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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL BARELA, Defendant and Appellant.	B276162 (Los Angeles County Super. Ct. No. PA083074)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hilleri G. Merritt, Judge. Affirmed as modified.

Benjamin Owens, 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, Noah P. Hill, Ilana Herscovitz, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Barela appeals from the judgment entered following his conviction by jury on one count of attempted murder. The jury found true the allegations that the offense was willful, deliberate and premeditated; that appellant used a deadly weapon; and that appellant inflicted great bodily injury. Appellant challenges the sufficiency of the evidence to sustain the allegation that the offense was willful, premeditated, and deliberate. He also contends the jury instructions lessened the prosecution's burden of proof and thus violated his constitutional rights. Finally, appellant challenges the award of attorney fees under Penal Code section 987.8.[1] We strike the award of attorney fees, order the minute order and abstract of judgment modified to reflect the change, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Prosecution Evidence*

At the time of the offense, appellant had been friends with the victim, Tyler Recesso, for over 10 years. In the evening of February 25, 2015, Recesso called appellant to ask if he wanted to go to El Torito restaurant for drinks. Recesso picked appellant up from the hair salon where appellant worked, and they drove to a grocery store to buy vodka and then to El Torito, where they sat in Recesso's car drinking vodka. They talked about their lives and had a "depressing discussion."

After sitting in the car for about 45 minutes, they drove to another store, bought more vodka, and drove to JJ's Bar and Grill. They sat in

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[1] Unspecified statutory references will be to the Penal Code.

the car for about an hour, talking about how appellant was frustrated because he was going to become homeless soon. Recesso was living out of his car at the time.

While they were talking, appellant pinched Recesso's nipples "because he thought it was funny." As the conversation became "darker," appellant grabbed Recesso's thumb and twisted it painfully. Appellant told Recesso he would release his thumb if Recesso "released control and surrendered."

At some point, appellant took Recesso's face in his hands and said, "You know, I love you, bro." Appellant told Recesso that if he needed anything, including having someone killed, appellant would do it for him. Appellant got out of the car and walked to a nearby hair salon where he used to work and said unfriendly words to the owner before returning to the car.

Appellant began to apologize to Recesso for borrowing money from Recesso about two years earlier. Recesso reassured appellant that it was fine because appellant had paid Recesso back. Appellant became very emotional and started saying, "It's not fucking right." Appellant pulled out a pocket knife, looked at Recesso and said, "I'm sorry, bro. I'm going to have to kill you." Appellant stabbed Recesso in the chest three times and in the throat near his left ear once.

Recesso pushed the blade out of his throat, opened his car door and rolled out of the car onto the ground. He ran into JJ's Bar and Grill and yelled, "Call 911. I have been stabbed. I have been stabbed by Michael Barela. He's in the parking lot." Recesso wanted to identify appellant in case appellant escaped. Recesso went out to the back patio

and called his mother on his cell phone in case he died. He felt faint and out of breath.

The bartender, Charles Rubin, was working at the bar when Recesso entered the restaurant. When Rubin saw Recesso was bleeding, he told Recesso to lie down. Shortly after Recesso came in, appellant entered the restaurant with his hand behind his back. Rubin thought appellant was holding a knife. He told appellant to stop and called 911.

Casey Coffey and his friend Tyler Kremer were at JJ's Bar and Grill at the time. When they initially arrived, they noticed appellant and Recesso sitting in a car outside the restaurant. Coffey thought they were "rowdy" and appeared to be drinking.

Coffey and Kremer were sitting on the back patio of the restaurant when Rubin came outside with a fearful look on his face and apparently on the phone with the police. They looked inside the bar where they saw Recesso with slashes on his neck and blood on his shirt and saying, "This guy is trying to kill me." Recesso looked panicked.

Coffey and Kremer saw appellant walk into the restaurant. Appellant appeared to be smiling and holding a knife. Recesso became nervous and ran toward the back of the restaurant. Coffey screamed that appellant had a knife, and everyone except two couples, who were cornered by appellant, left the restaurant. Appellant was swinging the knife toward one of the men cornered at the bar, so Coffey began hitting a bar stool on the ground to attract appellant's attention. One of the men at the bar used a bar stool to push appellant, who fell to the floor. Coffey hit appellant in the face until appellant went limp, then he

yelled for everyone to leave. As Recesso began to leave, appellant started to get up off the floor.

Coffey and Kremer went outside and while they were standing in the parking lot, Coffey saw appellant start walking toward them from the bar. Appellant was wearing a knee brace, but he was able to run or walk quickly toward Coffey and Kremer. Appellant chased them through the parking lot, hitting cars with the knife and yelling that he was going to kill them.

