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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NEIL DEONTRAI DUFFEY and
WILLIAM DESHAWN CARTLIDGE,

Defendants and Appellants.

G044032

(Super. Ct. No. 06NF2865)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant Cartlidge.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant Duffey.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry J.T. Carlton and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendants Neil Deontrai Duffey and William Deshawn Cartlidge of two counts of attempted premeditated murder (Pen. Code, §§ 187, 664, subd. (a); all further statutory citations are to the Penal Code), and two counts of second degree robbery (§ 211). The jury also found Duffey personally discharged a firearm inflicting great bodily injury (§§ 12022.53, subd. (d), 12022.7), and Cartlidge was armed with a firearm (§ 12022, subd. (a)(1)).

Duffey contends the prosecutor committed misconduct when she violated a pretrial ruling and elicited testimony from a prosecution investigator suggesting Duffey was one of the suspects in a surveillance video of the robbery. Cartlidge contends the trial court abused its discretion and denied him due process by declining to sever his trial from Duffey's, and erred by failing to instruct the jury on premeditation and the theory of natural and probable consequences for the attempted murder charges. Both defendants challenge the sufficiency of the evidence to support the robbery conviction involving one of the victims. For the reasons expressed below, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Around 11:30 a.m. on the morning of August 8, 2006, two heavy-set African-American men entered a Buena Park liquor store after parking their gray or silver sports utility vehicle (SUV) around the corner from the store. One of the men, later

identified as Duffey, asked the owner, Mote Malhas, for a bottle of liquor. Malhas grabbed a bottle off the shelf, but Duffey asked for a different bottle closer to where he was standing. When Malhas approached and turned to get the bottle, Duffey pulled out a gun from his pocket or waistband and shot Malhas in the back of the head, the bullet entering a few inches above the victim's left ear.

The second man, later identified as Cartlidge, strolled around the store until Duffey shot Malhas. Cartlidge immediately walked behind the counter, followed by Duffey, and the men began rifling through merchandise and tried to open or remove the cash register. As defendants pursued their goals on both sides of the counter, Cesar Castillo entered the store to purchase a telephone card and lottery tickets. Duffey and Cartlidge walked toward the exit. Castillo faced Duffey and briefly interacted with him, as Cartlidge walked behind Castillo. Duffey then pulled out his gun and fired at least two shots at Castillo's face. Castillo collapsed to the floor.

The robbers continued rummaging around the counter before Duffey left to get the SUV. Cartlidge lifted the cash register and placed it on the floor next to Castillo's body. After rifling through Castillo's pockets, Cartlidge removed Castillo's wallet and cash. Cartlidge went behind the counter again, then left the store carrying the cash register.

Malhas testified the cash register contained about \$200. The robbers also stole the keys to the register, lottery tickets, and about \$200 from a second cash register. Malhas underwent surgery to remove a bullet fragment, spent several days in the hospital, and suffered serious injuries including a skull fracture, bleeding and bruising, and memory loss.

Castillo testified one bullet grazed the top of his head, a second entered his right cheek, and a third entered the back of his neck and lodged near his clavicle. He spent three days in the hospital, and suffered permanent blindness in his left eye. He lost his wallet and keys in the robbery.

Malhas and Castillo identified Duffey and Cartlidge in photo lineups and in court with varying levels of certainty. Michael Stevenson, who was walking near the store at the time of the robbery, also identified the men and their SUV. Finally, defendants' "uncle" Curtis Washington, who lived with defendants in Cerritos about three miles from Malhas's liquor store, recognized the men from a surveillance videotape of the robbery, which the local media broadcast soon after the crime. He described Duffey and Cartlidge as "very close" and "like brothers."

Police began surveilling Washington's Cerritos home. The day after the robbery they observed Washington's son, Dartonyon Loyd, and Loyd's friend, Travis Graham, load a black suitcase containing the cash register into Graham's car. Graham later discarded the register in a Long Beach dumpster. Police officers discovered the gun used in the shootings, a Ravens Arms .25 caliber semiautomatic pistol, hidden in a compartment in Graham's trunk. Graham testified Loyd asked for help in discarding the items. Duffey's DNA was on the grip of the gun.

Police officers found the cash register keys, an empty box of .25 caliber ammunition and other items connected to defendants at Washington's residence. Washington admitted he knew about the cash register and gun at his house, and told Loyd to wipe any fingerprints off the items.¹

¹ Washington, Loyd, and Graham pleaded guilty to being accessories after the fact to the crimes. The court granted the prosecution's motion to reopen after it located Loyd during the trial, but Loyd refused to testify. The court found him in contempt and held him in custody until the trial ended.

