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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL AUGUSTINE LOPEZ,

Defendant and Appellant.

B290988

Los Angeles County
Super. Ct. No. VA143254

APPEAL from a judgment of the Superior Court of
Los Angeles County, Raul A. Sahagun, Judge. Affirmed.

Mark McBride for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Steven D. Matthews and Rama R. Maline,
Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Manuel Augustine Lopez of the attempted murder of Joshua V. and Alondra B., shooting at an occupied motor vehicle, and possession of a firearm by a felon. The jury found firearm and gang allegations true.¹ On appeal, Lopez argues the verdict resulted from an “unconstitutional identification procedure,” there was no substantial evidence of Lopez’s intent to kill, and Senate Bill No. 1437 somehow exonerates him as an “aider and abettor.” We find no error and affirm his conviction.

FACTS AND PROCEDURAL BACKGROUND²

1. *Lopez shoots into the victims’ car, striking one victim*

In the early morning hours of October 16, 2016, Alondra B. and Joshua V. were sitting in their parked car next to Mayberry Park at the border of Whittier and Santa Fe Springs. A car pulled up next to them. The car approached from the opposite direction, so the driver’s door of that car was next to the driver’s door of Joshua’s car. Alondra saw a driver and two passengers. The driver said they were “from La Mirada.” He said, “What are you doing here? This is not your area; it’s my area.” The driver asked Joshua where he was from. Joshua “told him that you guys have the wrong guy.” Joshua said he would leave; he put his hands up. But the driver pointed a gun at them and then

¹ The jury also found Lopez guilty of possession of ammunition by a felon and possession of methamphetamine for sale. Lopez does not challenge these convictions on appeal.

² All of Lopez’s citations to testimony are to the preliminary hearing. Lopez’s brief contains no citations to the testimony at trial. On appeal, we of course consider the trial—not preliminary hearing—testimony in reviewing the record for substantial evidence.

“just started shooting,” firing more than five times. Alondra ducked. She heard bullets hitting the car.

Alondra heard the car leave. She looked at Joshua and saw “[h]e was bleeding from his head.” She called 911. Paramedics arrived, put Joshua in an ambulance, and took him to the hospital. Joshua had been shot in the back of the head and the back. Doctors “had to take a flat bone out of [his] head to release the pressure” on his brain. He was in the hospital for about three weeks.

Joshua was not able to identify any perpetrators. He later testified, “All I just see is one guy with a gun.” He believed that person was on the driver’s side of the car that pulled up next to his. Joshua “heard them say a gang” but he didn’t remember “if they said Southside Whittier or La Mirada.”

Humberto Soto was working as a security guard “right across from the park” that night. Between midnight and 1:00 a.m. he saw two cars—a Dodge Dart and a Honda Civic—driving fast westbound. The cars stopped “right across from [him].” They had turned off their lights. The cars “accelerated real quick to the Mayberry Park” and then Soto heard six to eight gunshots in rapid succession from “more than one gun.”

The cars then drove eastbound. Soto got a look at the driver of the Dodge Dart. When later shown a photo six-pack by detectives, Soto selected photographs of two men who were not Lopez. At the preliminary hearing and trial, however, Soto testified the man there in court—Lopez—was the man he saw driving the Dodge Dart. When asked, “Is seeing him live better than seeing him in a picture?” Soto answered, “Yes.” Soto said he had no doubt that the man he identified in court was the driver of the Dodge Dart.

Officers and forensic technicians who arrived at the scene found Joshua’s car with shattered windows and “bullet holes

along the driver's side." Two bullets and ten shell casings lay in the street. Two of the shell casings were .40 caliber and the other eight were .45 caliber.

On October 26, 2016, detectives showed Alondra a photo six-pack. Alondra chose Lopez's photograph as the man who shot at her. Lopez's photograph was in position 2. She also considered the man in position 5. Alondra ultimately selected Lopez's photograph because his skin color was lighter, his face was more round, and "it just look[ed] more like him" than the man in position 5. She also identified Lopez in court at the preliminary hearing and trial. Alondra testified she was "really confident" in her identification.

Eight days after the shooting, detectives—armed with a warrant—followed Lopez as he drove a Dodge Dart away from a residence in La Mirada. They stopped him and arrested him. A later examination of the Dart at a tow yard revealed three bullet holes. A technician found gunshot residue on the interior panel of the driver's side door and on the driver's headliner of the Dart.

Cell phone records showed Lopez's phone was about half a mile from Mayberry Park between 12:55 and 1:10 a.m. on October 16, 2016.

Authorities obtained a surveillance video from a nearby business. The prosecutor played the video for the jury. We have watched it. The black-and-white, soundless video shows a parking lot outside a small building with a door. Two cars and a truck are parked in the lot. Beyond the right side of the truck, in the distance, a car approaches from the top left of the screen. The parties agree this is Joshua's car. It pulls forward, then backs up, then stops. The headlights remain on.

Several seconds later, a car approaches from the upper right side of the screen. The parties agree this was a Dodge Dart.

