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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.

JESUS SOTO,

Defendant and Appellant.

G044170

(Super. Ct. No. 07CF2465)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
W. Michael Hayes, Judge. Affirmed.

Michael Bacall, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and
Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

A jury convicted appellant Jesus Soto of two counts of attempted murder, three counts of assault with an assault weapon, discharging a firearm with gross negligence, active participation in a street gang, being a gang member carrying a loaded gun in public, and possession of a firearm by a felon. The jury also found the offenses were committed for the benefit of a street gang. Soto was sentenced to 25 years to life in prison, after which he is to serve a determinate term of 14 years. The 25-years-to-life component was the result of using a firearm to cause great bodily injury. In Soto's case the jury found he fired at one man attempting to flee over a fence, striking him in the leg, and also pulled the trigger aiming a gun directly at another man's head. The gun failed to fire, though, and the man escaped.

On appeal, Soto seeks reversal of his two attempted murder convictions on several grounds, most of which center on his theory that he was really only acting in self-defense during an altercation at his apartment building. He not only argues that his conduct constituted self-defense as a matter of law, he contends the evidence was insufficient to support a specific intent to kill and, at the most, he acted in the heat of passion. He further argues the trial court violated his constitutional rights when it allowed a gang expert to testify he had a prior conviction for armed robbery with a knife.

His arguments are unpersuasive. There was substantial evidence that Soto fired his Tec-9 semiautomatic weapon at least three times while his erstwhile assailants were in full retreat. And the trial judge was careful to limit the evidence of the prior conviction to only its relevance in showing his active participation in the Brown Thugs street gang.

FACTS

1. Preliminary Comment

Much of Soto's briefing is what is commonly called in appellate parlance, "jury argument." Jury arguments generally go to the credibility of witnesses in the context of conflicting stories. In this case, Soto's briefing is rife with such arguments. (E.g., "Saavedra's statement to the detective is neither believable nor credible." "Detective Arzate must have misunderstood Soto during the interview." "The 'Bam, Bitch' comment was a lie")

To be sure, there was plenty of substantial evidence in this record which, *if believed by the jury*, would have supported a defense verdict. On appeal from a judgment of conviction after a jury trial, however, we are required to view the facts as the jury found them, not as the jury might have found them. We must resolve all evidentiary conflicts, draw all reasonable factual inferences, and uphold all express or implied findings in favor of the party who prevailed on appeal, if supported by substantial evidence. (*People v. Alexander* (2010) 49 Cal.4th 846, 882-883.) Moreover, as explained by the Supreme Court in *People v. Barnwell* (2007) 41 Cal.4th 1038, the testimony of one witness is enough to establish substantial evidence. "Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the standard is sufficient to uphold the finding." (*Id.* at p. 1052.)

The following narrative has been written with the foregoing rules in mind.

2. Events of July 21, 2007

On July 21, 2007, Soto, fellow Brown Thugs member Aaron Carrillo, and two teenage girls drove to Cabrillo Park in Santa Ana shortly after midnight. When they arrived at the park, they noticed a large group of people gathered at the opposite end. The group was a "party crew," known to gather to consume alcohol and drugs.

A man from the party crew walked over to Soto and Carrillo and began to “mad dog” (stare menacingly) them. The man asked where Soto and Carrillo were from. Carrillo replied that they were from “The Brown Thugs,” a local street gang. The man from the party crew called his friends over. Soon a large number of individuals came running towards Soto, Carrillo, and the two girls. Soto threw a beer bottle at the approaching crowd. Then he, Carrillo, and the two girls fled to get into Soto’s vehicle.

There was a car chase. Between 12 and 20 men from the party crew piled into several vehicles and gave chase at very high rates of speed, perhaps even reaching 90 miles an hour.

The party crew followed Soto’s vehicle to the gated Bahamas Apartment complex in Tustin. Soto’s vehicle slipped through the gate before the party crew vehicles arrived.

The party crew vehicles stopped outside the gate and approximately 12 men ran towards the gate. However, only six men actually jumped over the fence. Once on the other side, they challenged Soto and Carrillo to a fight.

None of the party crew members were armed. Carrillo grabbed a metal mop handle with which to fight off his assailants.

