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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ODELL LANCE DOUGLAS, Defendant and Appellant.	B232531 (Los Angeles County Super. Ct. No. YA078620)

APPEAL from a judgment of the Superior Court of Los Angeles County. Eric C. Taylor, Judge. Affirmed.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II and J. Michael Lehmann, Deputy Attorneys General for Plaintiff and Respondent.

Defendant and appellant Odell Lance Douglas (defendant) appeals from his conviction of assault with a firearm and attempted murder. Defendant contends that the trial court erred in failing to instruct the jury to view with caution any unrecorded out-of-court statements made by him. Defendant also contends that the trial court erred in relying on an abstract of judgment as evidence of a prior conviction, without testimony from the superior court clerk responsible for its preparation. Respondent agrees that the court should have read an instruction such as CALCRIM No. 358 to the jury, but contends that any such omission was harmless. Respondent also contends that the certified record presented needed no further authentication and was sufficient proof of defendant's prior conviction. We agree with respondent and affirm the judgment.[1]

BACKGROUND

1. Procedural background

In an amended information, defendant was charged with two counts of assault with a firearm in violation of Penal Code section 245, subdivision (a)(2).[2] The alleged victim in count 1 was William Cannon, II (Senior), and in count 2, William Cannon, III (Junior). The amended information also alleges as to counts 1 and 2 that defendant personally used a firearm in the commission of the crimes. (§ 12022.5.) Count 3 charged defendant with the attempted, willful, deliberate, and premeditated murder of Senior, in violation of sections 187, subdivision (a), and 664, with the special allegation that defendant personally used a firearm (§ 12022.53, subd. (b)) and personally and intentionally discharged a firearm (§ 12022.53, subd. (c)) in the commission of the offense. For purposes of section 667, subdivision (a)(1), as well as the "Three Strikes" law, section 1170.12, subdivisions (a) through (d), and section 667, subdivisions (b)

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[1] With his reply brief, defendant filed a petition for writ of habeas corpus, case No. B241160, and asked that it be consolidated for hearing with his appeal. We denied defendant's motion to consolidate, but agreed to consider the petition concurrently with the appeal. In a separate order, we have denied the petition.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

through (i), it was alleged that defendant had suffered two prior serious or violent felonies.

A jury found defendant guilty in counts 1 and 2 as charged, and found true the firearm allegations as to all counts. The jury also found defendant guilty of attempted murder, but found not true the allegation that the attempted murder was willful, deliberate, and premeditated. Defendant waived his right to a jury trial on the prior convictions, and after a separate court trial, the trial court found them to be true.

The trial court sentenced defendant to a total term of 80 years to life in prison. In count 1 the court imposed a third-strike term of 25 years to life, plus 20 years due to the gun use. As to count 2, the court imposed a consecutive term of 25 years to life as a second strike, plus 10 years for the gun use. In count 3 defendant was given a 25-to-life concurrent sentence. The court assessed mandatory fines and fees and awarded defendant 622 days of presentence custody credit. Defendant filed a timely notice of appeal.

2. Prosecution evidence

On July 17, 2010, during a water fight involving Junior and several other young people in front of the apartment building where defendant lived, defendant was sprayed by one of the participants. Later, after Junior had stopped playing and was text messaging on his cell phone, defendant turned the hose on Junior, and the water damaged Junior's cell phone. Junior had seen defendant earlier that day with a vodka bottle and noted that he smelled of alcohol.

When Junior asked defendant what he intended to do about the damage to Junior's cell phone, defendant ignored him. Junior went across the street and brought his father back with him, and continued to argue with defendant while Senior watched. Junior and Senior both testified that defendant then drew a gun from his pocket, cocked it, and touched it to Senior's face. Senior testified that he and his son were unarmed during this encounter. Defendant pointed the gun at both Junior and Senior, and at one point, touched it to Junior's chest. Junior testified that defendant screamed something like, "Nigga, I'm a gangster. I'm a gangster. I do this." Senior testified that defendant said,

"I don't have to take this," and that he heard defendant "rant" about being a gangster. Junior and Senior retreated to their apartment. Defendant continued to yell outside.