Los Angeles County Sheriff's Deputy Kevin Fleck and his partner responded to the call about an assault with a deadly weapon. When they arrived at the parking lot of JJ's Bar and Grill, they saw appellant holding a knife and walking toward some people. Appellant appeared to be under the influence of alcohol. The deputies ordered appellant at gunpoint to drop the knife and get on the ground. Appellant complied.

Recesso was taken to the hospital in an ambulance, accompanied by Deputy Angela Caruso. Recesso told Deputy Caruso that appellant said, "I feel so bad, and I love you so much, I'm going to have to kill you," immediately before stabbing Recesso. Recesso underwent surgery and was released from the hospital a few days later. At the time of trial, he had several scars, including a three-inch long scar under his clavicle.

II. *Defense Evidence*

Deputy Edgar Quintana interviewed Coffey at the scene of the incident. Coffey told Deputy Quintana that after appellant had been knocked to the floor inside the restaurant, appellant walked outside and

out of Coffey's sight. Coffey did not say that appellant chased him and Kremer in the parking lot.

Detective Brandon Painter responded to the radio call about the assault around 9:00 p.m. When Detective Painter interviewed Recesso at the scene, Recesso told him that before appellant stabbed him, appellant said, "You're such a good guy, I don't deserve to have a friend like you." Detective Painter did not recall Recesso telling him that appellant said, "I have to kill you," and there was no such statement in Detective Painter's police report.

When Detective Painter interviewed Recesso the following day at the hospital, Recesso stated that appellant only said, "I'm sorry, I love you," before stabbing Recesso. Recesso did not tell Detective Painter that appellant said, "I need to kill you." Recesso told Detective Painter that appellant became very emotional after drinking a lot of vodka and that appellant was apologizing profusely for borrowing money in the past. Recesso further told Detective Painter that appellant said that he was a bad friend and that Recesso was a good friend. Recesso did not know why appellant stabbed him.

Dr. Marvin Pietruszka, a forensic toxicologist, testified that Recesso's blood alcohol level around 9:45 p.m. on the night of the offense was 0.266, or more than three times the legal limit for driving. Pietruszka estimated that appellant's blood alcohol level would have been higher than Recesso's because he drank more of the vodka than Recesso had. Pietruszka testified that a person in appellant's state would be in the "stupor stage" and unable to think clearly or determine right from wrong. One also might exhibit a "rage reaction" and

"exaggerated emotional states." The stage after the "stupor stage" is a coma.

III. *Procedural Background*

Appellant was charged by information with attempted willful, deliberate, and premeditated murder of Recesso (§§ 664/187, subd. (a)) and assault with a deadly weapon of Kremer and Coffey. (§ 245, subd. (a)(1).) It was further alleged that appellant inflicted great bodily injury on Recesso and used a deadly weapon. (§§ 12022.7, subd. (a), 12022, subd. (b)(1).)

A jury convicted appellant of all three counts and found the allegations to be true. The trial court sentenced appellant to a term of seven years to life, calculated as follows: life imprisonment on count 1, plus three years for the great bodily injury enhancement and one year for the deadly weapon enhancement; a consecutive term of three years on count 2; and a concurrent term of three years on count 3. Appellant timely appealed.

DISCUSSION

I. *Sufficiency of the Evidence*

Appellant contends the evidence is insufficient to support the finding that the attempted murder was willful, deliberate, and premeditated. "When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a

reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585 (*Elliott*).)

"'Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.] Hence, in order for defendant to be convicted of the attempted murder of [Recesso], the prosecution had to prove he acted with specific intent to kill that victim. [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).) "Because direct evidence of a defendant's intent rarely exists, intent may be inferred from the circumstances of the crime and the defendant's acts. [Citation.]" (*People v. Sanchez* (2016) 63 Cal.4th 411, 457.) "We do not distinguish between attempted murder and completed first degree murder for purposes of determining whether there is sufficient evidence of premeditation and deliberation. [Citation.]" (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462–1463, fn. 8, disapproved on other grounds in *People v. Mesa* (2012) 54 Cal.4th 191, 198.)

"*People v. Anderson* (1968) 70 Cal.2d 15, 26–27 identified three categories of evidence relevant to deciding whether to sustain a verdict of first degree murder based on premeditation and deliberation: (1) evidence of planning activity prior to the killing, (2) evidence of the

defendant's prior relationship with the victim from which the jury could reasonably infer a motive to kill, and (3) evidence that the manner in which the defendant carried out the killing 'was so particular and exacting that the defendant must have intentionally killed according to a "preconceived design" to take his victim's life in a particular way for a "reason" which the jury can reasonably infer from facts of type (1) or (2).'" (*People v. Brooks* (2017) 3 Cal.5th 1, 58–59 (*Brooks*).) Although the presence of these factors may be sufficient to sustain a first degree murder conviction, the "factors are simply an 'aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' [Citations.]" (*Id.* at p. 59.)

