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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. SEVERIANO ARREDONDO, Defendant and Appellant.	2d Crim. No. B290855 (Super. Ct. No. 2012023947) (Ventura County)

Severiano Arredondo appeals from the judgment after a jury convicted him of two counts of assault with a deadly weapon on a peace officer (Pen. Code,[1] § 245, subd. (d)(1)), and found true allegations that he intentionally discharged a firearm when he committed his crimes (§ 12022.53, subd. (c)). The trial court sentenced him to 34 years eight months in state prison. Arredondo contends: (1) the court erroneously denied his motion for a mistrial, (2) the prosecution presented insufficient evidence that he did not act in self-defense and that he knew his victims

[1] All further statutory references are to the Penal Code.

were police officers, (3) the court erred when it refused to strike the firearm enhancements, and (4) the matter should be remanded to determine whether he is eligible for pretrial diversion. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Prosecution case

Santa Paula Police Officers Walter Harper and Todd Aguilar were on patrol one evening in June 2012. Both officers were in uniform. Their black-and-white police vehicle had red and blue lights in the center of the windshield and "Santa Paula Police" written on the side. It also had a push bumper, and spotlights mounted on the side.

Just before midnight, the officers approached an "extremely well lit" intersection in downtown Santa Paula. While stopped at a red light, they saw Arredondo cross the street in front of them while holding a skateboard. Officer Harper made eye contact with Arredondo, and suspected that he may be a juvenile violating the city's curfew. Officer Aguilar activated the patrol vehicle's spotlight and told Arredondo to stop. Arredondo continued to walk away.

The officers turned into a shopping complex and stepped out of their patrol vehicle. Officer Aguilar again told Arredondo to stop. Arredondo pulled a firearm from his waistband and fired at him. He fired four more shots as the officers took cover. Officer Harper returned fire at Arredondo, who ran down the street. Several additional officers soon arrived to contain the scene.

Early the next morning, officers found a blood trail leading away from the scene of the shooting. A detective found a skateboard and broken pieces of a revolver handgrip nearby.

Officers followed the blood trail to an apartment complex, where they found and arrested Arredondo. He was bleeding from a gunshot wound to his hand.

Paramedics arrived and transported Arredondo to the hospital. Arredondo appeared calm and did not have trouble answering their questions. When an officer took pictures of his hands, Arredondo extended his middle finger and laughed.

Officers Harper and Aguilar's patrol car had a bullet hole in one of the rear quarter panels after the shooting. There was a bullet strike in the rear wheel well. There were also bullet holes in a UPS drop box and mailbox near the officers' vehicle.

Motion for mistrial

During direct examination, a police officer testified that Arredondo was arrested after he and a cousin stole beer from a local market. Later, the prosecutor asked a police sergeant if he participated in a probation search of Arredondo's residence. Arredondo objected. At a hearing outside the jury's presence, Arredondo said that, based on discussions with the prosecutor, he understood that there would be no mention of the probation search. The prosecutor replied that he believed Arredondo was referring to a different probation search.

The trial court was "troubled" that, because of the prosecutor's question, the jury knew that Arredondo was previously on probation. Arredondo moved for a mistrial. He said that a defense investigator saw three jurors "perk up a little bit" when the prosecutor asked about the probation search. He was also concerned that the jury would "look at him differently" if he decided to testify.

The trial court determined that the prosecutor's question did not warrant a mistrial. It indicated that it would

tell the jury to disregard the question unless Arredondo wanted to let jurors know that the probation search related to his beer theft. Arredondo declined, and asked the court to simply tell the jury to disregard the prosecutor's question.

When jurors returned, the trial court told them to disregard the prosecutor's question about the probation search. "[J]ust because an attorney asked a question that suggested something was true doesn't mean that it actually [was] true. You are to disregard that last question and answer completely."

Defense case

Arredondo testified in his own defense. He said that he witnessed someone stab his brother in June 2010. He started drinking heavily after the incident. Six months later, someone assaulted Arredondo as he walked alone in Santa Paula. He suffered a concussion.

Arredondo said he started drinking malt liquor around noon the day he shot at Officers Harper and Aguilar. He recalled "little clips" of the day's subsequent events. When he was crossing the street that night, he saw a car coming toward him. He was drunk and did not know it was a police vehicle. He felt scared when the car's occupants started to talk to him because he thought they could be gang members. He ignored them and walked away.

After he crossed the street, Arredondo heard the car move. He did not hear sirens or see any lights. He felt "adrenaline going through" him, and grabbed his gun to prepare for a possible attack. He looked back, saw someone exit the vehicle and begin to "creep[] up on" him, and heard yelling. He did not want to risk anyone getting close enough to shoot or stab him, so he turned around and started shooting. He did not take

time to aim his shots, nor would he have fired had he known the victims were police officers.

Arredondo admitted that he had prior encounters with law enforcement. He was once caught making a "beer run" with his cousin. Another time, he ignored an officer's command to stop while riding his bicycle.

