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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO DIAZ,

Defendant and Appellant.

B233108

(Los Angeles County
Super. Ct. No. PA062033)

APPEAL from a judgment of the Superior Court of Los Angeles County. Shari K. Silver, Judge. Modified and affirmed with directions.

Murray A. Rosenberg, 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, Senior Assistant Attorney General, and Mary Sanchez and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Fernando Diaz appeals from the judgment entered following a jury trial in which he was convicted of two counts of attempted murder, two counts of assault with a firearm, and possession of a firearm by a felon, with findings that defendant personally used and fired a gun and personally inflicted great bodily injury in the commission of the attempted murders and aggravated assaults, and one of the attempted murders was willful, deliberate, and premeditated. Defendant contends that insufficient evidence supports his attempted murder convictions and the trial court improperly imposed a full term, not a one-third subordinate term, for the great bodily injury enhancement for one of his aggravated assault convictions. We modify the judgment to reduce the great bodily injury enhancement in issue and direct correction of the abstract of judgment, but otherwise affirm.

BACKGROUND

About 10:45 a.m. on May 17, 2008, Carolina Mendoza, Joseph Siam, Stephanie Contreras-Gaines, and other parent volunteers were setting up booths at the St. John Baptist De La Salle parochial school in Granada Hills. Mendoza's nine-year-old son, who attended the school, was with her. Defendant, who was the father of Mendoza's son, unexpectedly appeared before the carnival opened. Defendant had a history of domestic violence against Mendoza and she had obtained restraining orders against him. Defendant had twice phoned Mendoza before the carnival to ask her when she would be working at the carnival. Defendant had represented that his parents wanted to attend the carnival to see their grandson, but his mother testified she knew nothing about the carnival. Defendant hugged his son, who then ran off but remained in the vicinity of the fish booth, where Mendoza was working. Defendant walked behind some other booths and out of sight. He attracted the attention of several parent volunteers because it was a very hot day, and he was wearing slacks and a long-sleeved dress shirt and carrying what appeared to be a tennis bag. Syed Husain was watching defendant as he took a rifle out of the tennis bag and aimed it at someone in one of the booths.

Siam testified that as he was walking toward the fish booth to await the opening of the carnival, someone yelled, "Get down. Get down." Siam turned in the direction of the voice and saw defendant about 20 feet away from him holding a rifle that was pointed downward. Defendant was about 10 feet from the fish booth, between Siam and the booth. Defendant lifted the rifle, aimed at Siam, and fired, striking Siam in the chest. Siam ran as far as he could across the school grounds before collapsing. As he ran, he heard another shot. Siam did not know defendant and had never seen him before.

Contreras-Gaines testified that she was near the fish booth, but outside of it. Defendant aimed the rifle at her, then turned, aimed it at Siam, and shot Siam. Defendant then turned around again, aimed at Mendoza, and fired at her. He continued to fire at Mendoza as she dropped to the ground and rolled.

Mendoza testified she saw defendant aim a rifle at Siam, then at a woman who was about 10 feet from her, then back at Siam. Mendoza heard two shots and saw Siam react. Defendant then turned and aimed the rifle at Mendoza from a distance of less than seven feet. Defendant and Mendoza locked eyes. He had an angry expression on his face. Mendoza turned, ducked, and scrambled under a barrier to get out of the booth. As she did so, she felt a bullet strike her left arm. She yelled to her son and they both ran away from the booth toward the parking lot.

Defendant then turned and shot parent volunteer Didier Lugo in the thigh as Lugo sat at a booth two booths down from the fish booth.

