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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MAURICE BAUGH, Defendant and Appellant.	B265153 (Los Angeles County Super. Ct. No. LA077863)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph Brandolino, Judge. Affirmed.

Jamie Lee Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Corey J. Robins, Deputy Attorney General, for Plaintiff and Respondent.

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Maurice Baugh (defendant) was convicted of shooting at an inhabited dwelling, being a felon in possession of a firearm, and two counts of assault with a firearm after he repeatedly shot a .38 caliber revolver into an inhabited apartment complex. On appeal, defendant argues that there was insufficient evidence to support his assault convictions. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Facts

One afternoon in May 2014, defendant visited his friend Jeff Lumel (Lumel) at Lumel's apartment, which was on the second floor of a 28-unit complex in Reseda, California. After the two men started talking "bullshit" to each other, defendant pulled out a .38 caliber revolver he brought with him and opened fire inside Lumel's apartment.

Defendant fired the gun five times. When he opened fire, Lumel was standing on the inside of the front door. Defendant fired once at the front door. Defendant also fired two times at Lumel's floor, and the bullets zipped through the apartment below Lumel's. And defendant fired two other times at Lumel's front wall and window; one bullet ended up in the swimming pool in the complex's courtyard and another ended up hitting the interior wall of the apartment across the way, just five feet from where Jeffrey Estrin (Estrin) was sitting. Although "a lot" of other residents in the complex were home at the time of the shootings, no one was injured.

After one of the complex's residents called 911 and reported gunfire, defendant barricaded himself inside Lumel's apartment, alone. He refused to come out, and the SWAT team eventually flushed him out with tear gas. After defendant exited, the police entered; they found no one else in the apartment, but located a .38 caliber revolver with five expended rounds secreted between the dresser and wall in the apartment's bedroom. Later that day, defendant asked an officer if the police had "found the gun."

II. Procedural History

The People charged defendant with shooting at an inhabited dwelling (Pen. Code, § 246),[1] being a felon in possession of a firearm (§ 29800, subd. (a)(1)), and two counts of assault with a firearm (§ 245, subd. (a)(2))—one count as to Estrin and one count as to Lumel. As to the assaults, the People also alleged that defendant personally used a firearm (§ 12022.5, subds. (a) & (d)). The People alleged that defendant's 1996 rape conviction (§ 261, subd. (a)(2)) and his 1996 robbery conviction (§ 211) each qualified as "strikes" within the meaning of our "Three Strikes" law. (§§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d).) The People further alleged that defendant's 1996 rape conviction qualified as a prior "serious" felony. (§ 667, subd. (a)(1).) The People lastly alleged that defendant's 1996 rape conviction and his 2008 conviction for failing to register as a sex offender (§ 290.012, subd. (a)) resulted in prior prison terms (§ 667.5, subd. (b)).

A jury convicted defendant of all four counts and found the firearm enhancements true. Defendant admitted his prior convictions in a bifurcated proceeding. The trial court denied defendant's posttrial motions for new trial and judgment notwithstanding the verdict.

The court sentenced defendant to a total term of 25 years and four months in state prison. The court treated the assault on Estrin as the principal count, and imposed a sentence of 22 years in prison, comprised of a base term of six years (three years, doubled for the prior strikes), plus 10 years for the personal use of a firearm, five years for the prior serious felony conviction, and one year for his prior prison term. The court then imposed a consecutive term of three years and four months for the assault on Lumel, comprised of a base term of two years (one-third of the midterm sentence of three years, doubled for the prior strikes) plus 16 months (one-third of the midterm sentence of two years, doubled for the prior strikes) for the personal use enhancement. The court stayed the sentences on the remaining counts under section 654.

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

Defendant timely appealed.

DISCUSSION

Defendant argues there was insufficient evidence to support his convictions for assault with a firearm. In reviewing the sufficiency of the evidence to support a conviction, we assess whether a rational jury "'could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) In so doing, we "'consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment.'" (*People v. White* (2015) 241 Cal.App.4th 881, 884 (*White*).)

Section 245, subdivision (a)(2) makes it a crime to "commit[] an assault upon [] another [person] with a firearm." This offense has two elements: (1) an assault; and (2) the means by which the assault is committed (that is, with a firearm). (*People v. Smith* (1997) 57 Cal.App.4th 1470, 1481.) The assault element requires proof of (1) "an unlawful attempt . . . to commit a violent injury on the person of another," (2) "coupled with a present ability" to do so. (§ 240; *People v. Licas* (2007) 41 Cal.4th 362, 366-367.) Although assault is sometimes referred to as an "attempted battery" (*People v. Wright* (2002) 100 Cal.App.4th 703, 706 (*Wright*); see also *People v. Rocha* (1971) 3 Cal.3d 893, 899), it is not in actuality an attempt crime and thus does not require proof of a specific intent to commit the complete crime of battery (§ 21a; *People v. Chandler* (2014) 60 Cal.4th 508, 516). Instead, assault is a general intent crime. (*People v. Williams* (2001) 26 Cal.4th 779, 784-785 (*Williams*).)