Once inside, Senior recalled that his daughter was out walking the dog. Senior took his gun from the safe where it was kept, put it in his pocket, and went outside to find his daughter. Senior saw his neighbor Janet Wilson (Wilson) with defendant, talking to him, holding him and trying to calm him down. Meanwhile, Junior could not find his father so he took a kitchen knife, went outside, and then saw his father arguing with defendant. Senior testified that after his daughter was safely home, he saw Junior with the knife. Senior then placed himself in front of Junior, and told him to drop the knife and return home. Junior testified that he dropped the knife on his own before he crossed to defendant's side of the street while approximately 20 feet from defendant, because he realized the senselessness of holding the knife. After Junior dropped the knife, defendant approached them and placed his gun against Junior's forehead. Junior pushed it away and a shoving match ensued among the three of them. According to Junior, during this struggle defendant said, "I'll kill you. I'm a gangster. This is nothing to me." Senior added that defendant said such things as, "I'm a gangster, I'm a gangster, I don't give an 'F' about this"; and "I'll blow your mother fucking head off. I'm a mother fucking gangster."

Wilson testified that she saw Junior walk toward defendant with the knife, but he threw it down without using it to threaten defendant. She saw a gun in defendant's hand, but never saw Senior's gun. Wilson added that Junior, Senior and defendant shoved one another until Junior and Senior began to head home. Defendant then put the gun to Junior's head and said, "You mother fuckers got me fucked up. I'm not paying for no fucking phone. We was all over there, you know, in a water fight." Wilson held her five-year-old godson against her to cover his eyes, and screamed, "Don't kill [Junior] in front of my kid." Defendant turned and walked away. Then, Senior stopped and yelled a challenge to defendant to drop the gun and fight like a man in the street. Defendant immediately pointed his gun at Senior and fired it three times. The first bullet struck a parked car very close to Senior, who then took cover behind the car. Senior responded by

returning fire once in defendant's direction. Defendant fled and Wilson went home and called 911. A recording of the 911 call was played for jury.

Junior and Senior ran to their garage, took the car, drove several blocks, and spent the remainder of the day with Junior's grandmother. Senior later destroyed his revolver and threw it into a landfill. He admitted that he had not registered the gun and had bought it 10 days before the incident under circumstances indicating that it had been stolen. Senior did not tell the police that he had been armed until he met with Detective Pamela Robinson 10 days later.

Gardena Police Officer Toshio Hirai testified that he arrived at the scene at approximately 2:00 p.m. and participated with other officers in a search for defendant, who was found and arrested after 40 minutes. Defendant tested positive for gunshot residue. Officer Hirai also found one spent shell casing and two unspent bullets near defendant's apartment building.

3. Defense evidence

Gardena Police Officer Bryan Yee found the knife on the parkway grass on defendant's side of the street, as well as a bullet hole in the window of a ground floor apartment in defendant's building. The bullet was found inside in a speaker box in the apartment. Junior was not cooperative when Officer Yee interviewed him. Senior was more cooperative, but did not disclose his own gun use.

Detective Robinson testified that Junior never showed her his cell phone.

Defendant's niece Shani Smith (Smith) testified that she lived with her grandmother and defendant at the time of the incident and had participated in the water fight that day, which lasted about two hours. Defendant also participated, but disappeared after awhile. After Smith went home to change clothing, she went to the second floor balcony where she saw defendant holding a gun, but not pointing it anywhere. Smith also testified she saw a reflection of Senior in a window across the street. She told the police only that she had seen defendant, and during trial was her first mention of a reflection view of Senior. Smith heard four or five gunshots after she went back inside and did not see who fired them.

