017, the jury returned its verdict.

On January 18, 2018, the court sentenced Sutter to an aggregate, indeterminate term of 25 years to life on the personal discharge of a firearm enhancement (§ 12022.53, subd. (d)) in count 1, life with the possibility of parole on his attempted first degree murder conviction in that count, stayed terms on the great bodily injury enhancement and remaining firearm enhancement in that count, and a concurrent three-year term on count 2.

Sutter's appellate counsel has filed a brief that summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende*, *supra*, 25 Cal.3d 436.) However, in a letter filed on September 19, 2018, Sutter contends the evidence is insufficient to sustain his conviction because: (1) at trial, Martinez was the only person who implicated him in the shooting and his testimony was not credible for several reasons, including that he was "high" on methamphetamine the day of the shooting; and (2) the prosecution did not present any physical evidence or admissions by Sutter that connected him to the shooting. Sutter also contends his defense counsel provided ineffective representation because he did not call "[key] witnesses," attempt to exhaust all state remedies, and did not present any mitigating evidence at his sentencing hearing. There is no merit to these contentions.

The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such

that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*Ibid*.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) "The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.)

The prosecution's case was based primarily on Martinez's testimony that Sutter shot him when he turned his back to him. Since Martinez's testimony was neither physically impossible or inherently improbable, we reject Sutter's insufficiency of evidence claim.

Further, "[t]o prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel's performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. [Citation.]" (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93.)

Sutter does not identify the witnesses he claims defense counsel should have called, the mitigating circumstances counsel should have presented, or the remedies he should have pursued. Nor does Sutter explain how he was prejudiced by any of these alleged omissions. Thus, we reject Sutter's ineffective assistance of counsel claim.

Further, following an independent review of the record, we find that no reasonably arguable factual or legal issues exist.

DISPOSITION

The judgment is affirmed.