The general intent required for an assault has two components. First, the defendant must engage in the conduct constituting the assault willfully. Second, the defendant must be subjectively "aware of the facts that would lead a reasonable person to realize that a battery [that is, a touching] would directly, naturally and probably result from his conduct." (*Williams*, *supra*, 26 Cal.4th at p. 788; *White*, *supra*, 241 Cal.App.4th at p. 884 [same]; *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1190 [defendant "need only be aware of what he is doing"].) By focusing on what a reasonable person

would foresee, the second intent requirement does not obligate the People to prove that a defendant subjectively appreciated the risk that a battery might occur or that he intended to inflict harm. (*Williams*, 26 Cal.4th at p. 785; *Aznavoleh*, at p. 1189; *People v. Felix* (2009) 172 Cal.App.4th 1618, 1629.) It is in this sense akin to a negligence standard (*Williams*, at p. 787; *Wright, supra,* 100 Cal.App.4th at p. 706), although it is not a pure negligence standard because the assessment of what risk a reasonable person would foresee is grounded in the facts the defendant *actually knew* rather than the facts the defendant *should have known*. (*Williams*, at p. 788, fn. 4.)

We will separately examine the evidence that supported each assault conviction.

There was sufficient evidence that defendant assaulted Lumel with a firearm. Defendant argues that there was "no evidence that Lumel was ever in the line of fire." Specifically, he asserts that Lumel was only inside the apartment during defendant's first shot and there was no evidence as to the sequence of defendant's shots; thus, he reasons, it is possible that Lumel was not standing inside the front door at the time defendant shot at the door. We reject this argument. Whether or not Lumel was standing inside the doorway or had recently exited through that doorway, a reasonable person in defendant's situation would realize that a battery would directly, naturally, and probably result from the conduct in which defendant engaged. In *People v. Navarro* (2013) 212 Cal.App.4th 1336, 1347 (*Navarro*), the court affirmed an assault conviction for a defendant who fired a gun at a door a person had just entered. The evidence in this case is just as sufficient.

There was also sufficient evidence that defendant assaulted Estrin with a firearm. Defendant willfully and knowingly fired his gun through the wall, window and floor of Lumel's second-story apartment and knew there were other apartments beside, across from, and below Lumel's apartment. On these facts, a jury could find that a reasonable person would realize that a battery would directly, naturally and probably result. Although the act of firing a gun into the air does not suffice (*People v. Carmen* (1951) 36 Cal.2d 768, 775), firing a gun into places where people may be—such as at a car or at a home—does. (*People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1355 [cars]; *People*

v. Lathus (1973) 35 Cal.App.3d 466, 470-471 (*Lathus*) [same]; *Navarro, supra*, 212 Cal.App.4th at pp. 1345-1346 [house].)

Defendant makes two arguments in response.

He suggests that the requirement that a reasonable person recognize that the defendant's acts will "directly, naturally and *probably*" result in a battery translates into either (1) a requirement that the People prove that the defendant knows that there is at least a 50 percent chance that someone is in his crosshairs when he opens fire into an occupied apartment complex, or (2) a requirement that a reasonable person would perceive a more than 50 percent likelihood of a battery.

We reject defendant's first proposed requirement because, as explained above, the crime of assault requires that the defendant subjectively appreciate his own acts and the circumstances in which he undertakes them, but does not require the defendant to subjectively appreciate the risk of harm that those acts and circumstances create. The refusal of courts to embrace a requirement that the defendant subjectively appreciate the risk of his assault conduct ensures that a defendant cannot escape criminal liability by claiming he had no idea a building had people in it. (See *Lathus, supra,* 35 Cal.App.3d at p. 470 ["[i]t would be anomalous to hold that a person who has injured another seriously by deliberately shooting a gun into a building or at a moving train or at or in the direction of a vehicle stalled on a public highway, can escape the consequences of his highly dangerous act by the bald assertion that he did not know that anyone was in the building or in the train or in or near the vehicle"].) What is more, even if we were to depart from this precedent and require the People to prove a defendant's subjective appreciation of risk, and thus his specific intent to commit a battery, it is well settled that an "intent to commit the battery is presumed" "when an act inherently dangerous to others is committed with a conscious disregard of human life and safety." (*Ibid.*; *People v. Valdez* (1985) 175 Cal.App.3d 103, 107-108.)

We reject defendant's second proposed requirement because the applicable standard requires that a touching would "directly, naturally and probably" result—not

that it "inevitably" will. (*Navarro, supra,* 212 Cal.App.4th at p. 1346.) Opening fire in random directions in an apartment complex satisfies this standard.

Defendant next appears to argue that interpreting assault with a firearm to require no more than a possibility that the gunfire "could" hit someone makes that crime indistinguishable from the crime of grossly negligent discharge of a firearm (§ 246.3). We disagree with the premise of this argument because the standard we apply is not grounded in what "could" happen. We also disagree that the argument compels us to reinterpret and elevate the intent requirement for assault with a firearm. Our Legislature can criminalize the same conduct under multiple statutes (§ 954), and it is up to the People to decide which of those statutes to charge (*People v. Wallace* (1985) 169 Cal.App.3d 406, 409-410). The existence of possible overlap between these statutes is not problematic. And in this case, it is wholly irrelevant because defendant's jury had the opportunity to convict him of grossly negligent discharge of a firearm as a lesser-included offense to shooting at an inhabited dwelling, and chose not to do so.

DISPOSITION

The judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST