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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE HERNANDEZ, Defendant and Appellant.	B234574 (Los Angeles County Super. Ct. No. NA085048)

APPEAL from judgment of the Superior Court of Los Angeles County, James B. Pierce, Judge. Affirmed and remanded with directions.

Law Offices of Russell S. Babcock and Russell S. Babcock, under appointment of the Court of Appeal, for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael C. Keller, Deputy Attorneys General for Plaintiff and Respondent.

Appellant Jose Hernandez appeals from the judgment of conviction of attempted willful, deliberate, and premeditated murder under Penal Code sections 187 and 664, subdivision (a). The only issue on appeal is whether there is sufficient evidence to prove deliberation and premeditation. We find sufficient evidence and affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On February 28, 2010, at about 4:00 a.m., Raul Lopez was awakened by loud voices in an alley next to his residence. He looked out his window at the alley and saw appellant and another man. Appellant was talking on his cell phone while drinking a beer. When appellant apparently ended his cell phone conversation, he approached a fence in the alley and began talking to Galdino Diaz. There was a cinderblock wall, approximately four and a half feet high, and a wooden fence, approximately six and a half feet high between appellant and Diaz. From his vantage point, Lopez saw appellant but could not see Diaz.

Appellant repeatedly told Diaz to "come here," and they argued loudly for two to three minutes.[1] Lopez then saw appellant climb the cinderblock wall and fire a handgun about five times towards Diaz. Two shots hit Diaz in the neck. Lopez heard Diaz scream and saw appellant and another man in the alley run away.

Jose Medina, who lived nearby also was awakened by the loud voices. He heard one of the persons tell the other to come over the fence or wall. He believed they knew each other because one said, "I brought you into this neighborhood." Medina looked out his window but did not see anyone. When he turned around to go to his daughter's room, he heard four gunshots and heard someone scream.

Officers Ibarra and Lopez responded to the scene and found Diaz bleeding from his neck. Diaz underwent emergency surgery and survived. The doctor noted that if surgery had not been immediately performed, Diaz would have died.

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[1] The substance of the argument is unknown because appellant and Diaz were speaking English and Lopez only understood Spanish.

In May 2010, appellant was charged in count one with attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664/187, subd. (a)); in count two with assault with a firearm (Pen. Code, § 245, subd. (a)(2)); and in count three with possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)). The information alleged as to count one that appellant had personally and intentionally discharged a firearm, causing great bodily injury and death (Pen. Code, § 12022.53, subd. (d)); that appellant personally and intentionally discharged a firearm (Pen. Code, § 12022.53, subd. (c)); and that appellant personally used a firearm (Pen. Code, § 12022.53, subd. (b)). It was alleged as to all counts that appellant had suffered prior felony convictions with a prison term (Pen. Code, § 667.5, subd. (b)), and a prior serious or violent felony conviction within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d), and 667, subd. (a)(1)).

A jury convicted appellant on all counts and found the allegations to be true. Appellant admitted his prior convictions. The court sentenced appellant to life imprisonment with the possibility of parole for count one, plus 25 years to life for the firearm enhancement and eight years for the prior convictions. The sentences for the other two convictions were stayed under Penal Code section 654. Appellant filed a timely notice of appeal.

DISCUSSION

I

Appellant challenges his conviction of attempted murder alleging there was insufficient evidence that he committed the crime with premeditation and deliberation. He contends the evidence demonstrates that he acted on a rash emotional impulse.

A court reviewing an appeal based on insufficiency of evidence views the record in the light most favorable to the judgment to determine if there is substantial evidence from which any reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1322.) The testimony of a single witness is sufficient to support a conviction. (*People v. Elliott* (2012) 53 Cal.4th 535, 585, citing *People v. Young* (2005) 34 Cal.4th 1149, 1181.) "'[I]f the

circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding.'" (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 295 (*Gonzales and Soliz*), quoting *People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

"An intentional killing is premeditated and deliberate if it occurred as the result of reflection rather than unconsidered or rash impulse. [Citation.]" (*People v. Nelson* (2011) 51 Cal.4th 198, 213 (*Nelson*).) "'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.]" (*People v. Booker* (2011) 51 Cal.4th 141, 172.) There is no time requirement for reflection as "[t]houghts may follow each other with great rapidity, and cold, calculated judgment may be arrived at quickly." (*Nelson*, *supra*, 51 Cal.4th at 213, citing *People v. Harris* (2008) 43 Cal.4th 1269, 1286–1287 (*Harris*).) In *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*), the California Supreme Court identified three types of evidence–planning activity, preexisting motive, and manner of killing–that assist in reviewing the sufficiency of evidence supporting a finding of premeditation and deliberation. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.) While the *Anderson* factors can assist a reviewing court in determining whether there is sufficient evidence of deliberation and premeditation, "'[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate.'" (*Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 294.) Therefore, while we address the *Anderson* factors in the analysis, they are not necessarily dispositive.

