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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.

CESAR AVILES,

Defendant and Appellant.

G049466

(Super. Ct. No. 09NF2195)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Gary S. Paer, Judge. Affirmed.

Cesar Aviles, in pro. per.; and Richard Jay Moller, under appointment by
the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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INTRODUCTION

A jury found defendant Cesar Aviles guilty of attempted murder and found true the allegation Aviles personally used a firearm in the commission of that offense.

We appointed counsel to represent Aviles on appeal. Appointed appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), setting forth the facts of the case and requesting that we review the entire record. Pursuant to *Anders v. California* (1967) 386 U.S. 738 (*Anders*), appointed appellate counsel identified potential issues to assist us in our independent review. Aviles also filed a supplemental brief.

We have examined the entire record, appointed appellate counsel's *Wende/Anders* brief, and Aviles's supplemental brief; we find no reasonably arguable issue. (*Wende, supra*, 25 Cal.3d 436.) We therefore affirm.

FACTS

One evening in May 2009, Peter Smith looked out his apartment window and saw three "individuals"¹ walking through the parking lot where his truck was parked; he saw one of the individuals walk up to his truck and attempt to "put his hand to [it]." Afraid that his truck was about to be broken into, Smith ran outside and confronted the individuals. Two of the individuals ran away and the third, who had appeared to Smith to have been acting as a lookout, told Smith that they had not been doing anything. Smith followed the two who had run away, but he lost them after a few blocks.

Smith returned home, got into his pink Chevrolet Impala, and drove around to look for them. He was about to give up his search when he saw all three young men sitting at a bus stop. After Smith drove toward them, two of them ran into a Guitar Center store. Smith followed them into the store. Smith approached one of the young

¹ According to our record, at least two of the three individuals were juveniles at the time.

men, who had his back turned, tapped him on the shoulder, and asked him what they had been doing next to his truck. As the person turned to face Smith, Smith thought he was pulling a weapon out of his pants; Smith responded by punching him and causing him to fall to the floor. The second person, who had run into the store, asked Smith, “how can you hit a 15-year-old boy?” Smith was surprised he had pursued a 15 year old who was later identified as Aviles’s younger brother, C.

The police arrived, as did Aviles’s father. Aviles’s father and Smith discussed the situation and neither decided to press any charges. They discussed that they were neighbors, living only three streets away from each other, and neither wanted any problems. Smith thought the incident was over. Before C. and his father left, C. warned Smith, “you ever hit me again, you will find out what happens to you” or “you will see what happens to you.”

About 1:00 p.m. on July 25, 2009, Smith had been working on his Chevrolet Impala outside his apartment building when a man, later identified as Aviles, then 20 years old, rode by him on a bicycle; Aviles stopped and stared at Smith “really hard.” Smith had never before seen Aviles. Smith asked if he could help Aviles and asked why he was staring at him. Aviles rode his bicycle past Smith, made a U-turn, rode back toward Smith, and stopped.

Aviles asked Smith, “you own that pink car out front?” Smith answered, “yeah. What do you know about the pink car?” Aviles said, “I don’t know nothing about the pink car.” Aviles then asked Smith where his black truck was. Smith asked Aviles who he was. Aviles asked Smith why he needed to know who he was; Smith responded, “because you seem to know a lot about me. I need to know who you are.” Aviles, who was standing about 31 feet away from Smith, pulled a black gun from his waistband, and pointed it at Smith’s chest. Smith saw Aviles’s finger on the trigger and saw Aviles pull the trigger. Smith heard a click and he dropped to the ground. After he realized that he was “still alive,” Smith jumped up and saw Aviles looking at the gun as if in shock the

gun did not go off. Smith charged at Aviles. Aviles rode away. Smith ran to a neighbor and asked him to call the police because someone had just tried to shoot him.

Aviles returned to the home that he shared with his parents and siblings, and said, “the gun didn’t work.” He had also said that he went to “get” Smith. During an interview with police officers, Aviles was asked whether he knew why he was there; he responded it was because of a “fucking shooting,” and also said, “the gun didn’t go pop.” Aviles explained his confrontation with Smith occurred in direct response to the incident between Smith and C.; after that incident, he obtained a gun “from the streets.” Aviles claimed he did not pull the trigger but only intended to scare Smith.

PROCEDURAL BACKGROUND

Aviles was charged in an information with one count of attempted murder. The information alleged that, pursuant to Penal Code section 12022.53, subdivision (b), Aviles personally used a firearm during the commission of that offense, within the meaning of Penal Code sections 1192.7 and 667.5.

The jury found Aviles guilty of attempted murder as charged and found true the personal use of a firearm enhancement. The trial court sentenced Aviles to a total prison term of 17 years by imposing the middle term of seven years for the attempted murder offense and a consecutive 10-year term for the firearm enhancement. Aviles appealed.

ANALYSIS

We have reviewed the record in accordance with our obligations under *Wende* and *Anders*, and we find no arguable issues on appeal. (*People v. Kelly* (2006) 40 Cal.4th 106, 120, 124.) In his supplemental brief, Aviles does not raise any contentions of error. Instead, he expresses his deep regret for his conduct, argues he never intended to kill Smith, and requests that this court reduce the length of his prison term by imposing

the low term instead of the middle term on the attempted murder offense. Aviles does not contend insufficient evidence showed he intended to kill Smith; no reasonably arguable issue exists that insufficient evidence supported that element. Aviles does not contend the trial court abused its discretion by imposing the middle term for the attempted murder offense. On this record, there is no arguable issue the trial court abused its discretion by imposing the middle term. In light of the absence of any reasonably arguable issue on appeal, we must affirm the judgment.

DISPOSITION

The judgment is affirmed

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.