Appellant contends that the *Anderson* factors are not satisfied here. First, he contends there was no evidence of planning activity prior to the killing, pointing out that Recesso initiated the meeting. He argues that his possession of a folding knife does not evince planning because he did not know that Recesso would call him to invite him out that evening. He also argues that there was no evidence of anything in his prior relationship with Recesso to indicate a motive. He contends that his aggressive conduct toward Recesso immediately prior to the stabbing indicates "the attack was a pointless alcohol-fueled crime." Appellant further contends that the manner of the attempted killing, stabbing Recesso and then indiscriminately lashing out at patrons of the restaurant, indicated his act was a "rash and spontaneous" result of "a generalized drunken aggression," rather than the type of "execution-

style murder" that can support a finding of "premeditation and deliberation in the absence of planning or motive evidence." (*People v. Boatman* (2013) 221 Cal.App.4th 1253, 1269 (*Boatman*).)

We conclude the evidence is sufficient to support the jury's finding. First, it is important to note that "the *Anderson* factors are not exhaustive or exclusive of other considerations." (*Boatman*, *supra*, 221 Cal.App.4th at p. 1270.) Rather, the question is whether, viewing the whole record in the light most favorable to the judgment, there is substantial evidence to support the finding. (*People v. Zaun* (2016) 245 Cal.App.4th 1171, 1173.) Doing so, we find the evidence sufficient.

"'"Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance.' [Citation.] '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, but the express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides . . . which are the result of mere unconsidered or rash impulse hastily executed.' [Citation.]" (*Brooks*, *supra*, 3 Cal.5th at p. 58.) Here, Recesso testified that appellant apologized to him and told him he was going to kill him before stabbing him. This evidence alone is sufficient to show that appellant considered his action and decided to go ahead with the attempted murder.

Although appellant presented evidence contradicting Recesso's testimony, "[u]nless it describes facts or events that are physically impossibly or inherently improbable, the testimony of a single witness

is sufficient to support a conviction. [Citation.]" (*Elliott*, *supra*, 53 Cal.4th at p. 585.) Moreover, the credibility of witnesses is for the jury to determine. (*Ibid.*) Deputy Caruso also testified that Recesso told her appellant said he was "going to have to kill" Recesso before stabbing him.

Although appellant contends that the evidence suggests the attack was a rash, impulsive act, he stabbed Recesso three times in the chest and once in the neck. His manner of attacking Recesso "'supports the inference of a calculated design to ensure death, rather than an unconsidered "explosion" of violence'" and thus is sufficient to support a finding of premeditation and deliberation. (*People v. Steele* (2002) 27 Cal.4th 1230, 1250; see *People v. Pride* (1992) 3 Cal.4th 195, 247 ["A violent and bloody death sustained as a result of multiple stab wounds can be consistent with a finding of premeditation."]; compare *Smith*, *supra*, 37 Cal.4th at p. 741 ["'[t]he 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"'"].) The evidence is sufficient to support the jury's finding that the offense was willful, deliberate and premeditated.

II. *Jury Instructions*

Appellant challenges the jury instructions on the mental states required for attempted murder and premeditation, arguing that the instructions erroneously lowered the prosecution's burden of proof.

The trial court instructed the jury on attempted murder with CALCRIM No. 600, which included the requirement that the People prove the defendant "intended to kill that person." As to the allegation of deliberation and premeditation, the jury was instructed with CALCRIM No. 601 as follows: "If you find the defendant guilty of attempted murder under Count 1, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation. [¶] The defendant acted *willfully* if he intended to kill when he acted. The defendant *deliberated* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant *premeditated* if he decided to kill before acting. [¶] The length of time the person spends considering whether to kill does not alone determine whether the attempted killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved."

The trial court also instructed the jury pursuant to CALCRIM No. 252, which addresses the "Union of Act and Intent: General and Specific Intent Together." The instruction stated: "The crime or other

allegations charged in Count 1 require proof of the union, or joint operation, of act and wrongful intent. [¶] The following crime and allegations require general criminal intent: Assault with a Deadly Weapon, as charged in Count [*sic*] 2 & 3; Personal use of a Dangerous or Deadly Weapon; and Personal Infliction of Great Bodily Injury. For you to find a person guilty of these crimes or to find the allegations true, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime or allegation. [¶] The following crime requires a specific intent or mental state: Attempted Willful, Premeditated and Deliberate Murder, as charged in Count 1. For you to find a person guilty of this crime, that person must not only intentionally commit the prohibited act or intentionally fail to do the required act, but must do so with a specific intent. The act and the specific intent required are explained in the instruction for that crime. [¶] The specific intent required for the crime of Attempted Willful, Premeditated and Deliberate Murder is [t]he specific intent to kill, or premeditation and deliberation." When the trial court read the jury instructions aloud to the jury, the final words "or premeditation and deliberation" were omitted.