Defendant testified that in May 2010 (about a month before the incident) between 7:30 and 8:00 p.m., he was in his neighborhood near the corner of 141st Place and Ardath Avenue, chatting with five other people, including Deon Sergeant, whom he knew only as "Bad News," as well as Nick, Ricky, and his friend Henry, whose last names he did not know. Suddenly gunfire erupted and everyone ducked. Henry and two others, including Bad News, were struck by bullets. Defendant then saw Senior walking quickly toward his home, holding a large chrome gun. Without waiting for the police, defendant went to the hospital to be with his friend Henry. When defendant returned to the scene later, the police had arrived, but he did not speak to them.

Several days before the May shooting, defendant had been involved in an altercation with Junior and his 17-year-old friend, a "little guy" who was about five feet four inches and weighed about 120 pounds. Defendant, who was in his late 40's, admitted that he grabbed the friend by the collar and struggled with him until Junior intervened by trying to put him into a headlock. Defendant later used Wilson's telephone to speak to Senior about the incident, and the conversation was not friendly.

Defendant said of the day of the shooting in this case, that it was a hot day and he brought the hose out for several people to play in the water. He said that Junior was not there, and that the game lasted for about 20 minutes. After most of the water fight participants had left, Junior came from across the street with Senior, who kept his hand on the gun protruding from his right pocket, while Junior demanded that defendant pay for his cell phone. The gun was the same one Senior carried at the time of the earlier May shooting. Defendant denied getting Junior wet and replied that he "wasn't paying for nothing." Defendant claimed that Junior testified falsely about the cell phone.

Defendant and Junior began arguing and Senior went back across the street, but continued to watch them. Junior then said, "Blood, you're going to pay me for my mother fucking phone," pulled a knife from behind his back, and swung it at defendant. Defendant punched Junior in the face, causing him to drop the knife and run back across the street to his father. After they spoke for a few moments, Senior fired his weapon. Defendant ran toward home when a second shot "whizzed" by his head and went through

a nearby window. Defendant fell next to the patio swing that had been placed on the front lawn by a neighbor whom defendant knew only as "Majesty." Knowing that Majesty had placed a gun under the cushion of the swing just before the water fight, defendant retrieved that gun. Though he had never fired a gun before, he had learned how to cock it from watching television. Defendant twice attempted to "rack a round," but the gun jammed and a bullet flew out each time. The third attempt was successful, and defendant aimed above Senior's head and fired.

Defendant said that Senior fired the first shot, and defendant fired back only to protect himself when Senior's second shot came close to his head and hit a nearby window. Defendant fired only once and Senior fired three or four times in all. Defendant did not see the police searching for him after the shooting, and that only 15 minutes had elapsed when they found him on a friend's porch.

Defendant denied that he ever said he was a gangster, explaining that he would not say that because it was not true. He also denied that he ever threatened Junior or Senior with the gun, or that he said "I'll kill you" or "I'll blow your head off." Defendant denied that Wilson was present during the incident, claiming that she lied. The only other neighbors had run away when Junior displayed the knife. Defendant claimed that Wilson fabricated the 911 story to protect Senior. Defendant denied that he changed clothes, put a gun to Senior's head, crossed to the other side of the street, or fired at Senior without provocation. He admitted his three prior felony convictions.

4. Rebuttal

Officer Denny Ward testified that he arrived at the scene of the shooting about 3:30 p.m. and interviewed Smith, who told him that she had heard gunshots while inside her apartment. She then went to the second floor walkway and saw defendant standing on the sidewalk, holding a large blue steel semiautomatic handgun, pointed downward. He then ran toward the alley yelling something about a phone. Smith did not say she saw Senior or anyone else nearby. She told Officer Ward that the gun defendant held resembled the officer's gun, which was a large blue steel semiautomatic handgun.

DISCUSSION

I. Instructional error was harmless

Defendant contends that the trial court erred by failing to instruct the jury to view with caution the several statements attributed to him, made prior to the shooting.