One carnival attendee testified that after he heard shots, he saw defendant reach into a nearby bag, remove an object from the bag, and insert the object into the bottom of the rifle where a magazine would be loaded. Ivette Franco testified that after she heard shots and saw people running, she saw defendant walking toward her while aiming the rifle at her. It appeared he was attempting to fire the rifle. Franco ducked and crawled out the back of her booth. Dennise Mejia testified that after she heard shots, she saw defendant sliding a part of the rifle backward and forward repeatedly with his right hand. It appeared that something was wrong with the rifle. Bernie Mapili testified that after he

heard shots, he ran to help Lugo. Mapili looked up and saw defendant aiming the rifle at him from a distance of about 30 yards. Cori Engelberg testified she heard shots, saw a woman run away holding her arm, then saw defendant pointing a rifle at different people. Engelberg thought defendant had “a blank stare on his face.”

As defendant walked or ran away across the grounds, several parents, including Charles Sternberg, chased him. Defendant raised his rifle to aim at Sternberg, who quickly tackled and restrained defendant. Other parents arrived and assisted in restraining defendant, who struggled to free himself and spoke loudly and rapidly about the school and his child. One off-duty police officer took the rifle away from defendant, and a second off-duty officer handcuffed defendant.

Defendant’s rifle was a .22-caliber semiautomatic with a collapsible stock. Twelve rounds were in the magazine and two were in the firing chamber due to a “double-feed” malfunction that would have precluded the rifle from firing. A plastic bag inside a black sports bag contained 24 live rounds. A Los Angeles Police Department firearms examiner who tested defendant’s rifle testified that it jammed when the magazine was loaded with more than 10 cartridges.

A trauma surgeon removed a bullet from Siam’s right shoulder. The bullet shattered the shoulder, lacerated Siam’s right lung, and fractured multiple ribs. Siam suffered significant blood loss that required transfusions and left him anemic. He remained in the hospital for seven days and had a tube in his chest the entire time. Mendoza’s elbow was shattered and required reconstructive surgery. She suffered nerve damage and reduced arm mobility as a result of her injuries. The bullet that struck Lugo went straight through his thigh. He required crutches for two weeks and was left with scars on the front and back of his leg.

Defendant introduced no evidence in his defense.

The jury convicted defendant of the attempted murder of Mendoza and Siam, but acquitted him of attempting to murder Lugo. It found that the attempted murder of Mendoza, but not that of Siam, was willful, deliberate, and premeditated; that defendant

personally used and fired a gun in the commission of both attempted murders, causing great bodily injury (Pen. Code, § 12022.53, subd. (d); undesignated statutory references are to the Penal Code); that defendant personally inflicted great bodily injury upon Mendoza and Siam (§ 12022.7, subd. (a)); and that defendant personally inflicted great bodily injury upon Mendoza under circumstances involving domestic violence (§ 12022.7, subd. (e)). The jury also convicted defendant of assault with a firearm on Siam and Lugo, and found that defendant personally inflicted great bodily injury upon these victims and personally used a firearm in the commission of the offenses. (§ 12022.5, subd. (a).) In addition, the jury convicted defendant of possession of a firearm by a felon. The court sentenced defendant to prison for life, plus 50 years to life, plus 17 years.

DISCUSSION

1. Sufficiency of evidence

Defendant contends that there was insufficient evidence of his intent to kill to support his attempted murder convictions. He argues that he acted “under the weight of his demons,” was merely trying “to deliver some type of important message of frustration,” “was not prepared to be in a public setting or for that matter to kill anyone,” Siam was a stranger in the wrong place at the wrong time, defendant “had so little control over the complex emotions driving him that the first two shots just went off,” and he could have killed both Siam and Mendoza, but he yelled at Siam to get down before shooting him and “could not bring himself to shoot [Mendoza] anywhere life threatening.”

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Lee*

(2003) 31 Cal.4th 613, 623.) A defendant's intent to kill must usually be inferred from his actions and other circumstances. (*People v. Smith* (2005) 37 Cal.4th 733, 741.)

“‘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”’” (*Ibid.*; see also *People v. Jackson* (1989) 49 Cal.3d 1170, 1201 [intent to kill could be inferred from act of firing shotgun at police officer a short distance away]; *People v. Lashley* (1991) 1 Cal.App.4th 938, 945–946 [intent to kill could be inferred from act of firing rifle at boy 20 yards away].)