A forensic analyst testified that Arredondo's blood-alcohol content was 0.13 percent about six hours after the shooting. She opined that someone with a blood-alcohol content in excess of 0.08 percent could have impaired judgment and vision. The person may be unable to recover quickly from the glare of a bright light. Intoxication could also reduce inhibition.

Arredondo retained Dr. Randy Wood to identify psychological factors that may have impacted him during the shooting. Dr. Wood reviewed police reports, toxicology reports, and the probation report, and clinically evaluated Arredondo. He identified four interacting factors that affected Arredondo during the shooting: (1) a fight-or-flight response to a perceived dangerous situation, (2) "residual features" of posttraumatic stress disorder (PTSD), (3) gang involvement, and (4) alcohol intoxication.

Dr. Wood said that Arredondo "likely had some initial PTSD" when he witnessed his brother's stabbing in 2010. By the time of the shooting two years later, however, Arredondo's PTSD symptoms had diminished. He did not meet all the criteria required for a PTSD diagnosis in 2012.

Given a hypothetical scenario similar to the facts of this case, Dr. Wood opined that a person with a blood-alcohol content of 0.13 percent would be hypervigilant to danger. Intoxication would make it difficult for the person to understand

the events occurring. The perception of danger could invoke a flight-or-fight response.

Sentencing

At sentencing, Arredondo moved the trial court to exercise its discretion to strike the firearm enhancements found true by the jury pursuant to Senate Bill No. 620. In support of his motion, Arredondo noted that he was 17 years old at the time of the shooting. He had committed no offenses as an adult and had served no prior prison terms. He also asked the court to consider Dr. Wood's testimony.

The trial court said that it had "thought a lot about [Arredondo's] sentence." It acknowledged that it had discretion to strike the firearm enhancements, but found "no legal reason to do that." On the one hand, Arredondo was relatively young, had mental health issues, and was intoxicated at the time of the shooting. On the other, the evidence belied Arredondo's claim that he shot over his shoulder at Officers Harper and Aguilar, his crimes involved the threat of great bodily harm to two police officers, and he showed little remorse for his actions. The court concluded that the latter considerations outweighed the former, and denied Arredondo's motion. It sentenced him to 34 years eight months in state prison: six years on one of the assault convictions, a consecutive 20 years on the attached firearm enhancement, a consecutive two years on the second assault conviction, and a consecutive six years eight months on that conviction's firearm enhancement.

DISCUSSION

Motion for mistrial

Arredondo contends the trial court erred when it denied his motion for a mistrial because the prosecutor's question

about the probation search exposed the jury to his prior criminality, rendering the outcome of trial suspect. We disagree.

"'A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged.'" (*People v. Clark* (2011) 52 Cal.4th 856, 990.) If the alleged prejudice can be cured by admonition or instruction a mistrial should not be granted. (*People v. Harris* (2013) 57 Cal.4th 804, 848.) The court has "considerable discretion" when determining whether an incident is incurably prejudicial. (*Ibid.*) We will not interfere with that determination unless the court has abused its discretion. (*Clark*, at p. 990.)

There was no abuse of discretion. While we recognize that the prosecutor's question "present[ed] the possibility of prejudicing [Arredondo's] case and rendering suspect the outcome of the trial" (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580), it did not do so here. Arredondo objected immediately after the prosecutor asked about the probation search. After discussing the matter with counsel, the trial court admonished jurors to disregard the prosecutor's question "completely." We presume that they did. (*People v. Melendez* (2016) 2 Cal.5th 1, 33.) The admonition sufficiently cured any prejudice stemming from the prosecutor's question. (*Ibid.*; see also *People v. Price* (1991) 1 Cal.4th 324, 430-431.) Arredondo's chance of receiving a fair trial was not irreparably damaged. (*People v. Rices* (2017) 4 Cal.5th 49, 92-93 [motion for mistrial properly denied where trial court promptly admonished jury to disregard witness's "fleeting and vague reference" to defendant's gang membership].)

Sufficiency of the evidence

Arredondo contends the evidence presented at trial was insufficient to show that he: (1) knew that Officers Harper

and Aguilar were police officers, and (2) did not act in self-defense when he shot at them. We disagree with both contentions.

When evaluating a challenge based on the sufficiency of the evidence, we "'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, 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.]" (*People v. Davis* (1995) 10 Cal.4th 463, 509.) We "'"presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*Ibid.*) Reversal "'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

1. Knowledge that Harper and Aguilar were police officers

To be convicted of assault on a peace officer, there must be proof that the defendant knew or should have known that the victim was a peace officer. (*People v. Livingston* (1970) 4 Cal.App.3d 251, 256-257.) Here, both Officers Harper and Aguilar were in uniform. They were inside a black-and-white patrol car equipped with a push bumper, red and blue lights in the center of the windshield, and spotlights. The vehicle also had "Santa Paula Police" written on the side. From such characteristics, the jury could rationally conclude that Arredondo knew or should have known that Officers Harper and Aguilar were police officers. (*People v. Wright* (1969) 272 Cal.App.2d 53, 58-59.)

