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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

KEITH D. DENNIS,

Defendant and Appellant.

B267237

(Los Angeles County
Super. Ct. No. MA063306)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Daviann L. Mitchell, Judge. Affirmed.

Siri Shetty, 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, Senior Assistant Attorney General, Scott A. Taryle and
Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Keith D. Dennis appeals from the judgment entered following his conviction by a jury for attempted willful, deliberate and premeditated murder, assault with a semiautomatic firearm and making a criminal threat with special findings by the jury he had used a firearm in committing each of the offenses. Dennis contends the evidence at trial was insufficient to support his convictions for attempted murder and aggravated assault. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Incident

On June 14, 2014 Roy Swims, his wife, Ryan Smith, their son and several of Swims's in-laws and their children spent the day together at a family gathering at Swims's residence. Dennis was at a neighboring apartment with his girlfriend (or, perhaps, former girlfriend), Tamika Williams. Dennis had been drinking vodka throughout the afternoon.

Late in the afternoon Dennis and Williams argued inside Williams's apartment; Dennis accused Williams of having an affair with Swims. Williams denied the accusation. Dennis left Williams's apartment, rang the doorbell at Swims's apartment and, when Swims went out to meet him, confronted Swims near the adjacent garage. Dennis, who appeared angry and upset, accused Swims of sleeping with Williams. Swims denied the allegation. Dennis pulled a gun from his waistband and pointed it at Swims's head.

Ryan Smith, who had looked out a window after the doorbell rang and saw Dennis approaching her husband, yelled that the man had a gun and ran outside. As she was coming out the door, Smith saw Dennis pull back the slide of his semiautomatic handgun before pointing it at Swims and heard him say Swims was "messaging with his bitch." Smith also heard Dennis tell Swims he was going to shoot him: "He racked it, he pulled the shaft back, and told my husband he was gonna blow his brains out. He kept sayin' he was gonna blow his brains out in front of my kids." The gun at this point was

approximately two inches from Swims's head. Smith saw Dennis pull the trigger once and heard a "click."¹ The gun did not fire.

Brenda Smith, Swims's mother-in-law, followed her daughter outside after Ryan Smith called out that Dennis had a gun. Brenda Smith saw Dennis with a gun aimed at Swims's head and heard him say, "I came to kill you because you fuckin' with my bitch. . . . Yeah, I know you been fuckin' her because she like men with Cadillacs."² Swims denied Dennis's accusation and said, "Man, you got the wrong man. I don't know your woman. . . . I don't know nothin' about your woman." Dennis responded, "Yes, you do. Yes, you do. You do know her," while the gun remained pointed at Swims's head. According to Brenda Smith, when she ran a little past the garage, she heard a clicking sound and then, as she came a little closer to Dennis, saw and heard him cock the gun (or, as she subsequently described, rack the slide).

According to Swims, when Dennis initially confronted him and accused him of being intimate with Williams, Dennis had a glass in his hand. He then set the glass down, "pulled a gun and racked it and pointed it at me, and said, 'Nigga, I blow your motha' fuckin' brains out.'" Dennis had his finger wrapped around the trigger. Swims testified at both the preliminary hearing and trial that he did not see Dennis pull the trigger and did not recall hearing any kind of click from the gun. However, Los Angeles County Deputy Sheriff Scott Carter, one of the officers who responded to the emergency call, testified Swims reported when interviewed on the day of the incident that Dennis had pulled the trigger several times after the slide was racked and that Swims had heard a clicking sound.³

¹ Ryan Smith testified at trial she was having some difficulty recalling the precise sequence of events in the confrontation between Dennis and her husband.

² Brenda Smith testified that Swims owned a Cadillac.

³ Deputy Carter, who prepared a report based on his post-incident interviews, testified during cross-examination by Dennis's counsel that in his opinion, "because of the condition of the weapon being that the safety was on, that the defendant was

Brenda Smith managed to place herself between Swims and Dennis and told Dennis he should not kill Swims in front of the children. As this was taking place, Swims was able to run inside his home and call the police emergency number. As he began to walk away, Dennis said, “Aw, shucks, I wasn’t goin’ to shoot nobody.”

The prosecutor played the audio tape of the emergency call for the jury. On the tape Swims’s son can be heard saying, “There’s this man over here trying to shoot my dad.” Swims then took the phone and reported, “This man’s got a gun, just tried to shoot me”; Swims gave his residence address and urged a quick response by law enforcement.

Surveillance footage showed Dennis leaving the handgun in the apartment complex garage. Dennis was arrested nearby, and the firearm was recovered. The prosecutor played an audio tape of Brenda Smith’s identification of Dennis during a field show-up, which included the following exchange:

Brenda Smith: “I kept standing in front of him trying to get him to focus on me because he had already pulled the trigger once.”

Sheriff Deputy 2: “He pulled the trigger?”

Brenda Smith: “Yeah. And it . . . and the gun didn’t shoot.”

Sheriff Deputy 2: “And then he racked a round?”

Sheriff Deputy 1: “He racked a round.”

Brenda Smith: “And then he cocked it again. And he told me, ‘You better get out the way, I’ll shoot you.’”

2. Trial Evidence Regarding the Handgun

The firearm used by Dennis was a nine-millimeter semiautomatic handgun (a Luger) with one round in the chamber and an additional nine rounds in the magazine. When the gun was recovered, the safety lever was activated.

A senior criminalist testified for the People that the handgun, in general, and the safety lever, in particular, were functional. The criminalist demonstrated for the jury that

unfamiliar with it, and the pulling of the trigger with the safety on caused it not to fire, but I believe that he had every intent to fire that weapon at Mr. Swims.”

the gun was designed for the safety lever to be turned off and on (enabled or disabled) by the shooter's thumb. He explained, unless a safety latch malfunctions, which is possible, the gun will not fire when the lever is activated because a pull of the trigger does not actuate the hammer. In this particular model, the safety mechanism can be partially activated in a middle position—halfway up—which will still prevent the gun from firing. The criminalist also testified it is possible for the safety lever to be accidentally activated, either fully or partially, when the slide is pulled back (racked) to chamber a round. If that occurred, the gun would not fire even if the shooter intended to have the firearm be in the firing position.

When a person pulls the trigger of a gun with the safety lever activated, the trigger spring makes a noise. The criminalist demonstrated that sound for the jury. When a person pulls the trigger of a gun with the safety lever off but no round in the chamber, it makes a louder noise, which the criminalist also demonstrated for the jury.

The defense firearm expert similarly testified the recovered handgun was functional, there were no defective parts that would have caused it to jam or misfire, and someone would hear a trigger spring if the trigger was pulled when the safety latch was engaged.

3. Instructions and Closing Argument

The trial court read the substantive portion of the jury instructions prior to closing arguments. Using CALCRIM No. 600 the court instructed, in part, to prove Dennis guilty of attempted murder, the People were required to prove he intended to kill Swims. Using CALCRIM No. 875 the court instructed, in part, to prove Dennis guilty of assault with a semiautomatic firearm, the People were required to prove Dennis did an act with a semiautomatic handgun that by its nature would directly and probably result in the application of force to a person (Swims). The court also explained that attempted murder was a specific intent crime, aggravated assault was a general intent crime.

In her closing argument the prosecutor acknowledged the recollection of Ryan Smith, Brenda Smith and Roy Swims of the events of June 14, 2014 had changed

somewhat from their statements to responding sheriff deputies on the day of the incident and that, by the time of trial approximately one year later, the three percipient witnesses did not remember those events in precisely the same way. Nonetheless, she argued, both Ryan Smith and Brenda Smith had at the earlier time described Dennis as having first pulled the trigger while pointing the gun at Swims's head and then racking the slide while still pointing the gun at Swims's head and saying he was going to kill him. The only reasonable inferences from these facts, she continued, was that Dennis intended to shoot Swims in the head; the gun initially did not fire because the chamber was empty; Dennis then racked the slide to chamber a round; and, in doing so, he accidentally activated the safety lever, at least in part, which prevented the gun from firing when, as Brenda Smith recalled, he pulled the trigger a second or third time.

Dennis's counsel emphasized the safety on Dennis's gun was on when the gun was recovered and both expert witnesses had agreed the firearm and the safety were fully functional. She argued her client, who was jealous and angry and probably also a little drunk, went to Swims's residence, not with the intent to kill him, but to scare him: "If he wanted to kill that man, he would have turned the safety off, and he would have blown his brains out. That gun was working. There were bullets in the chamber, there were bullets in the magazine." Defense counsel emphasized that Swims testified he did not recall the trigger being pulled by Dennis; all he heard was the racking of the gun.

In her final argument the prosecutor reiterated the only reason to rack a round when the gun did not fire after the first trigger pull was to carry out the ongoing threats to kill Swims, not simply to scare him. "If he wanted to scare Mr. Swims, pulling [the gun] out is enough. Pointing it is enough. The only reason that he pulled the trigger, racked the slide, pulled the trigger again is because he didn't know the safety was on, and he was trying to kill Mr. Swims."

4. *Verdict and Sentencing*

The jury convicted Dennis of attempted willful, deliberate and premeditated murder (Pen. Code, §§ 187, subd. (a), 664) (count 1), assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)) (count 2) and making a criminal threat (Pen. Code, § 422, subd. (a)) (count 3) and found true the special allegations he had personally used a firearm in committing the three offenses (Pen. Code, §§ 12022.53, subd. (b), as to count 1; 12022.5, subds. (a) & (d), as to count 2; 12022.5, subd. (a), as to count 3). The court sentenced Dennis to an indeterminate life term in state prison for attempted murder plus 10 years for his use of a firearm. Sentence on the other two counts was imposed and stayed pursuant to Penal Code section 654.

DISCUSSION

1. *Governing Law and Standard of Review*

Attempted murder is a specific intent crime. (*People v. Sanchez* (2016) 63 Cal.4th 411, 457 [“[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing”]; *People v. Gonzalez* (2012) 54 Cal.4th 643, 653 [“[w]hile implied malice murder does not require an intent to kill, *attempted murder* does require a specific intent to kill”]; see Pen. Code, § 21a.) “““To constitute murder, the guilty person need not intend to take life; but to constitute an attempt to murder, he must so intend.” [Citation.] “The wrong-doer must specifically contemplate taking life; and though his act is such as, were it successful, would be murder, if in truth he does not mean to kill, he does not become guilty of an attempt to commit murder.””” (*People v. Bland* (2002) 28 Cal.4th 313, 327-328.)

“Because direct evidence of a defendant’s intent rarely exists, intent may be inferred from the circumstances of the crime and the defendant’s acts.” (*People v. Sanchez, supra*, 63 Cal.4th at p. 457; accord, *People v. Smith* (2005) 37 Cal.4th 733, 741 [“intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant’s acts and the circumstances of the crime”].)

Aggravated assault (here, assault with a semiautomatic firearm), like a simple assault, does not require a specific intent to injure the victim. (*People v. Wyatt* (2012) 55 Cal.4th 694, 702.) Penal Code section 240 defines an assault as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” “[T]he defendant must ‘actually know[] those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another.’ [Citation.] No actual touching is necessary, but the defendant must do an act likely to result in a touching, however slight, of another in a harmful or offensive manner.” (*Wyatt*, at p. 702; see *People v. Williams* (2001) 26 Cal.4th 779, 788 [defendant need not be subjectively aware of the risk a battery might occur but must have actual knowledge of those facts that would lead a reasonable person to realize a harmful or offensive touching will “directly, naturally and probably result from his conduct”].)

Emphasizing that Dennis told Brenda Smith as he walked away following his confrontation with Swims that he had never intended to shoot anyone, that the gun did not fire when Dennis pulled the trigger, and that the safety was activated on the semiautomatic handgun when it was recovered by a sheriff’s deputy shortly after the incident, Dennis argues no rational jury could conclude he had the specific intent to kill Swims. Similarly, because the safety was apparently on when he pulled the trigger as he held the gun to Swims’s head, Dennis contends the evidence does not support a finding he had engaged in an intentional act that would probably and directly result in the application of force against Swims.

In considering Dennis’s claims of insufficient evidence, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., 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. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support

of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.’ (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Sandoval* (2015) 62 Cal.4th 394, 423; *People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

The standard of review is the same in cases in which the People rely mainly on circumstantial evidence to prove one or more elements of their case. (*People v. Clark* (2016) 63 Cal.4th 522, 625; *People v. Tully* (2012) 54 Cal.4th 952, 1006.) “““Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant’s guilt beyond a reasonable doubt.””” (*People v. Story* (2009) 45 Cal.4th 1282, 1296.) “Where the circumstances reasonably justify the trier of fact’s findings, a reviewing court’s conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment’s reversal.” (*People v. Zamudio, supra*, 43 Cal.4th at p. 358; accord, *Clark*, at p. 626.)

2. Substantial Evidence Supports Dennis’s Convictions for Attempted Murder and Aggravated Assault

The jury heard evidence that, while pointing a semiautomatic handgun at Swims’s head and repeatedly stating in an angry voice that he was going to kill him, Dennis pulled the trigger and, when the gun did not fire, racked a round into the chamber and pulled the trigger again. The prosecution’s expert testified the act of pulling the slide back on the Luger could accidentally engage the safety enough to prevent the gun from discharging. Those circumstances reasonably justified the jury’s finding Dennis expected the handgun

to fire and intended to kill Swims and its implicit conclusion he did not intentionally activate the safety prior to pointing the gun at Swims.

To be sure, there was inconsistent testimony whether Dennis pulled the trigger one or more times, as well as whether he did so only after racking a round into the chamber, and not before. It may be that the evidence, viewed in a different manner, permitted a reasonable inference that Dennis was aware at all times the safety was on and intended only to scare Swims. But in light of the deferential standard of review, Dennis's argument the evidence was insufficient to show either that he intended to kill Swims or that he engaged in an intentional act that would probably and directly result in the application of force against Swims necessarily fails.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.