Defendants surrendered to the police two days after the robbery. Investigators located Cartlidge's SUV a few days later in Victorville, where Duffey's godmother and a girlfriend lived. Duffey had received a traffic citation driving the vehicle on the day of the robbery.

Duffey's godmother's daughter testified she was with Duffey in Victorville when they viewed surveillance video of the robbery on the television news. The shooter looked "similar" to Duffey, but was not him. When Duffey saw the video he reacted with shock, surprise, and confusion.

Duffey called Kathy Pezdek, an experimental cognitive psychologist specializing in the study of eyewitness memory and identification. As an expert on eyewitness identification, Pezdek testified identification accuracy depends on several factors, including the time the victim had to observe the suspect, whether the suspect disguised his appearance, whether the suspect and witness belong to different races or are familiar with each other, the passage of time between observation and identification, stress on the witness, and whether something suggestive happened after the initial observation. A witness's inconsistent descriptions of events may reflect the witness did not clearly see what happened at the outset. Pezdek explained there is not a strong correlation between confidence in an identification and its accuracy.

Following trial in June 2010, the jury convicted defendants of robbery and attempted premeditated murder as noted above. The trial court sentenced Duffey to 64 years to life in prison, comprised of consecutive seven-year-to-life terms for each attempted premeditated murder, plus consecutive 25-year terms for the gun enhancements (§ 12022.5, subd. (d)). The court stayed punishment for the robbery convictions and other enhancements. The trial court sentenced Cartlidge to 14 years to

life in prison, comprised of consecutive seven-year-to-life terms for each attempted premeditated murder. The court stayed punishment for the robbery convictions and arming enhancements.

II

DISCUSSION²

A. *The Trial Court Did Not Abuse Its Discretion or Violate Cartlidge's Right to Due Process by Denying Duffey's Severance Motion*

Cartlidge contends the trial court abused its discretion and violated his right to due process by failing to sever his case from Duffey's.³ We disagree.

In a postarrest interview with police officers, Cartlidge incriminated Duffey and himself concerning the robberies, but denied knowing that Duffey would shoot the victims. He also admitted committing recent uncharged robberies without Duffey. The prosecutor informed the trial court she would not introduce this evidence during her case-in-chief. Cartlidge later moved to preclude Duffey from questioning Cartlidge about the other incidents if Cartlidge testified "because . . . that's going to unfairly prejudice [Cartlidge's] right to a fair trial." Duffey's lawyer stated if "Cartlidge takes the stand . . . I think there's a very real possibility that I would be inquiring about prior bad acts." The trial court deferred ruling on the issue, remarking "we will have to meet the issue of relevance at that time." Cartlidge then moved for severance, arguing he should be "able to present his own complete and thorough defense," but that if he took "the stand

² Defendants join in all arguments and contentions made by the other as applicable.

³ Before trial, Duffey moved to sever his case from Cartlidge's. The superior court denied the motion, and we affirmed the order in a pretrial writ proceeding. (*Duffey v. Superior Court* (G041829, Nov. 25, 2009) [nonpub. opn.])

obviously he would be looking at significant cross-examination” concerning the other robberies. The court denied the motion. Cartlidge did not renew the severance motion, did not testify, and did not ask for a ruling on whether the court would allow Duffey to impeach him with the other crimes.

Section 1098 expresses a legislative preference for joint trials by providing that defendants generally “must” be tried together when charged with a public offense. (*People v. Boyde* (1988) 46 Cal.3d 212, 231.) The joint trial preference is designed to conserve scarce public resources. (*People v. Coffman And Marlow* (2004) 34 Cal.4th 1, 40.) The trial court has discretion to order separate trials in appropriate cases “in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.” (*People v. Massie* (1967) 66 Cal.2d 899, 917, fns. omitted; *People v. Marshall* (1997) 15 Cal.4th 1, 27-28 [abuse of discretion standard applies to alleged misjoinder of lopsided charges, bearing in mind it is defendant’s burden to show necessity of severance].) We review denial of a severance motion for abuse of discretion based on the facts as they appeared at the time the trial court ruled on the motion. (*People v. Hardy* (1992) 2 Cal.4th 86, 167; cf. *People v. Mendoza* (2000) 24 Cal.4th 130, 162 [joinder ruling proper at the time it was made may become reversible if the defendant demonstrates “‘joinder actually resulted in “gross unfairness” amounting to a denial of due process”’]; *People v. Turner* (1984) 37 Cal.3d 302, 313.)