A fight between Soto and Carrillo and the party crew members began in the alleyway inside the apartment complex. Carrillo hit party crew member Humberto Rodriguez on the back of the head with the mop handle. Rodriguez fell to the ground.

Soto taunted the party members, “ahora si putos.” Loosely translated, in context the phrase meant, “what now, bitches!” Soto’s vehicle was nearby and he was soon able to retrieve a Tec-9 semiautomatic firearm from it.

Events occurred in rapid succession. Someone yelled “Gun!” Soto aimed the gun at the head of Juan Salazar and yelled “Bam Bitch!” He then pulled the trigger. There was a click. The gun misfired. It never discharged. Soto then hit party crew

member Diego Martinez over the head with the gun as Martinez was running toward the gate.

Salazar, Martinez, and the rest of the party crew members all fell into a full retreat toward the gate, then jumped over it into their vehicles.

Rodriguez, however, was still lying on the ground after being struck in the head by the metal broom handle. Julio Chavez and Wernher Saavedra, however, would not leave Rodriguez behind. They jumped back over the gate to help the fallen Rodriguez back to safety on the other side of the fence. Carrillo approached Rodriguez with a broom handle but Chavez and Saavedra fought him off.

Saavedra was able to jump back over the gate. But Chavez and Rodriguez remained on the inside.

Soto then fired two shots from his semiautomatic firearm in the direction of the party crew members. Rodriguez was struck in the leg.

Tustin Police arrived, arrested Soto and Carrillo, and found the Tec-9 in a bag in one of Soto's bedroom closets. Soto told detectives that he "had enough." Eventually he admitted to firing the gun. But he claimed it was in self-defense. He said if he had really wanted to kill Rodriguez and Salazar, he would have done so.

DISCUSSION

1. Self-Defense as a Matter of Law

Soto first claims his attempted murder conviction should be reversed because his conduct constituted self-defense as a matter of law. (See Pen. Code, §§ 197-198.)

As the court stated in *People v. Hardin* (1982) 85 Cal.App.4th 625, 629: "The principles of self-defense are founded in the doctrine of necessity. This foundation gives rise to two closely related rules. . . . First, only that force which is necessary to repel an attack may be used in self-defense; force which exceeds the necessity is not

justified.” Here, however, there is substantial evidence that Soto used significantly more force than necessary to repel his party crew assailants.

To be sure, the party crew were the initial aggressors. They chased Soto and his companions at very high rates of speed to the apartment complex. And Soto and Carrillo were outnumbered after a contingent of six party crew members came over the fence and challenged them to a fight. There is also some evidence that supports the idea that one of the party members had been able to land a punch to Soto’s nose, though the characterization in the reply brief that Soto’s face was “battered” appears to be overstated. (On cross-examination, Detective Arzate was shown a photo of Soto on the morning of his arrest. Soto’s counsel asserted Soto’s nose appeared “to be swollen.” Arzate agreed. “It appears to be red, yes.” But Arzate then disagreed with counsel over whether Soto’s forehead area was red or swollen.)

However, the evidence was also plain that the party crew members’ attack was not so relentless as to prevent Soto from being able to retrieve a firearm from his nearby vehicle. And there is no doubt that Soto and Carrillo were better armed than their assailants. It is hardly “implausible” that Soto’s mere brandishing of a gun might send six harassers scurrying back to their vehicles. Thus, as between the competing scenarios of (1) Soto first using his gun to scare off the six potential assailants versus (2) Soto first brandishing a semiautomatic weapon, sending his assailants into retreat, and *then* firing, or attempting to fire, that weapon a reasonable jury could choose (2).

By the same token such a jury could also conclude that at the precise moment when Soto unsuccessfully pulled the trigger on Salazar, then later more successfully pulled the trigger on Rodriquez, he was under no immediate threat. We note in particular that as the party crew members were in the process of recovering their wounded companion Rodriquez, Soto fired two rounds toward the men with sufficient accuracy to strike one of them.

2. *Intent to Kill*

There is no question, of course, that a conviction for attempted murder requires a specific intent to kill. (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

The evidence surrounding the attempted murder of Juan Salazar was disputed. Salazar himself testified at trial that no one ever pointed the gun at him. In fact, he said he never entered the interior of the apartment complex and remained in his vehicle during the entire altercation because he was too intoxicated to fight.