Substantial evidence supported a finding that defendant intended to kill both Mendoza and Siam. Defendant brought a rifle and ample ammunition with him to a school carnival knowing that Mendoza would be there, working a booth at a scheduled time. At some point, either before he arrived or at the carnival, he loaded the rifle with many cartridges. He aimed the rifle at Siam, then turned and aimed it at Contreras-Gains, then turned back to aim at Siam and fired at least once at Siam's chest—an area likely to result in a mortal wound—at a distance of about 20 feet. After Siam ran, defendant turned around again and aimed his rifle at Mendoza and repeatedly fired at her from a distance of less than seven feet as she attempted to flee the confines of the fish booth. Defendant then aimed at Lugo as he sat in a different booth, two booths down from the fish booth, and shot him, then aimed the rifle at other carnival volunteers and appeared to be attempting to fire it and clear a jam or other malfunction of the rifle. This amply demonstrates an intent to kill with respect to Siam and Mendoza, at least. Defendant was not firing into the air above everyone's head, or firing multiple shots at a tight cluster of people from a great distance. He was instead turning his body and his aim from one victim or potential victim to another and firing at relatively close range. No evidence supported defendant's theory on appeal that the rifle “just went off” accidentally.

Most of defendant's arguments on appeal echo arguments made to, and rejected by, the jury at trial. They are based upon speculation regarding his motive and mental state, and do not undermine or negate the substantial and uncontradicted evidence of

defendant's conduct or the clear, strong inference of defendant's intent to kill shown by repeatedly firing a rifle at Siam and Mendoza from a relatively short distance. Defendant was free to argue to the jury that his failure to kill Siam and Mendoza showed he did not intend to kill them, but defendant's fortuitously poor marksmanship does not negate the inference of intent to kill arising from the uncontradicted evidence of his observed conduct. In addition, this argument overlooks the evasive measures Siam and Mendoza took after defendant began shooting. Defendant's shouted warning to get down also does not negate the inference of his intent to kill arising from his remaining conduct, especially in the absence of any evidence as to whom this warning was directed; it may, for example, have been directed to his son or other children who were in the vicinity of the fish booth. Finally, the absence of any apparent motive to kill Siam did not negate the clear import of defendant's conduct in aiming at Siam and shooting him in the chest from a relatively short range.

2. Imposition of full term for great bodily injury enhancement for count 5

Defendant contends, and the Attorney General aptly concedes, that the trial court erred by imposing the full term of the section 12022.7, subdivision (a) great bodily injury enhancement in count 5 (assault with a firearm on Lugo), for which the court imposed a subordinate term. The court should have imposed one-third of the enhancement term, that is one year, not three years. (§ 1170.1, subd. (a).) We modify defendant's sentence to reflect this two-year reduction.

3. Correction of abstract of judgment

The Attorney General contends, and defendant aptly concedes, that the abstract of judgment inaccurately reflects that the amount of the Penal Code section 1465.8 court security fee and Government Code section 70373 criminal conviction assessment imposed by the trial court. The court imposed a court security fee of \$200, but the abstract reflects a \$160 fee. Similarly, the court imposed a \$150 criminal conviction assessment, but the abstract reflects a \$120 assessment. We direct issuance of an amended abstract of judgment to correct these errors.

DISPOSITION

The term imposed for the Penal Code section 12022.7, subdivision (a) enhancement in count 5 is reduced to one year. The judgment is otherwise affirmed. Upon remand, the trial court is directed to issue an amended abstract of judgment reflecting the reduced enhancement for count 5 and the correct amount of the following fees and assessments: the Penal Code section 1465.8 court security fee imposed by the trial court was \$200 and the Government Code section 70373 criminal conviction assessment imposed by the trial court was \$150.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.