That Arredondo was intoxicated at the time of the shooting does not change our conclusion. Where, as here, a

defendant reasonably should know that a victim is a police officer, voluntary intoxication is not a defense to assault on a peace officer. (*People v. Finney* (1980) 110 Cal.App.3d 705, 712-714, cited with approval by *People v. Brown* (1988) 46 Cal.3d 432, 444, fn. 7.)

2. Self-defense

A person acts in self-defense if they: (1) reasonably believe they are in imminent danger of harm, (2) reasonably believe the immediate use of force is necessary to defend themselves, and (3) use no more force than reasonably necessary to defend against the threat. (*People v. Hernandez* (2011) 51 Cal.4th 733, 747.) Arredondo argues he reasonably believed in the need to act in self-defense because he: (1) was intoxicated, (2) was "leery and on guard" after witnessing his brother's stabbing two years earlier, and (3) did not know Harper and Aguilar were police officers. But neither voluntary intoxication nor the residual effects of PTSD was relevant to the jury's self-defense determination. (*People v. Soto* (2018) 4 Cal.5th 968, 977 [voluntary intoxication]; *People v. Brady* (2018) 22 Cal.App.5th 1008, 1013-1015 [PTSD] (*Brady*).) And, as set forth above, Arredondo should have known that Officers Harper and Aguilar were police officers.

"'The issue is not whether [Arredondo], or a person like him, had reasonable grounds for believing he'" needed to act in self-defense. (*Brady*, *supra*, 22 Cal.App.5th at p. 1015.) Rather, it is "'whether a person of ordinary and normal mental and physical capacity would have believed'" they needed to do so. (*Ibid.*) Arredondo argues no reason why such a person would have believed as much here. Substantial evidence supports his convictions for assault on a peace officer.

Firearm enhancements

Arredondo contends the trial court erred when it denied his motion to strike the firearm enhancements attached to his assault convictions. We again disagree.

Since 2018, a trial court has had discretion to strike a firearm enhancement imposed pursuant to section 12022.53. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079-1080.) The court must exercise that discretion in furtherance of justice (*People v. Clancey* (2013) 56 Cal.4th 562, 580), and "explicitly justify its decision" to strike an enhancement (*People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*)). If the court declines to do so, the defendant bears the burden of showing that that decision was "so irrational or arbitrary that no reasonable person could agree with" its decision. (*Id.* at p. 377.)

Arredondo fails to carry that burden here. He argues, as he did at sentencing, that the trial court should have granted his motion to strike the firearm enhancements because he had a minor juvenile record, "randomly" fired his weapon during the incident, was intoxicated, and had mental health issues. He also points out that the majority of his sentence was due to the enhancements and that, had he been tried as a juvenile, a different result would have occurred.

But the trial court considered these factors at sentencing. It disagreed that Arredondo "randomly" fired his weapon, and noted that his crimes involved the threat of great bodily injury. Arredondo showed no remorse. Given these factors, the court's refusal to strike the firearm enhancements was not "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, *supra*, 34 Cal.4th at p. 377.) There was no abuse of discretion.

Section 1001.36

Finally, Arredondo contends the judgment should be conditionally reversed and remanded to permit the trial court to determine whether he is eligible for pretrial diversion because section 1001.36 applies retroactively to his case. (See *People v. Frahs* (2018) 27 Cal.App.5th 784, 791 (*Frahs*), review granted Dec. 27, 2018, S252220; see also *People v. Weaver* (2019) 36 Cal.App.5th 1103, 1113-1114.) The Attorney General argues *Frahs* was wrongly decided, and that section 1001.36 does not apply retroactively. (See *People v. Craine* (2019) 35 Cal.App.5th 744, 756.) We need not—and do not—decide whether section 1001.36 is retroactive because, even if it is, Arredondo does not fulfill its requirements.

A trial court may grant pretrial diversion if: (1) the defendant suffers from a mental disorder, such as PTSD; (2) that mental disorder was a "significant factor in the commission of the charged offense"; (3) the defendant "would respond to mental health treatment"; (4) the defendant "consents to diversion and waives [their] right to a speedy trial"; (5) the defendant agrees to participate in the prescribed treatment; and (6) the defendant will not "pose an unreasonable risk of danger to public safety . . . if treated in the community." (§ 1001.36, subds. (a) & (b)(1).)

The *Frahs* court determined that a conditional reversal and remand was required there because the defendant had a diagnosed mental disorder. (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, review granted.) While Arredondo likely had PTSD in 2010, he suffered only "residual" effects two years later. Indeed, his symptoms had diminished to the point that he no longer met the criteria for a PTSD diagnosis at the time of the shooting. Because Arredondo does not allege he meets section 1001.36's

criteria, he is not entitled to remand even if the statute is retroactive.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Ryan J. Wright, Judge

Superior Court County of Ventura

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.