But Salazar's testimony was impeached by Tustin Police Officer Luis Garcia, who testified regarding statements Salazar made immediately after the incident. According to Officer Garcia, Salazar admitted to breaching the gate, fighting Soto and Carrillo, and seeing a man point a gun at him. Officer Garcia's testimony was corroborated by Wernher Saavedra who testified he saw a man point a gun at Salazar's head. Saavedra further testified he heard the man say, "Bam, Bitch!," and the gun click.

Soto now claims that Saavedra's testimony is not credible because he was trying to shift blame away from himself since he and his group were the initial aggressors. He also contends that Saavedra's testimony lacks credibility because it was physically impossible for Saavedra to have heard the alleged "Bam, Bitch!" comment sitting, as he was, in his vehicle parked on the street.

But these are "jury arguments," and the jury was entitled to credit Officer Garcia's rendition of Salazar's statements right after the incident over Salazar's direct version at trial. (See *People v. Reilly* (1970) 3 Cal.3d 421, 425 [court must "presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence"].) Soto's briefing effectively concedes that the statement "Bam, Bitch!" shows an intent to kill. The briefing thus labors to remove the comment from the realm of substantial evidence. The jury, however, believed the statement was made and drew a reasonable conclusion.

We now turn to the issue of Soto's intent to kill Rodriguez. Again, the issue is a matter of resolving conflicts in the evidence. Since there was substantial evidence that Rodriguez was shot as he was attempting to flee the scene by retreating back over the fence with the assistance of two other party crew members, a reasonable jury could infer an intent to kill.

That Rodriguez was only struck in the leg, as distinct from near the head or heart, is of no moment. The jury could reasonably infer that Soto was simply a bad shot. (See *People v. Lashley* (1991) 1 Cal.App.4th 938, 945 [that victim may have escaped death due to poor marksmanship does not vitiate intent to kill]; accord, *People v. Avila* (2009) 46 Cal.4th 680, 702 [the "degree of the resulting injury is not dispositive of defendant's intent"].)

3. Heat of Passion and Imperfect Self-Defense.

Soto next argues his attempted murder convictions should be reduced to attempted voluntary manslaughter because there was evidence beyond a reasonable doubt that (1) he acted in the heat of passion, or (2) he acted in self-defense, albeit with an unreasonable belief in the need for it. We note in this regard that the trial court found substantial evidence to support each theory, and thus properly instructed the jury regarding attempted involuntary manslaughter.

The jury, however, rejected the involuntary manslaughter alternative proffered to it, and it was not unreasonable to have done so. As discussed above, the jury found Soto fired his weapon at least three times after the party crew members were in retreat and posed no immediate threat to him.

4. The 2002 Prior Conviction for Armed Robbery Was Properly Admitted

Finally, Soto argues the trial court erred when it admitted evidence of his 2002 armed robbery conviction to support the allegation that he had used a firearm in support of the Brown Thugs, a criminal street gang. (See Pen. Code, § 186.22, subd. (b).)

A brief review of the facts regarding the admission is necessary.

Detective Arzate was on the stand, recounting statements that Soto had made to him on July 21, 2007. The prosecutor soon switched gears and began asking the detective questions in his role as a gang expert. However, at the beginning of the gang-expert line of questions, the trial judge read this instruction to the jury, specifically limiting their consideration to whether the charged crimes were gang related: “Ladies and gentlemen of the jury, you are about to hear testimony from Detective Manuel Arzate of the Tustin Police Department regarding criminal street gangs and opinions of this detective regarding whether or not the defendants were actively participating in a criminal street gang on July 21, 2007. [¶] You may consider evidence of gang activity only for the limited purpose of deciding whether: The defendants acted with an intent, purpose, or knowledge that are required to prove the gang-related crimes and enhancements charged”

After the admonition, the prosecutor established Officer Arzate’s credentials as a gang expert. The prosecutor then proceeded to elicit testimony on gangs generally, then on the Brown Thugs in particular.

The subject next turned to Aaron Carrillo, who was Soto’s co-defendant. The prosecutor asked whether there had been an “adjudication” that “factored” into Arzate’s opinion that Carrillo was a member of the Brown Thugs. The officer referred to an arrest for auto theft in 2002, defense counsel immediately objected, and the court called a recess to talk to counsel in chambers.