Cartlidge focuses on his proposed “exonerating testimony” arguing “the joint trial realistically deprived [him] of the opportunity to testify in his own defense” as to his “state of mind.” He asserts the issue “is analogous to the issue which arises where

a co-defendant's exonerating testimony can only be obtained by severing the defendants for trial. Whether the issue involves testimony of a co-defendant, or of the defendant himself, crucial exculpatory evidence is available only at separate trials.”

Cartlidge's argument founders on the speculative assumptions (1) the trial court would have allowed Duffey to introduce evidence of Cartlidge's other robberies, either as substantive evidence or to impeach Cartlidge's credibility as a witness, and (2) the trial court in a separate trial would have prohibited the prosecution from introducing evidence of the other robberies, either in the prosecution's case-in-chief or on cross-examination. Moreover, unlike the situation with a codefendant who cannot be compelled under the Fifth Amendment to testify in a joint trial, but who may testify favorably for the defendant in separate trials depending on the circumstances, Cartlidge controlled whether “exonerating testimony” from his own lips would be presented at the joint trial. He made a tactical decision to withhold his “state of mind” testimony. None of Cartlidge's cited authority mandates a separate trial under the circumstances presented here. Cartlidge has not demonstrated the trial court abused its discretion by denying his motion to sever his trial from Duffey's.

B. No Prejudicial Prosecutorial Misconduct Occurred

Duffey's primary defense at trial was misidentification. Before trial, Duffey's lawyer moved to preclude the investigating police officers from testifying that Duffey was the shooter based on their observations of the videotape. The court ruled the prosecution could not offer opinion evidence concerning the police officers “saying it's Duffey and Cartlidge on the tape,” and directed the prosecutor to inform the officers of the court's ruling.

During the testimony of Lee Smith, an investigator with the district attorney's office who prepared and administered the photo lineups in February 2007 and transported Stevenson to a live lineup in June 2007, the prosecutor asked Smith if he had seen Duffey in pictures before the lineup and if Duffey's appearance had changed. The court sustained Duffey's objection based on vagueness, foundation, and speculation. The prosecutor then asked if Smith had seen Duffey's "appearance before seeing him at the" lineup. Smith replied he had seen Duffey in "photographs and on a video."

In a hearing out of the jury's presence, Smith admitted he was referring to the video footage taken inside the store, rather than the video of Duffey's postarrest interview. Duffey's counsel argued the witness had violated the court's pretrial ruling, moved to strike the testimony and ultimately moved for a mistrial. The prosecutor explained the testimony was "meant to show [Duffey's] weight loss" between his arrest and the lineup and the reference to the video was "definitely unintentional." The court struck the testimony and admonished the jury, but denied Duffey's motion for mistrial. The court advised the jury: "Ladies and gentlemen, just before our noon recess, Mr. Smith was asked a question, and I'll read the question to you: 'Had you seen Mr. Duffey's appearance before seeing him at the in-person lineup?' He answered that question, but that answer is stricken, and you're admonished not [to] consider it in any way."

Duffey contends the prosecutor committed misconduct and violated his due process rights in eliciting Smith's testimony he had seen Duffey "on a video." "It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. [Citation.] . . . Because we consider the effect of the prosecutor's action on the defendant, a determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct. [Citation.] A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the

defendant would have been reached without the misconduct. [Citation.]” (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Thus, to commit misconduct, the prosecutor’s question must be “inherently likely” to elicit a reference to inadmissible evidence. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1405.)

We need not decide whether the prosecutor’s question was “inherently likely” to elicit a reference to evidence the trial court previously had excluded. Any conceivable error was harmless. Smith’s reference to a “video” was vague and the trial court struck Smith’s answer without emphasizing the testimony. Even assuming the unlikely possibility jurors made the connection and concluded Smith was identifying Duffey from the surveillance video, Smith’s opinion would not have affected the jury’s determination that Duffey was the shooter because the jurors were able to make that determination on their own after viewing the video. Given the overwhelming independent evidence placing Duffey at the scene, including eyewitness identifications by the victims and Stephenson, and Washington’s identification of Duffey in the video, Duffey’s close relationship with Cartlidge, his presence in Cartlidge’s SUV on the day of the offense, and his DNA on the gun, there is no possibility the error affected the verdict.