Contrary to Soto's testimony, the headlights are on and can be seen in the video. The Dart stops right next to Joshua's car. Several small white spots can be seen. In the meantime, another car arrives from the right top of the screen and stops next to the Dart. White flashes can be seen. The Dart drives away, then the second car to arrive drives away.

The quality of the video is poor. It is difficult to make out what is happening. The large white numerals of the time code in the upper righthand corner obscure some of the scene.

Neither Joshua nor Alondra remembered seeing the second car that pulled up. Joshua wouldn't have been able to see the second car because the first car was blocking it.

Lopez is a Varrio La Mirada gang member with the moniker "Termite."

2. *The charges, verdict, and sentence*

The People charged Lopez with two counts of attempted willful, deliberate, premeditated murder (counts 1 and 2), shooting at an occupied motor vehicle (count 3), possession of a firearm and ammunition by a felon (counts 4 and 5), and possession of methamphetamine for sale (count 6). The People alleged Lopez personally and intentionally discharged a firearm causing great bodily injury to Joshua under Penal Code section 12022.53, subdivision (d)³ (counts 1, 2, and 3), and that he committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang under section 186.22, subdivisions (b)(1)(A) (counts 1, 2, 4, and 5) and (b)(4) (counts 1, 2, and 3).⁴

³ Statutory references are to the Penal Code.

⁴ Lopez states in his brief that the jury found true sentencing enhancements under "sections 12022.6(a)(2), 12022(a)(3), and 186.11(a)(2)." There are no such code sections as "12022.6(a)(2)"

The jury convicted Lopez on all six counts and found all of the allegations true. The trial court sentenced Lopez to two indeterminate terms of life in prison as well as a determinate term of five years. The court imposed consecutive 40 years to life sentences on the attempted murder counts (a minimum parole eligibility date of 15 years under section 186.22, subdivision (b)(4), plus 25 to life for the discharge of the firearm causing great bodily injury to Joshua). On count 3 the court sentenced Lopez to the midterm of five years plus 15 years for the gang allegation and 25 years to life for the firearm enhancement; the court stayed that sentence under section 654. On count 4, the court imposed the midterm of two years plus the midterm of three years on the gang allegation. On counts 5 and 6, respectively, the court sentenced Lopez to the midterm of two years plus three years for the gang allegation, and the midterm of two years, concurrent with count 4.

DISCUSSION

1. Lopez’s contention that police used an “unconstitutional identification procedure” is meritless

Lopez contends “[t]he prosecution . . . was rife with investigative failures, and the victims’ traumatic experience left a memory void in which detectives inserted their own version of events” Lopez says “no reasonable evidence was offered to prove that [he] actually shot a gun at anyone that night.” The record does not support Lopez’s contentions.

Lopez asserts the video is “clear that the second car was the only vehicle from which shots were fired.” To the contrary,

or “12022(a)(3).” Section 186.11, subdivision (a)(2) has to do not with gang crimes but with fraud or embezzlement resulting in a financial loss to the victim. (§ 186.11, subd. (a)(1), (2).)

it is not clear at all. As we have said, the video is of poor quality. A viewer can see the victims' car stopped with its headlights on, then a car approaches and stops next to the victims' car. Several small white spots can be seen, but they are unclear because the viewer is looking through the back windows of the victims' car toward the perpetrator's car. When the second car pulls up, brighter white flashes can be seen; they are more visible because there is no obstruction between them and the viewer.

In short, the video is entirely consistent with Alondra's testimony that Lopez pulled up next to Joshua's car window, pointed a gun at them, and fired repeatedly. That the second car also arrived and started shooting does not change this fact. Alondra testified she saw Lopez fire the first shot, then she ducked. After that she heard but didn't see gunshots. On cross-examination, defense counsel asked Alondra, "Did you actually look at the person [who] was shooting?" Alondra answered, "Yes." Lopez's assertion that it is "clear that [Alondra] did not see anything other than possibly a shadow when she looked up just before the shooting" ignores the testimony and evidence at trial, including the presence of gunshot residue inside Lopez's car above and next to the driver's seat.

Lopez also argues the eyewitness identification of Lopez at trial after detectives showed the witnesses photo six-packs "gave rise to a substantial likelihood of 'irreparable misidentification.'" Again, the evidence is to the contrary. Joshua was unable to choose any photo in the six-pack. Soto chose two photographs that were not Lopez but he recognized Lopez when he saw him in person in court. Alondra considered two photographs and ultimately chose Lopez's; she explained the reasons for her decision. She also recognized Lopez when she saw him in court. The detective who showed the six-packs

to the witnesses testified he gives witnesses as much time as they need to look at photographs in a six-pack.

We reject Lopez's contention that "the identifications were unreliable as a result of the investigation process that aggressively guided the witnesses toward one suspect only."