A colloquy then took place on the subject whether prior convictions done for the sake of the Brown Thugs might be unduly prejudicial. The judge ultimately

rejected the argument, stating, “It apparently is an auto theft conviction where he’s a self-admitted gang member. What better evidence is there than a conviction beyond a reasonable doubt to support the officer’s opinion?”

The jury was called back and Arzate finished his opinion concerning Carrillo. The prosecutor next asked about Arzate’s opinion about Soto. Arzate testified that, in his opinion, Soto was an active member of the Brown Thugs. His opinion was based on a “gang background.” That “gang background” included a review of seven years of information, including 25 “contacts” (field interviews or arrests), Soto’s admission that he had a gang moniker, and the issuance of 10 notices advising him that the Brown Thugs were indeed a criminal street gang. Asked what else he relied on, Arzate mentioned Soto’s statements during the arrest, Soto’s gang tattoos, and an arrest and conviction in 2002.

At that point defense counsel objected and moved to strike, but did not specifically mention the reason. The trial judge only said “overruled,” and the detective finished his answer: “During that arrest, he was convicted of being an active participant of Brown Thugs during that date, and that that crime was Brown Thugs related.” The detective then began talking about a gang notice in 2006 in connection with a homicide investigation. Defense counsel objected, the objection was sustained, and the prosecutor then asked a question that established that this homicide involved another Brown Thugs member. About five questions later, in a catch-all question asking for “anything else” that prompted Arzate to arrive at his opinion, he summarized: “Just the 25 contacts, being with the members, his tattoos, his statements, some of the activity he’s previously participated in --.” The prosecutor interjected “okay,” but Arzate finished his thought, “ -- and his convictions.”

When the judge instructed the jury, one of those instructions (tracking CALCRIM 1403) specifically concerned the evidence of gang activity: “You may consider evidence of gang activity only for a limited purpose in deciding whether the

defendant acted with the intent, purpose, and knowledge that are required to prove gang-related crimes or enhancements charged or if the defendant had a motive to commit the crimes charged. [¶] You may not consider this evidence for any other purpose. You must -- you may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.”

There is now no doubt that the evidence of Soto’s 2002 conviction for armed robbery was properly admissible under the Street Terrorism Enforcement and Prevention Act (commonly called the “STEP Act”), Penal Code section 186.20 et seq., and was particularly probative to show Soto’s active participation in the Brown Thugs. The issue was recently settled by our high court in *People v. Tran* (2011) 51 Cal.4th 1040, 1044 [predicate offense under section 186.22, subdivision (f) “may be established by evidence of an offense the defendant committed on a separate occasion”]. (See also *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1210-1212 [upholding limited admission of evidence from gang expert showing participation in prior gang drive-by shooting].) The only real question is whether the evidence was more “unduly prejudicial” than probative under Evidence Code section 352. Soto’s briefing correctly points out that the evidence entailed a certain amount of overkill. His allegiance and membership in the Brown Thugs were readily established without reference to the 2002 conviction.

While the members of this panel might not have made the same call ourselves if we had been the position of the trial judge, tested under the abuse of discretion standard inherent within Evidence Code section 352, we cannot say the trial court’s decision not to strike the prior conviction evidence was an abuse of discretion. (See *Lincoln v. Schurgin* (1995) 39 Cal.App.4th 100, 105-106 [“Whether we would have made the same determination in the first instance is immaterial. As long as the contested decision is supported by reasonable inferences, we have no authority to substitute our judgment for that of the trial court.”].)

In particular, there certainly was no undue consumption of time or, as in *People v. Williams* (2009) 170 Cal.App.4th 587, a belaboring of multiple prior convictions. (See *id.* at p. 611 [“The sheer volume of evidence extended the trial -- and the burden on the judicial system and the jurors -- beyond reasonable limits, and the endless discussions among the trial court and counsel concerning the admissibility of such evidence amounted to a virtual street brawl.”].) The details of the 2002 conviction were sparse, and even then restricted to the bare bones of the crime’s gang relatedness. Given those circumstances, and the trial judge’s knowledge that he had already instructed the jury to limit its consideration of the prior conviction to its gang relatedness, plus his anticipation that he would be giving an instruction telling the jury it was not to draw the conclusion that Soto was of bad character or prone to commit crimes from the evidence, the decision cannot be said to have been outside the bounds of reason.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.