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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

DONTE BAY MCNEIL,

Defendant and Appellant.

B268631

(Los Angeles County
Super. Ct. No. SA088057)

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie E. Brown, Judge. Affirmed as modified.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Donte Bay McNeil was convicted by jury of murder (Pen. Code, § 187, subd. (a); count 1)¹ and assault with a firearm (§ 245, subd. (a)(2); count 2). The jury also found true the special circumstance that the murder was committed by lying-in-wait (§ 190.2, subd. (a)(15)), and that defendant discharged a handgun causing great bodily injury or death as to the murder count (§ 12022.53, subds. (b), (c), (d)). Defendant was sentenced to life without the possibility of parole for count 1, plus 25 years to life for the firearm enhancement, plus an additional consecutive term of four years for count 2.² Defendant contends that insufficient evidence supports the lying-in-wait special circumstance, reasoning there was no evidence of a substantial period of watching and waiting. He also contends the court erroneously imposed two 25-year-to-life terms for the firearm enhancement. We find substantial evidence supports the special circumstance, but that the trial court's minutes must be corrected to reflect the proper sentence.

BACKGROUND

Defendant and Alejandra Salvatierra dated for several years, but ended their relationship in 2012. They remained in contact following their breakup. In January 2014, Ms. Salvatierra started dating Azaam Stallsworth. She eventually asked defendant to stop contacting her, and blocked his phone number from her phone, but he continued to contact her using other numbers. In early July 2014, defendant and

¹ All further statutory citations are to the Penal Code unless otherwise indicated.

² The court's sentencing minute order erroneously reflects that the court imposed *two* 25-year-to-life terms for the murder conviction, plus the life without the possibility of parole term.

Mr. Stallsworth got into an argument when defendant called Ms. Salvatierra, and Mr. Stallsworth got on the line and asked defendant to stop calling.

On July 15, 2014, Ms. Salvatierra and Mr. Stallsworth went to dinner and a movie. Mr. Stallsworth drove them in Ms. Salvatierra's gold Lexus, as his car was out of gas. They left for their date from Ms. Salvatierra's Hawthorne home, and returned there around midnight. Mr. Stallsworth stopped to retrieve something from his car, which was parked in front of Ms. Salvatierra's home, and then drove the Lexus to the alley behind the house to park.

Defendant, driving his mother's Toyota SUV, entered the alley from the opposite direction, and pulled alongside the Lexus, blocking it in. Mr. Stallsworth and defendant rolled down their windows, and defendant shot and killed Mr. Stallsworth. The Lexus accelerated forward, striking the rear of the SUV, and then crashed into a gate in the alley. Defendant fired three additional shots before taking off.

The entire incident was captured by surveillance cameras from a nearby business. The video showed that defendant's vehicle and the Lexus entered the alley at the same time, from opposite ends of the alley. Police were able to trace the SUV back to defendant from the license plate captured in the video.

When defendant was interviewed at the police station following his arrest, he initially denied any involvement in the murder. He later admitted to shooting Mr. Stallsworth. Defendant claimed that Mr. Stallsworth had threatened to kill him during their July phone conversation, and that he later drove by defendant's house.

Defendant told police that on the night of the shooting, he

ran into Mr. Stallsworth and Ms. Salvatierra near Ms. Salvatierra's home, and he and Mr. Stallsworth "had words." Mr. Stallsworth and Ms. Salvatierra drove off, and defendant drove around to the alley to see if they were there. He had a gun he had obtained a month earlier for protection.³ The Lexus stopped, and defendant pulled alongside of it. Mr. Stallsworth raised his hand as if he had a gun, so defendant pulled out his gun and fired at Mr. Stallsworth.

Two defense witnesses testified that Mr. Stallsworth had driven by defendant's house on two occasions, and that defendant was scared.

DISCUSSION

1. Sufficiency of the Evidence

Defendant contends insufficient evidence supports the lying-in-wait special circumstance finding, because he did not engage in a substantial period of watching and waiting. He contends the evidence only showed that he entered the alley at the same time as his victim, which could be attributed to coincidence, and that defendant did not attack Mr. Stallsworth on the street in front of Ms. Salvatierra's home when he was vulnerable and outside of his car. We disagree.

" 'In reviewing the sufficiency of evidence . . . the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' [Citations.] . . . [Citation.] 'In determining whether a

³ Defendant's statements on this point were somewhat confusing. He appeared to claim he retrieved the gun after first seeing Mr. Stallsworth and Ms. Salvatierra, which he had stored with a friend who lived near Ms. Salvatierra.

reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court “must . . . presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”’ [Citation.] The same standard also applies in cases in which the prosecution relies primarily on circumstantial evidence. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1175.) The reviewing court does not reweigh the evidence, evaluate the credibility of witnesses, or decide factual conflicts. (*People v. Culver* (1973) 10 Cal.3d 542, 548.)

The lying-in-wait special circumstance requires a substantial period of watching and waiting for an opportune time to act. (*People v. Moon* (2005) 37 Cal.4th 1, 22; see also § 190.2, subd. (a)(15).) “‘Watchful’ does not require actual watching; it can include being ‘alert and vigilant’ in anticipation of the victim’s arrival to take him or her by surprise. [Citation.]” (*People v. Streeter* (2012) 54 Cal.4th 205, 247.) Our Supreme Court has never fixed a minimum time period for watching and waiting. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1073.) What is required is not a precise period of time, but a period of watchful waiting that is substantial. Even a few minutes may be sufficient. (*Ibid.*; see also *Moon*, at p. 24.)

Here, we find the evidence supports the jury’s conclusion that defendant engaged in a substantial period of watching and waiting. Defendant, armed with a gun, entered the alley at the precise time that Mr. Stallworth and Ms. Salvatierra entered the alley from the opposite direction. The obvious inference is that defendant had been watching Ms. Salvatierra’s home from nearby, and decided to attack in the relatively secluded alley rather than on the busy street in front of Ms. Salvatierra’s home.

2. Sentencing Error

The court's minutes indicate that the court imposed *two* 25-year-to-life terms on count 1 for the firearm enhancement. The abstract of judgment reflects the proper sentence. Respondent concedes the error, and therefore we order the court's November 16, 2015 minute order be corrected to reflect only one firearm enhancement.

DISPOSITION

The judgment is affirmed, as modified. The superior court is directed to correct the November 16, 2015 minute order to reflect only one 25-year-to-life firearm enhancement on count 1.

GRIMES, J.

WE CONCUR:

BIGELOW, P.J.

FLIER, J.