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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.

HERBER MORALES,

Defendant and Appellant.

B236013

(Los Angeles County  
Super. Ct. No. LA066673)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Elizabeth Lippitt, Judge. Affirmed with directions.

Allison H. Ting, 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, Victoria B. Wilson and Chung L.  
Mar, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Herber Morales appeals from the judgment entered following his convictions by jury on count 1 – attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, 187) with personal infliction of great bodily injury (Pen. Code, § 12022.7, subd. (a)), three counts of attempted voluntary manslaughter (Pen. Code, §§ 664, 192, subd. (a)); as lesser included offenses of counts 2, 3, and 5, respectively, each of which counts alleged attempted willful, deliberate, and premeditated murder) with, as to the attempted voluntary manslaughter that is a lesser offense of count 2, personal infliction of great bodily injury (Pen. Code, § 12022.7, subd. (a)), and count 4 – leaving the scene of an accident (Veh. Code, § 20001, subd. (a)). The court sentenced appellant to prison for seven years to life, plus 12 years. We affirm the judgment with directions.

### ***FACTUAL SUMMARY***

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on the evening of December 5, 2010, appellant and Adalid Aguilar were in a bar on Sherman Way near Mason. Appellant pushed Aguilar and told him to get out, and the two fought.

Alex Vasquez, Cindy Jimenez, Hugo Alvarez, and Francisco Quinilla were in the bar when the fight started. Appellant and Aguilar continued the fight outside. At various times, Vasquez, Jimenez, Alvarez, and Quinilla were involved in the fight but it eventually stopped. Aguilar, Vasquez, Jimenez, Alvarez, and Quinilla began walking towards Mason and were going to Jimenez's house. Meanwhile, appellant was angry and trembling, and his face was covered with blood. However, he told Alma Fuentes that he was okay. Fuentes told appellant to go home, and appellant agreed to do so.

Appellant entered a parked white van and started driving. He drove quickly onto Mason. Appellant then made a right turn and drove towards Aguilar, Vasquez, Jimenez, Alvarez, and Quinilla as they were walking away. Appellant turned off the van's headlights and accelerated as he approached the group.

Fuentes testified the van first hit Aguilar, Jimenez, Alvarez, and Quinilla, “and at the end, the van hit [Vasquez].” Fuentes also testified when the van hit Aguilar, Jimenez, Alvarez, and Quinilla, the van did not slow or attempt to stop but was moving fast. Fuentes then testified “first the van hit the four other people, and then [appellant] started driving towards [Vasquez]. And then I saw when the van hit [Vasquez].” The van dragged Vasquez under it about 35 feet and for about five seconds, and dragged Aguilar about six feet. Appellant quickly drove away.

As a result of the collision, Vasquez was unconscious, covered in blood, and suffered various bodily injuries. An ambulance took Vasquez and Jimenez to the hospital. Doctors removed Vasquez’s kidney, he was hospitalized for about 20 days, and he needed to use a wheelchair for about a month after his release from the hospital. The collision also caused scarring on parts of Vasquez’s body. He did not remember the collision.

Jimenez was unable to stand and unable to feel anything below her waist, and she suffered a broken pelvis. Jimenez was in the hospital for three days. Aguilar’s right arm, left knee, and left foot were injured. The van struck Alvarez’s right leg.<sup>1</sup> Although the van had a red hood and black rear doors at the time of the collision, appellant later that day painted white those portions of the van. Appellant presented no defense witnesses.

### ***ISSUES***

Appellant presents related claims there is insufficient evidence of the attempted murder of Vasquez and insufficient evidence of premeditation and deliberation. He also claims the abstract of judgment must be corrected.<sup>2</sup>

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<sup>1</sup> Aguilar testified to the effect Quinilla was able to get out of the way of the van. The jury acquitted appellant on count 6, which alleged appellant attempted to murder Quinilla, and acquitted appellant of attempted voluntary manslaughter of Quinilla as a lesser included offense.

<sup>2</sup> In his opening brief, appellant’s third claim was, in essence, his sentence on count 4 was illegal and the abstract of judgment had to be modified to reflect the correct sentence on that count. In his reply brief, appellant abandons that claim; therefore, there

## ***DISCUSSION***

### *1. There Was Sufficient Evidence Appellant Committed Attempted Willful, Deliberate, and Premeditated Attempted Murder.*

The jury convicted appellant of the attempted willful, deliberate, and premeditated murder of Vasquez with personal infliction of great bodily injury upon him (count 1), and convicted appellant on three counts of attempted voluntary manslaughter upon Jimenez, Aguilar, and Alvarez, respectively (each offense as a lesser included offense of attempted willful, deliberate, and premeditated murder as alleged in counts 2, 3, and 5, respectively) with personal infliction of great bodily injury as to Jimenez.

