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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. ROBERT ANTHONY CHAVEZ, Defendant and Appellant.	B231576 (Los Angeles County Super. Ct. No. PA065347)

APPEAL from a judgment of the Superior Court of Los Angeles County, Harvey Giss, Judge. Affirmed.

John L. Staley, 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, Assistant Attorney General, Louis W. Karlin and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Robert Anthony Chavez, appeals the judgment entered following his conviction for premeditated attempted murder and possession of a firearm by a felon, with firearm use, great bodily injury and prior prison term enhancements (Pen. Code, §§ 664/187, [former] 12021, 12022.53, 12022.7, 667.5).[1] Chavez was sentenced to state prison for a term of life plus 28 years to life.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

Richard Mercardo lived with his girlfriend Gloria and her children, Lorraine and Joe. There was a rear house on the property where Gloria's daughter Rachel lived with defendant Chavez, who was her boyfriend. Richard's sister Olivia lived in a house next door with her two sons.

On August 30, 2009, Richard was barbequing and drinking in front of the garage with his brothers, Andy and Fernando, and Olivia's sons. Richard testified Lorraine left the house at one point and opened a gate, inadvertently allowing their pit bull to run into the street. When Lorraine returned to the house without the dog, Richard reprimanded her and said she had to retrieve it. Lorraine got upset and denied having let the dog out.

Rachel heard Lorraine yelling and came out of the back house to investigate. She had a drink in her hand and appeared to be intoxicated. She joined Lorraine in yelling at Richard. Then Chavez came outside and stood next to Rachel. Richard told him to take Rachel inside, but Chavez just stood there. Richard got mad because Chavez wasn't trying to help the situation.

"Q. As you continued to get angrier and angrier the less he responded the worse it got for you?

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

"A. The whole thing was he didn't seem he was drinking. He seemed mellow, you know? I'm asking him, he's not responding. These girls were just constantly yelling at me talking shit to me cussing every word they know, you know?

"Q. And you felt disrespected?

"A. Yeah. I mean, it wasn't the first time it happened."

Richard testified he told Chavez that "if he ain't gonna try to help out the situation he can just get out. Get the fuck out of the yard, out of the house."

Richard's brother Andy testified Richard was saying he wanted Chavez to leave because Chavez had been selling drugs out of the back house. Richard was upset and Andy tried to calm him, but Chavez kept egging Richard on. Richard hit Chavez and they started fighting.

The fight was pretty even at first, with both men grappling and throwing punches. But then, while Richard was on top of Chavez, Rachel kicked Richard in the face and knocked him to the ground. Chavez took advantage of this and started getting the best of Richard. Then someone pulled Chavez off Richard and the fight ended. Andy saw Chavez go into the back house and make a phone call:

"Q. Did you hear what was being said?

"A. Just like hurry up and come, . . . hurry up and get here.

"Q. You heard the defendant say that?

"A. Yeah. He was talking loud and still kind of full of adrenaline . . . he was talking loud and just telling them to hurry up and get here . . . ."

Olivia, who had come next door upon hearing the commotion, saw people trying to calm down Richard, who was very upset. Olivia then returned to her house, but five or ten minutes later she heard the commotion start up again. She saw four family members holding Richard and forcing him toward the front house. Richard was really upset and screaming.

About 20 or 30 minutes later, Olivia saw Chavez "leisurely" walk up the street from the corner.[2] He had a gun in his hand[3] and, according to Andy, he was dressed differently than he had been during the fight.[4] Chavez pointed the gun at Richard and said something about a fight. Richard tried to run and dive behind a car. Chavez fired two to four shots from about 10 or 12 feet away. Richard fell and blacked out. According to Olivia, Chavez then turned and "leisurely" walked away.[5]

Richard's brother Fernando followed Chavez, taking cover behind some cars. Chavez turned around and fired three or four times, shooting either at Fernando or at the house. Chavez then ran toward a silver Dodge Charger parked on the corner and jumped into the rear seat. He pointed the gun out the window and fired again, shooting four or five times toward where Fernando had been standing. The Dodge drove off.

Richard had been hit in the elbow and the back, and he was in the hospital for a week.