Appellant argues there is no evidence of planning activity prior to the shooting. We disagree. Carrying a weapon to the scene of the crime makes it '"reasonable to infer that [the appellant] considered the possibility of homicide from the outset.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1250.) In *People v. Morris* (1988) 46 Cal.3d 1, 23, overturned on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, the court found that "[d]efendant's possession of a weapon in advance of the killing, and his rapid escape to a waiting car moments afterwards, amply support an inference of planning activity." In our case, appellant possessed a gun before initiating contact with Diaz. He

instructed Diaz to come closer to him before the argument. Medina's testimony that he heard one of the men say, "I brought you into this neighborhood," supports the inference that appellant and Diaz knew each other prior to the argument. Viewing the record in the light most favorable to the judgment, we conclude a reasonable jury could find appellant took planning action and at least considered the possibility of murder prior to the shooting.

There also was sufficient time during the argument for appellant to plan. As we have discussed, there is no time requirement for deliberation and premeditation as "[t]houghts may follow each other with great rapidity, and cold, calculated judgment may be arrived at quickly." (*Nelson*, *supra*, 51 Cal.4th at 213.) In *Nelson,* the court upheld the defendant's conviction for deliberate and premeditated murder after he "took up a firearm, climbed out of a moving car, sat on the window frame, reached across the roof, braced himself, and aimed at [the intended victim]." (*Ibid*.) The court stated in performing these actions, the defendant "had ample time to premeditate and deliberate." (*Ibid*.) Similarly, the court in *Harris*, *supra*, 43 Cal.4th at 1269, upheld a deliberate and premeditated murder charge when the defendant waited until the victim's daughter walked from a door to a service window at a restaurant before attacking the victim. (*Id*. at p. 1277, 1324.) The court said, "[i]n the time it took for [victim's daughter] to go from the door to the service window, and to take and prepare defendant's order, there was ample time for him to deliberate and premeditate before attacking [the victim]." (*Id*. at p. 1287)

In our case, appellant had at least two to three minutes during the argument to deliberate and premeditate. Here, after this time elapsed, appellant climbed the fence separating him from Diaz, either after or before he took out his gun, and fired multiple shots directly at Diaz. This is about the same amount of time, or more, than in *Nelson*, who grabbed his gun, climbed out of a car, aimed, and fired. As in *Harris*, a reasonable jury could find that while appellant waited to attack during the argument, he had sufficient time to deliberate and premeditate. We therefore conclude a reasonable jury could find appellant undertook planning activity during the argument.

Appellant next contends the nature of the crime in this case demonstrates that he shot Diaz as a result of a sudden emotional outburst. We disagree. In *Gonzales and Soliz*, the defendants approached the victims and argued with them before shooting them at close range. There, the court found that a close range shooting without any provocation or evidence of a struggle supports an inference of premeditation and deliberation. (*Id.* at p. 295) Here, appellant approached Diaz, instructed him to come closer to the fence, argued with him for two to three minutes, climbed the wall, and then shot him multiple times at close range. There is no evidence of provocation or of a struggle during the argument. As in *Gonzales and Soliz*, we conclude a reasonable jury could infer appellant's actions support a conviction of premeditated and deliberate attempted murder.

After examining the evidence in the light most favorable to the judgment, we find sufficient evidence to support appellant's conviction for deliberate and premeditated attempted murder.

II

While not raised by either party, we note that the abstract of judgment does not list the enhancements for which the court sentenced appellant. We direct the trial court to amend the judgment to reflect the sentences imposed for these enhancements.

DISPOSITION

The conviction is affirmed. The trial court is ordered to correct the errors in the abstract of judgment and send a copy to the Department of Corrections and Rehabilitation.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.