The jury submitted two questions during deliberations. The first was "Please share with us documentation that [appellant] carried a knife on his person. Did he carry all [the] time?" The court responded, "All evidence has been received and is before [*sic*]." The second was,

"Can we separate premeditation from the first part of attempted murder." The court responded, "Please refer to the jury instructions and verdict forms."

Appellant contends that CALCRIM No. 252 as given to the jury was legally erroneous and affected his constitutional rights. "'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012.) "But we may review any instruction which affects the defendant's 'substantial rights,' with or without a trial objection. ([] § 1259.) 'Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087.)

"A criminal defendant has a right to accurate instructions on the elements of a charged crime. [Citation.] 'We determine whether a jury instruction correctly states the law under the independent or de novo standard of review. [Citation.] Review of the adequacy of instructions is based on whether the trial court "fully and fairly instructed on the applicable law." [Citation.] "'In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]" [Citation.] "Instructions

should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]' [Citation.]" (*People v. Spaccia* (2017) 12 Cal.App.5th 1278, 1287 (*Spaccia*).)

Appellant takes issue with the following statement in CALCRIM No. 252: "The specific intent required for the crime of Attempted Willful, Premeditated and Deliberate Murder is [t]he specific intent to kill, or premeditation and deliberation." When the trial court orally instructed the jury, the court omitted the last phrase, stating only that the required intent was "the specific intent to kill." Appellant contends that the written instruction erroneously conflated the findings the jury was required to make in order to convict him of attempted murder and to find the allegation true. He also contends that the oral instruction permitted the jury to find the allegation true without making the requisite finding at all. Although CALCRIM No. 252 may be seen as conflating the findings the jury was required to make, it was only addressing the requisite intent for attempted murder. The jury instructions as a whole correctly instructed the jury on the findings it was required to make in order to find true the special allegation.

The jury was required to find intent to kill in order to find appellant guilty of attempted murder, and then the jury was required to find the offense was willful, deliberate, and premeditated in order to find the special allegation true. Despite the statement in CALCRIM No. 252 that the specific intent required for attempted willful, premeditated and deliberate murder was only intent to kill, the jury subsequently was instructed pursuant to CALCRIM No. 601, which

stated that if the jury found appellant guilty of attempted murder, it was further required to find whether the People had proved beyond a reasonable doubt the allegation that the attempted murder was done willfully and with deliberation and premeditation. The verdict form also required the jury to make a further finding on the allegation.

We are to consider the instructions as a whole and interpret them, if possible, to support the judgment. (*Spaccia*, *supra*, 12 Cal.App.5th at p. 1287.) CALCRIM No. 601 properly set forth the findings the jury was required to make in order to find true the special allegation. When considered as a whole, the instructions accurately stated the law.

III. *Section 987.8*

Appellant contends, and respondent concedes, that the award of attorney fees under section 987.8 set forth in the minute order and the abstract of judgment must be stricken because the trial court did not hold a hearing on his ability to pay nor make an oral pronouncement regarding the fees. We agree and therefore order the fees stricken and order the minute order and abstract of judgment to be amended.

"Penal Code section 987.8 establishes the means for a county to recover some or all of the costs of defense expended on behalf of an indigent criminal defendant. [Citation.] Under subdivisions (b) and (c) of the statute, an order of reimbursement can be made only if the court concludes, after notice and an evidentiary hearing, that the defendant has 'the present ability . . . to pay all or a portion' of the defense costs. [Citations.]" (*People v. Verduzco* (2012) 210 Cal.App.4th 1406, 1420.)

The trial court did not give notice or hold an evidentiary hearing regarding appellant's ability to pay his defense costs. Nor did the court impose attorney fees under section 987.8 when it imposed fines and fees. Nonetheless, the abstract of judgment indicates an order for appellant to pay $470 in attorney fees under section 987.8, and the minute order indicates $457 in attorney fees under section 987.8. "In a criminal case, it is the *oral pronouncement of sentence* that constitutes the judgment. [Citation.]" (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324.) "'Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls.' [Citation.]" (*People v. Costella* (2017) 11 Cal.App.5th 1, 10.) Therefore we will order the minute order and abstract of judgment to be corrected to remove the attorney fees.

DISPOSITION

The trial court is directed to correct the minute order to eliminate the reference to attorney fees, to prepare an amended abstract of judgment reflecting that modification, and to forward the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.