Chavez did not present any evidence at trial.

CONTENTIONS

1. The trial court erred by not instructing the jury, sua sponte, on attempted voluntary manslaughter as a lesser included offense.

2. The trial court improperly punished Chavez for both attempted murder and being a felon in possession of a gun.

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[2] "Q. You saw [Chavez] walking down Lakeside? [¶] A. Right. Q. He walked in a leisurely fashion would you say? [¶] A. Yes."

[3] Andy testified: "I seen him walking up with his hands behind his back, and then he seen . . . us because we were actually in front of the car. He was coming from the back of the car. When he seen us he pulled out a gun."

[4] Andy testified: "I believe he was wearing different clothes. a different shirt."

[5] "Q. Okay. Then after [Chavez] shot your brother he turned around and leisurely walked back up Lakeside; is that correct? [¶] A. Yes, that's correct."

DISCUSSION

1. *Instruction on attempted voluntary manslaughter was not warranted*.

Chavez contends the trial court erred by failing to instruct the jury, sua sponte, on attempted voluntary manslaughter as a lesser included offense of attempted murder. This claim is meritless.

a. *Legal principles.*

"When there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of a lesser included offense, the court must instruct upon the lesser included offense, and must allow the jury to return the lesser conviction, even if not requested to do so. [Citations.]" (*People v. Webster* (1991) 54 Cal.3d 411, 443.) In this context, "substantial evidence" is evidence from which reasonable jurors could conclude the lesser offense, but not the greater, had been committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "[O]n appeal we employ a de novo standard of review and independently determine whether an instruction on the lesser included offense . . . should have been given." (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

Attempted voluntary manslaughter is a lesser included offense of attempted murder. (See *People v. Avila* (2009) 46 Cal.4th 680, 705-707.) "An intentional, unlawful homicide is 'upon a sudden quarrel or heat of passion' (§ 192(a)), and is thus voluntary manslaughter [citation], if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an ' "ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." ' [Citations.] ' "[N]o specific type of provocation [is] required . . . . " ' [Citations.] Moreover, the passion aroused need not be anger or rage, but can be any ' " '[v]iolent, intense, high-wrought or enthusiastic emotion' " ' [citations] other than revenge [citation]. 'However, if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter . . . . ' [Citation.]" (*People* v. *Breverman, supra,* 19 Cal.4th at p. 163.)

b. *Discussion*.

Chavez contends the lesser included offense instruction should have been given because the evidence showed he reasonably responded to adequate provocation, since he "was the victim of an assault and shot Richard in response to that physical provocation," and it should have been left to the jury to decide if he had sufficient time to cool down before shooting Richard. We disagree. Even if Chavez satisfied the objective element of attempted voluntary manslaughter by showing he reasonably responded to adequate provocation, which we doubt, there was certainly no substantial evidence of the subjective element, i.e., that Chavez's reason had been obscured by a strong passion.

As the Attorney General points out, the witnesses "generally did not testify to appellant's demeanor during the shooting. To the extent they did, their descriptions of the shooting were consistent with appellant being calm and collected." "There was no evidence appellant acted rashly, under the sway of intense emotion. Rather, appellant reflected and planned his attack. He changed clothes, left the house without notice, got a gun, and [apparently] met up with a getaway driver before approaching Richard. Appellant deliberately and precisely fired two shots at Richard, both of which hit him as he was diving for cover. This planning and exacting method of attempted murder is a strong indication that appellant did not act in the subjective heat of passion. . . . In short, there was absolutely nothing passionate about appellant's calculated attempt at revenge." The Attorney General's argument is firmly grounded on established principles because first degree murder "is evidenced by planning activity, a motive to kill or an exacting manner of death," a state of mind " 'manifestly inconsistent with having acted under the heat of passion – even if that state of mind was achieved after a considerable period of provocatory conduct' " (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.)

Chavez argues the jury could have reasonably concluded he had not cooled off by the time he shot Richard: "Appellant was obviously extremely angry that he had been assaulted by Richard. The fact that appellant engaged in a certain amount of deliberate behavior to acquire a gun did not mean that he had cooled down before the shooting occurred. . . . Indeed, it appeared that Richard had not calmed down. He was agitated

when the shooting occurred and had to be restrained by his family members from attempting to remove appellant from the house. It was only reasonable to presume that appellant was equally agitated." However, Chavez cites no authority giving this court the power to make such a presumption on appeal, and we cannot envision a possible basis for that power.