C. The Trial Court Did Not Err By Failing to Instruct the Jury to Determine Whether Premeditated Attempted Murder Was a Natural and Probable Consequence of Robbery

Cartlidge also contends the trial court erred in failing to instruct the jury he could not be liable for attempted premeditated murder, not simply attempted murder, unless they determined it was a natural and probable consequence of the robberies. He relies primarily on *People v. Hart* (2009) 176 Cal.App.4th 662 (*Hart*). In *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*), the California Supreme Court held the jury need not be instructed that a premeditated attempt to murder must have been a natural and probable consequence of the target offense of robbery. The majority reasoned section 664, subdivision (a) “requires only that the attempted murder itself was willful,

deliberate, and premeditated” and “it is only necessary that the attempted murder ‘be committed by one of the perpetrators with the requisite state of mind.’” (*Favor*, at p. 879.) The court disapproved *Hart* (*id.* at p. 879, fn. 3) and agreed with *People v. Cummins* (2005) 127 Cal.App.4th 667. We invited the parties to submit supplemental letter briefing, and Cartlidge concedes we are bound by *Favor*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) But he raises the issue for possible further litigation in federal court. We conclude the trial court did not err by failing to instruct the jury to determine whether attempted premeditated murder was a natural and probable consequence of robbery.

D. *Substantial Evidence Supports the Second Degree Robbery Conviction Involving Castillo*

Both defendants challenge the sufficiency of the evidence to support the second degree robbery conviction involving Castillo. Duffey contends the evidence does not show he intended to steal because he left the store and therefore was unaware Cartlidge stole Castillo’s property. Cartlidge argues the evidence shows he formed the intent to steal only after Duffey shot Castillo and therefore, there was no union of act and intent, a requirement for specific intent crimes like robbery.

“In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—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.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it

is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. (*Ibid.*) “If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.

[Citation.]” [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) “[I]n order to constitute robbery rather than theft, the act of force or intimidation must be motivated by the intent to steal; if the larcenous purpose does not arise until after the force has been used against the victim, there is no joint operation of act and intent necessary to constitute robbery. (*People v. Green* (1980) 27 Cal.3d 1, 54)” (*People v. Brito* (1991) 232 Cal.App.3d 316, 325; see, e.g., *People v. Green, supra*, 27 Cal.3d at pp. 53–57 [sufficient evidence of robbery where jury reasonably could conclude the defendant took victim's clothing and jewelry after rape and murder to destroy evidence]; *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 350–351 [trial court erred by failing to instruct jury on theft as a lesser included offense to robbery where the defendant testified he did not contemplate stealing the victim's property after until he stabbed him]; *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 825-827.)

Here, the evidence shows Duffey ambushed Castillo in the same manner he shot Malhas. The jury reasonably could conclude Duffey shot Castillo to facilitate stealing his belongings, but he left this task to Cartlidge while he retrieved the car so they could flee the scene. In other words, Duffey intended to rob Castillo when he shot him, and knew Cartlidge would take the victim's property while he arranged their escape.

As for Cartlidge, the jury could conclude that he formed the intent to steal when Duffey shot Castillo. (See *People v. Turner* (1990) 50 Cal.3d 668, 688 [when a person kills another and takes the victim's property "it is ordinarily reasonable to" infer "the killing was for purposes of robbery"].) The evidence shows Cartlidge harbored the intent to rob before Duffey shot Malhas, and Cartlidge does not contend otherwise. It follows the jury reasonably could conclude Duffey and Cartlidge implemented the same plan of attack when Castillo unwittingly entered the store during the robbery. In sum, ample evidence demonstrates both Duffey and Cartlidge harbored an intent, either before or during the assault, to permanently deprive Castillo of his property.

E. *Correction of Cartlidge's Abstract of Judgment*

After the verdict, Cartlidge pleaded guilty to a separate robbery charge (count 1) severed from the main case before trial. Cartlidge admitted using a firearm in the commission of this robbery, which triggered a 10-year enhancement (§ 12022.53, subd. (b)). The court imposed a concurrent low term of two years. The Attorney General concedes the abstract of judgment does not reflect the firearm enhancement tied to count 1 is necessarily a concurrent term. (See *People v. Mustafaa* (1994) 22 Cal.App.4th 1305 [trial court erred in imposing consecutive terms for the gun-use enhancements while imposing concurrent terms for the robbery convictions; procedure for sentencing does not

contemplate imposing an enhancement separately from the underlying crime].) We will direct the trial court to correct the abstract of judgment accordingly.

III

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment reflecting the firearm enhancement tied to the robbery conviction on count 1 as to Cartlidge is a concurrent term. The trial court is directed to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.