Appellant claims there is insufficient evidence he committed attempted murder. He argues, inter alia, there was insufficient evidence appellant intended to kill Vasquez, and if appellant committed attempted voluntary manslaughter upon Jimenez, Aguilar, and Alvarez, there could not be sufficient evidence appellant attempted to murder Vasquez. Appellant also claims there is insufficient evidence of premeditation and deliberation as to any attempted murder of Vasquez, and if appellant committed attempted voluntary manslaughter upon Jimenez, Aguilar, and Alvarez, there could not be sufficient evidence of premeditation and deliberation as to any attempted murder of Vasquez. Relying upon familiar principles,<sup>3</sup> we reject appellant's claims.

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is no need for us to address it. Appellant's separate remaining claim about the abstract of judgment raises other issues which we address herein.

<sup>3</sup> The elements of attempted murder are intent to commit murder plus a direct but ineffectual act towards its commission. Express malice, i.e., a deliberate intention unlawfully to kill another human being, is required. The intent must usually be derived from all the circumstances of the attempt, including the defendant's actions. (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) The trial court instructed on the elements of attempted voluntary manslaughter, and there is no dispute that that instruction was correct. According to the instruction, the elements of attempted voluntary manslaughter are (1) a direct but ineffective step towards killing a person, (2) the defendant intended to kill that person, (3) the defendant attempted the killing because the defendant was provoked, (4) the provocation would have caused a person of average disposition to act rashly and without due deliberation, and (5) the attempted killing was a rash act done

There was substantial evidence as follows. Appellant had a prior relationship with Aguilar, Vasquez, Jimenez, Alvarez, and Quinilla; they all were involved in a fight. Appellant was angry but he agreed to go home. Instead, appellant entered a van and, driving it fast, made a right turn onto Mason and accelerated the van towards the five. Appellant turned off the van's lights as he approached, making it difficult for the group to see the van. The above provided evidence of planning.

Appellant drove the van into the group, hitting at least Aguilar, Vasquez, Jimenez, and Alvarez.<sup>4</sup> Moreover, Fuentes testified “first the van hit the four other people, *and then [appellant] started driving towards [Vasquez]. And then I saw when the van hit [Vasquez].*” (Italics added.) The jury reasonably could have concluded from Fuentes's above italicized testimony that it was *after* the van hit others that appellant *began* driving towards Vasquez, a fact providing additional evidence of premeditation and deliberation.

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under the influence of intense emotion that obscured the defendant's reasoning or judgment.

As for premeditation and deliberation, “deliberate” means arrived at as a result of careful thought and weighing of considerations for and against the proposed course of action, and “premeditated” means considered beforehand. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123 (*Perez*).) “Premeditation and deliberation do not require an extended period of time, merely an opportunity for reflection.” (*People v. Cook* (2006) 39 Cal.4th 566, 603.) “An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.” (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) “[P]remeditation can occur in a brief period of time. ‘The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .’ [Citations.]” (*Perez, supra*, 2 Cal.4th at p. 1127.) Premeditation and deliberation can thus occur in rapid succession. (*People v. Bloyd* (1987) 43 Cal.3d 333, 348.) *People v. Anderson* (1968) 70 Cal.2d 15, sets forth three categories of evidence, i.e., evidence of planning activity, prior relationship, and manner of killing, relevant to whether a defendant harbored premeditation. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1019.) Finally, a willful, deliberate, and premeditated intent to kill is 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.’ [Citation.]” (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.)

<sup>4</sup> See fn. 1, *ante*.

The van dragged Vasquez under it about 35 feet and for about five seconds, and dragged Aguilar about six feet. There is no dispute appellant personally inflicted great bodily injury upon Vasquez and Jimenez for purposes of Penal Code section 12022.7, subdivision (a). Appellant drove away from the scene quickly, not rendering aid. The jury reasonably could have concluded concerning the manner of the attempted killing of Vasquez that appellant tried to use a van to kill him.

We conclude there was sufficient evidence appellant intended to kill Vasquez and attempted to murder him. We also conclude there was sufficient evidence appellant committed attempted willful, deliberate and premeditated murder, including the evidence that it was after the van hit others that appellant began driving towards Vasquez. As appellant concedes, premeditation and deliberation are inconsistent with the requisite state of mind for attempted voluntary manslaughter. Finally, any inconsistency of verdicts was irrelevant. (*People v. Santamaria* (1994) 8 Cal.4th 903, 911.)

*2. The Abstract of Judgment Must Be Corrected.*

The abstract of judgment reflects the jury convicted appellant on counts 2, 3, and 6 of attempted murder, with personal infliction of great bodily injury as to count 2. However, as the first full paragraph on page 2 of this opinion reflects, the jury convicted appellant on three counts of attempted voluntary manslaughter as lesser included offenses of counts 2, 3, and 5, respectively, and, as to the attempted voluntary manslaughter that is a lesser offense of count 2, the jury found appellant personally inflicted great bodily injury. We will direct the trial court to correct the abstract of judgment accordingly. (Cf. *People v. Humiston* (1993) 20 Cal.App.4th 460, 466, fn. 3.)

***DISPOSITION***

The judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting appellant's convictions consistent with the statement of them in the first full paragraph on page 2 of this opinion.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.