2. *Substantial evidence supports the jury's determination that Lopez fired at the victims with the intent to kill them*

Lopez next argues "[t]he evidence was insufficient to support the convictions because the prosecution failed to establish that [he] acted with an intent to kill." This is a variation on Lopez's first argument: he didn't "fire[] shots at the victims" and "the surveillance video was clear that the shots all came from the Honda Civic." Lopez contends "it was plainly unreasonable for the jury to accept [Alondra's] testimony that she saw . . . Lopez raise a gun and shoot at her in the dark."

Lopez misunderstands the substantial evidence rule and our task on review. On a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. (*People v. Young* (2005) 34 Cal.4th 1149, 1175.) We " " "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' ' ' (*Ibid.*) When a jury's "factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) "If our review of the record shows that there is substantial evidence to support the judgment, we must affirm, even if there is also substantial

evidence to support a contrary conclusion and the [trier of fact] might have reached a different result if it had believed other evidence. [Citation.] Accordingly, if the evidence is such that rational people could reach conflicting conclusions, there is by definition substantial evidence to support the judgment.” (*People v. Riley* (2015) 240 Cal.App.4th 1152, 1165-1166.)

Alondra testified Lopez fired a number of shots into the car where she and Joshua sat. Joshua was hit by three bullets. “[I]t is well settled that 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. (See *People v. Lee* (1987) 43 Cal.3d 666, 679) ‘There is rarely direct evidence of a defendant’s intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant’s actions. (*People v. Lashley* [(1991)] 1 Cal.App.4th [938,] 946) The act of firing toward a victim at a close, but not point blank, range “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” (*Id.* at p. 945.)’ ” (*People v. Smith* (2005) 37 Cal.4th 733, 741.) The jury was entitled to conclude that, when Lopez fired his gun repeatedly at the victims sitting, at most, only several feet from him, he intended to kill them.

3. *Lopez was not tried as an aider and abettor; in any event, Senate Bill No. 1437 does not apply to attempted murder*

Lopez bases his third argument on the same erroneous contention that only a person or persons in the second car shot at the victims. From that incorrect premise, Lopez seems to argue there was insufficient evidence that he aided and abetted the shooter in the second car, contending “the person driving the Dodge did not expect a shooting.” Lopez is wrong.

The prosecution always contended Lopez drove the Dodge Dart, pulled up next to the victims' car—facing driver's window to driver's window, pointed his gun at the victims, and then fired a number of shots, striking Joshua. The prosecutor spoke about the second car and "the other shooter" as well. The prosecutor told the jury the two cars were "driving together" and "acting together," "[o]ne gun in each car, at least that we know of." The prosecutor also told the jurors that Lopez "[took his] hand out of the car," pointed a gun, "hit . . . up" the victims, and then shot. There was gunshot residue in Lopez's car, the prosecutor said, "[b]ecause he was shooting at the two victims." After that, the prosecutor noted, Lopez drove off while the second car was still shooting.

Not surprisingly, Lopez's trial attorney did not ask the court to instruct on aiding and abetting nor did the court do so. In his closing, defense counsel argued all the shots came from the second car. The jury had the video and jurors were free to decide for themselves what the video showed. They had Alondra's testimony and the gunshot residue testimony as well. There is nothing to indicate the jurors did not convict Lopez based on their conclusion that he shot at the victims from the driver's window of the Dodge Dart and therefore was a direct perpetrator of the crimes.

Lopez also contends we must reverse his conviction in light of Senate Bill No. 1437 (SB 1437). There are three problems with this argument. First, as we have said, the jury did not convict Lopez as an aider and abettor, much less under the natural and probable consequences doctrine. Second, SB 1437 applies to murder but not attempted murder. Third, SB 1437 is not retroactive: a defendant seeking relief must petition the trial court to vacate his conviction and resentence him.

Lopez ignores the plain language of SB 1437. Newly-added subdivision (e) of section 189 provides a participant in an enumerated offense “in which a *death* occurs is liable for *murder*” only if certain proof is presented. (§ 189, subd. (e), italics added.) To establish he is entitled to relief, a petitioner must show he was charged with *murder*, convicted of first or second degree *murder*, and could not have been convicted of first or second degree *murder* due to changes SB 1437 made to sections 188 or 189. (§ 1170.95, subd. (a).)

Our colleagues in Division Seven recently held SB 1437 does not apply to attempted murder. (*People v. Lopez* (2019) 38 Cal.App.5th 1087.) We agreed, and reached the same conclusion in a case filed shortly after *Lopez*. (*People v. Munoz* (2019) 39 Cal.App.5th 738 (*Munoz*).)

Finally, the Legislature limited retroactive application of SB 1437. A defendant may seek SB 1437 relief, but he must do so via the procedural avenue provided by the legislation. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 727-729; *Munoz, supra*, 39 Cal.App.5th at pp. 751-753.) Again, however, Lopez cannot file a petition under SB 1437 in any event, because the jury convicted him of attempted murder, not murder.

DISPOSITION

We affirm Manuel Augustine Lopez's conviction.

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EGERTON, J.

We concur:

EDMON, P. J.

HANASONO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.