Chavez also argues his "shooting at [Richard], by itself, demonstrated anger and passion." But the mere act of firing a gun at someone cannot by itself demonstrate that the shooter's reason was obscured by passion; consider the example of an assassin-for-hire. As Chavez recognizes, there was plenty of evidence showing *Richard's* state of mind that day. Various witnesses, including Richard himself, testified he was extremely upset, screaming and yelling, and had to be calmed down by family members. There was, however, no evidence showing *Chavez* was similarly upset. The only arguable state of mind evidence we came across is Andy's testimony that after the fight, when Chavez went into the house to use the phone, he "was talking loud and still kind of full of adrenaline." Chavez does not even suggest this testimony constitutes substantial evidence he "acted while under 'the actual influence of a strong passion' . . . [which] caused him to ' "act rashly or without due deliberation and reflection, and from this passion rather than from judgment." ' " (*People v. Moye* (2009) 47 Cal.4th 537, 553.)

In sum, we agree with the Attorney General there was simply no substantial evidence of the requisite subjective element of attempted voluntary manslaughter, i.e., that Chavez's "reason was actually obscured as a result of a strong passion . . . ." (*People v. Breverman, supra,* 19 Cal.4th at p. 163.) And even assuming arguendo this had been the case during or right after the fight, the evidence showed Chavez actually cooled down before shooting Richard. " 'If, in fact, the defendant's passion did cool, which may be shown by circumstances such as the transaction of other business in the meantime . . . [or] evidence of preparation for the killing, etc., then the length of time intervening is immaterial.' " (*People v. Golsh* (1923) 63 Cal.App. 609, 617; see, e.g., *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704 ["The only inference to be drawn is that any passions that may have been aroused upon first hearing the reports of

molestation had cooled so that the killing became an act of revenge or punishment."].) "[*A*] *passion for revenge* . . . will not serve to reduce murder to manslaughter." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144.)

The trial court did not err by failing to instruct the jury, sua sponte, on attempted voluntary manslaughter as a lesser included offense.

2. *Chavez was properly sentenced for both attempted murder and being a felon in possession of a firearm.*

Chavez contends his sentence on count 2 for being a felon in possession of a firearm ([former] § 12021)[6] should have been stayed under section 654. This claim is meritless.

a. *Legal principles.*

As we said in *People v. Jones* (2002) 103 Cal.App.4th 1139, 1142-1143: "Section 654, subdivision (a), provides in pertinent part, '[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.' Section 654 therefore ' "precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. 'Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor.' [Citations.] '[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.' [Citation.]" [Citation.]' [Citations.] However, if the defendant harbored 'multiple or simultaneous

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[6] "Former Penal Code section 12021, subdivision (a), is now section 29800, subdivision (a), which became effective January 1, 2012. (Stats. 2010, ch. 711, § 6.) The Law Revision Commission Comments to section 29800 make clear that the provision was carried over 'without substantive change.' (Nonsubstantive Reorganization of Deadly Weapon Statutes (June 2009) 38 Cal. Law Revision Com. Rep. (2009) p. 758.)" (*People v. Correa* (S163273) __ Cal.4th __ [filed June 21, 2012], 2012 WL 2344999, at p. 11, fn. 1.)

objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]' [Citations.] [¶] Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]"

" 'Whether a violation of [former] section 12021, forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.' [Citation.]" (*People v. Bradford* (1976) 17 Cal.3d 8, 22.)

"Applying this rule, courts have determined that section 654 applies where the defendant obtained the prohibited weapon *during* the assault in which he used the weapon. [Citations.] However, section 654 has been found not to apply when the weapon possession preceded the assault. [Citation.]" (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1217.) Hence, "when an ex-felon commits a crime using a firearm, and arrives at the crime scene already in possession of the firearm, it may reasonably be inferred that the firearm possession is a separate and antecedent offense, carried out with an independent, distinct intent from the primary crime. Therefore, section 654 will not bar punishment for both firearm possession by a felon . . . and for the primary crime of which the defendant is convicted." (*People v. Jones, supra,* 103 Cal.App.4th at p. 1141.)

b. *Discussion*.