When indicated by the evidence, the trial court has a sua sponte duty to instruct the jury to view with caution the defendant's unrecorded oral statements made outside court before, during or after the crime. (*People v. Wilson* (2008) 43 Cal.4th 1, 19.)[3] Because intent to kill is an essential element of attempted murder (*People v. Smith* (2005) 37 Cal.4th 733, 739), an oral threat to kill is the kind of admission that warrants a view-with-caution instruction. (*People v. McKinnon* (2011) 52 Cal.4th 610, 679 (*McKinnon*).) Junior and Senior testified that defendant made such threats. Thus, the cautionary instruction was warranted. (See *id.* at p. 679.)

"In determining whether the failure to instruct requires reversal, '[w]e apply the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given.' [Citations.] '"Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. [Citations.]"' [Citations.]" (*McKinnon*, *supra*, 52 Cal.4th at pp. 679-680.)

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3 Defendant does not contend that the trial court should have chosen any specific instruction, but respondent observes that CALCRIM No. 358 contains the required language: "You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s]. [¶] [Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]"

Here, there was no evidence that defendant's words meant something else or were repeated inaccurately, or that the words used were different. Defendant simply denied having said them at all. "A defendant's simple denials about making the statements, along with uncontradicted testimony about his statements, may support the conclusion that the instructional error was harmless. [Citation.]" (*People v. Wilson, supra,* 43 Cal.4th at p. 19, quoting *People v. Dickey* (2005) 35 Cal.4th 884, 906 (*Dickey*); see also *McKinnon*, *supra*, 52 Cal.4th at p. 680.)

Defendant contends that he was prejudiced by the absence of the cautionary instruction in that Junior and Senior were not credible and their testimony "powerfully shaped the narrative of what had taken place."

Defendant's argument appears to be that the instruction was necessary to the evaluation of the witnesses' overall credibility. However, the purpose of the cautionary instruction is to determine whether defendant's out-of-court statements were in fact made. (*Dickey*, *supra*, 35 Cal.4th at p. 905.) Other instructions given were sufficient to help the jury evaluate credibility. As respondent points out, the trial court read CALCRIM No. 226, which thoroughly instructed the jury with the factors to consider in evaluating the credibility of witnesses. In addition, the trial court read: CALCRIM No. 301, regarding the sufficiency of a single witness's testimony; CALCRIM No. 302, instructing how to evaluate conflicting evidence; CALCRIM No. 316, evaluating the credibility of a witness with a felony conviction; and CALCRIM No. 318, the use of a witness's pretrial statements to evaluate the believability of his or her testimony at trial.

In particular, the jury was instructed to consider whether a witness had been convicted of a felony, had engaged in other conduct that reflected on his or her behavior, or had lied about something significant. Such instructions were adequate to direct the jury to view with caution the testimony of all three witnesses to the events: Wilson, due to her fraud conviction; Junior, due to his possible lies about the knife and the cell phone; and Senior, due to his destruction of evidence and initial silence about the gun. Thus the jury was given the tools to determine whether each witness was credible. In light of such

instructions and because defendant merely denied making the statements, he has not demonstrated prejudice. (See *Dickey, supra*, 35 Cal.4th at p. 906.)

Moreover, Wilson's testimony regarding her observations of defendant's actions provided ample circumstantial evidence of his intent to kill Senior, regardless of whether he actually made verbal threats. Specifically, Wilson testified that she saw defendant run toward her, her godson and Senior, and fire his gun in their direction. She testified that he fired a second time, hitting a nearby truck. As she took cover, she heard two more shots, and then one shot from another gun. Intentionally firing a weapon at a range and "'"in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." [Citation.]' [Citations.]" (*People v. Smith, supra*, 37 Cal.4th at p. 741; see also *People v. Lashley* (1991) 1 Cal.App.4th 938, 945.)