Chavez argues: "The evidence established that appellant possessed the gun solely for the purpose of shooting the victim. Because appellant possessed the gun solely for the purpose of shooting . . . Richard, and there was no evidence of an antecedent possession, the sentence for count two must be stayed." Chavez contends that because he "had one objective when he retrieved a firearm – to shoot at [Richard]," he cannot be punished for both crimes.

But the case law says otherwise. In *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, the defendant was involved in two armed robberies within a 90-minute period. Because the evidence showed he already had the gun in his possession when he arrived at the scene of the first robbery, the Court of Appeal concluded: "A justifiable inference from this evidence is that defendant's possession of the weapon was not merely simultaneous with the robberies, but continued before, during and after those crimes. Section 654 therefore does not prohibit separate punishments. [Citation.]" (*Id*. at p. 1413.) "Commission of a crime under [former] section 12021 is complete once the intent to possess is perfected by possession. What the ex-felon does with the weapon later is another separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon. [Citations.]" (*Id*. at p. 1414.)

We reached the same conclusion in *People v. Jones, supra*, 103 Cal.App.4th 1139, where the defendant carried out a drive-by shooting. "Jones committed two separate acts: arming himself with a firearm, and shooting at an inhabited dwelling. Jones necessarily had the firearm in his possession before he shot at [the victim's] house, when he and his companion came to the house 15 minutes before the shooting, or, at the very least, when they began driving toward the house the second time. It was therefore a reasonable inference that Jones's possession of the firearm was antecedent to the primary crime. . . . [¶] The evidence likewise supported an inference that Jones harbored separate intents in the two crimes. Jones necessarily intended to possess the firearm when he first obtained it, which, as we have discussed, necessarily occurred antecedent to the shooting. That he

used the gun to shoot at [the victim's] house required a second intent *in addition* to his original goal of possessing the weapon. Jones's use of the weapon after completion of his first crime of possession of the firearm thus comprised a 'separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon.' [Citation.] That Jones did not possess the weapon for a lengthy period before commission of the primary crime is not determinative. [Citations.]" (*Id*. at pp. 1147-1148.)

As the Attorney General points out, there is no dispute here that Chavez arrived at the shooting scene already in possession of a gun. Although the evidence did not disclose where or when Chavez acquired the gun, all the witnesses testified he had it in his possession when he came walking up the street before shooting Richard. Chavez does not dispute the obvious inference he had armed himself prior to returning to the scene of his fight with Richard.

Alternatively, Chavez argues count 2 must be stayed because he was also sentenced for a firearm enhancement under section 12022.53 in connection with count 1, citing our Supreme Court's recent decision in *People v. Ahmed* (2011) 53 Cal.4th 156. But in *Ahmed* the question was the relevance, if any, of section 654 to a situation in which the jury convicted the defendant of one crime (assault with a firearm) and found true two sentence enhancement allegations in connection with that crime (firearm use and the commission of great bodily injury). The holding in *Ahmed* simply has no application to Chavez's situation,[7] because here he is attacking the sentence on a crime, not an enhancement.

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[7] *Ahmed* said: "We conclude that a court deciding how multiple enhancements interact should first examine the specific sentencing statutes. If, as is often the case, these statutes provide the answer, the court should apply that answer and stop there. Because specific statutes prevail over general statutes, consideration of the more general section 654 will be unnecessary. Only if the specific statutes do not provide the answer should the court turn to section 654. We conclude that section 654 does apply in that situation, but the analysis must be adjusted to account for the differing natures of substantive crimes and enhancements. [¶] In this case, the relevant specific statute, section 1170.1,

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.

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permits the court to impose both one weapon enhancement and one great-bodily-injury enhancement. Accordingly, the trial court properly imposed both enhancements. Because the specific statute provides the answer, we do not turn to section 654." (*People v. Ahmed, supra,* 53 Cal.4th at pp. 159-160.)