Thus if the jury determined that defendant did not make the verbal threats claimed by Junior and Senior and rejected their testimony altogether, it would remain that Wilson's testimony alone was sufficient to convict defendant of attempted murder. Only Junior and Senior testified that defendant threatened to shoot or to kill. The statement heard by Wilson --"You mother fuckers got me fucked up. I'm not paying for no fucking phone. We was all over there, you know, in a water fight" -- was not an oral threat to kill, and thus not the kind of admission that requires a view-with-caution instruction. (See *McKinnon, supra*, 52 Cal.4th at p. 679.) Under such circumstances, we conclude that it is not reasonably probable the jury would have reached a result more favorable to defendant had such an instruction been given.[4] The error was thus harmless, and reversal is not warranted. (*Ibid*.)

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[4] This was not a close case and defendant's version of the events was neither corroborated nor very believable.

II. Defendant's prior conviction record was authenticated

Defendant contends that the evidence was insufficient to establish the truth of his 1994 conviction because the superior court clerk who prepared the abstract of judgment did not testify in accordance with Evidence Code section 1280.[5]

The abstract in question was included in a packet of documents attached to a letter signed by the custodian of the records for the California Department of Corrections and Rehabilitation, certifying the records as true and correct copies of the originals kept in her custody. The abstract bore certification of authenticity signed by a deputy clerk and stamped with the seal of the Los Angeles County Superior Court. Further, like each other document in the packet, the reverse side of the abstract was stamped with the seal of the California Department of Corrections and Rehabilitation, with the dated notation certifying it as a true and correct copy of the original document kept in the Department's records, signed by the custodian of the records.

Defendant acknowledges that section 969b allows, as proof of prior convictions, the introduction of "the records or copies of records of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records . . . ." Defendant also acknowledges that the California Supreme Court has held that such records include certified abstracts of judgment, which are presumed sufficient to establish that a prior conviction occurred, in the absence of evidence to rebut that presumption. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1066 (*Delgado*).) Finally, defendant concedes that records certified pursuant to section 969b

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[5] Evidence Code section 1280 provides that a record is not made inadmissible by the hearsay rule if: "(a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

will satisfy the foundational requirements of Evidence Code section 1280 without further testimony. (See *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1477.)[6]

Despite such concessions, defendant contends that the abstract was insufficient evidence of his 1994 conviction without testimony regarding the foundational requirements of Evidence Code section 1280. Defendant's contention is patently without merit, and he has cited no authority that contradicts the authorities and principles he has conceded.

Defendant also suggests that the section 969b packet itself contained evidence that was sufficient to rebut the presumption that the conviction in fact occurred. He contends that the presumption "may be rebutted where there are reasons to be skeptical about the records." Defendant's burden however, was to prove the nonexistence of the presumed fact. (*People v. Martinez* (2000) 22 Cal.4th 106, 125.) Defendant relies on *Delgado, supra*, 43 Cal.4th at page 1066, which describes the burden as one to present "some evidence"; it does not describe defendant's burden of proof as simply raising "reasons to be skeptical."

Defendant contends that he met his burden. First, he points to the date of the superior court certification in 1996, and contends that it shows that the abstract of judgment was prepared two years after his 1994 conviction, thus rebutting the presumption that the document was prepared at or near the time of the event. That date shows only that the copy was certified in 1996. It thus does not rebut the presumption that he suffered the conviction or that the abstract was prepared at or near such time.

Next defendant argues that because his first and last name was transposed on the abstract without a comma after his last name, it could not be presumed that his conviction was recorded accurately. This contention is equally without merit. The trial court was "'entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction . . . .' [Citations.]" (*Delgado, supra,* 43 Cal.4th at

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6 See also *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225-1226, cited by defendant, in which the appellate court rejected a claim that without appropriate testimony, section 969b records violated the Sixth Amendment right of confrontation.

p. 1066.) The trial court could reasonably infer that despite the absence of a comma, the document stated defendant's last name, then first name.

We conclude that the trial court properly relied on the section 969b packet and the certified abstract of judgment, and that defendant failed to rebut the presumption that arose from it that he suffered the convictions recorded therein.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST