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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. TOMMY REYES, Defendant and Appellant.	B288937 (Los Angeles County Super. Ct. No. BA444273)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed.

Sally Patrone Brajevich, 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, Scott A. Taryle, and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Tommy Reyes of (count 1) attempted murder (Pen. Code, §§ 664, 187, subd. (a))[1] and (count 2) assault with a firearm. (§ 245, subd. (a)(2).) The jury also found true allegations that Reyes personally inflicted great bodily injury (§ 12022.7, subd. (a)), and that the crimes were gang related. (§ 186.22, subd. (b)(1)(C).) With respect to count 1, the attempted murder charge, the jury found true an allegation that Reyes personally and intentionally discharged a firearm and proximately caused great bodily injury. (§ 12022.53, subd. (d).) With respect to count 2, the assault with a firearm charge, the jury found true an allegation that Reyes personally used a firearm. (§ 12022.5.) The trial court sentenced Reyes to 30 years to life in prison; the sentence consisted of 5 years for count 1, plus 25 years to life for the section 12022.53 enhancement. The court struck the enhancement under section 12022.7 and stayed the gang enhancement. The court also sentenced Reyes to three years for count 2 but stayed the sentence and enhancement pursuant to section 654.

In this appeal, Reyes contends that: (1) because the victim recanted his claim that the Reyes shot him, there was insufficient evidence to support his conviction under either count, and (2) his conviction for assault with a firearm should be reversed because it is a lesser included offense of attempted murder with a firearm enhancement. We reject these contentions and affirm the judgment of the trial court.

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[1] Unless otherwise indicated, subsequent statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL SUMMARY

A. *Prosecution Case*

On January 25, 2016, at about 3:30 a.m., J.A. was leaving his house when he saw two men trying to break into his brother's car. The man near the passenger door was wearing a black skeleton mask over part of his face and was dressed in black. When J.A. asked what they were doing, the masked suspect pulled out a handgun. J.A. said, "[I]f you're going to shoot me, you better shoot." The masked man fired three shots in J.A.'s groin and leg. J.A. suffered serious injuries, and ultimately underwent surgery to remove one of his testicles. Both the men fled from the crime scene and J.A. went inside his house.

J.A. told a police officer who responded to a 911 call that he knew who the assailants were. At a subsequent interview with a police detective while he was recovering in the hospital, J.A. said that the shooter was a Burlington gang member called "Pelon" or "Youngster," and the other man was from a gang named L.P. and his gang moniker was L.T.[2] J.A. knew both men from previous occasions when they had tried to steal from him. Although he could not see their faces, he recognized Reyes's eyes and voice. The detective showed J.A. a six-pack of photographs. J.A. identified a photograph of Reyes and indicated that he was the shooter. Reyes stipulated at trial that he is a member of a gang and is known by the nickname Pelon.

At trial, J.A. recanted his previous statements to the police. He denied that he had told the detective anything regarding the shooter, his name, the gang he belonged to, or his accomplice. He

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[2] We refer to this man's gang as L.P. and his gang moniker as L.T. to protect his identity.

also denied that he remembered any characteristics of Reyes and his accomplice. He further denied identifying either of them from the six-pack and testified that he was unable to see any part of the shooter's face.

B. *Defense Case*

Two witnesses testified on behalf of Reyes. An expert on eyewitness identification testified about the factors that may affect the accuracy of eyewitness identifications, including lighting conditions and stress. Reyes's wife testified that Reyes owned a soft black mask that covered the face from the nose down, but said that it was not a skeleton mask. While Reyes was in custody, he asked her to find and destroy the mask, and she complied. She claimed that she burned the mask because Reyes asked her to, and because she did not want it to be used against him.

DISCUSSION

Reyes raises two contentions on appeal. First, he argues that J.A. 's recantation of the identification of Reyes as his shooter rendered the evidence insufficient to support the convictions for attempted murder and assault with a firearm. Second, he contends that his conviction for assault with a firearm should be reversed because it is a lesser included offense of attempted murder with a firearm enhancement. We affirm.

I. There Was Sufficient Evidence to Support Reyes's Conviction

Reyes contends that because J.A. recanted his statements identifying him as the shooter, there was insufficient evidence to support Reyes's convictions. We disagree.

"When reviewing a challenge to the sufficiency of the evidence, we ask ' "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt." ' (*People v. Edwards* (2013) 57 Cal.4th 658, 715 . . . , quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319 . . . .) Because the sufficiency of the evidence is ultimately a legal question, we must examine the record independently for ' "substantial evidence—that is, evidence which is reasonable, credible, and of solid value" ' that would support a finding beyond a reasonable doubt. (*People v. Boyce* (2014) 59 Cal.4th 672, 691 . . . .)" (*People v. Banks* (2015) 61 Cal.4th 788, 804.)

Reyes argues on the basis of *In re Hall* (1981) 30 Cal.3d 408 (*Hall*) that, after J.A. recanted his statements identifying Reyes as the shooter, there was insufficient evidence to support his convictions. But the circumstances of *Hall* were drastically different from those here. In *Hall*, multiple witnesses testified at a habeas corpus hearing either to corroborate the defendant's alibi, or to testify that the defendant had not committed the murder of which he had been convicted. (See *id.* at pp. 417-420.) Two of these witnesses had testified against the defendant at his trial, and they recanted their testimony. (*Id.* at p. 417.) The referee at the habeas hearing found the witnesses' recantation of their previous testimony credible. (*Id.* at p. 418.) On this basis, our Supreme Court granted the habeas petition. (See *id.* at p. 435.) Not only are all of the factors that supported the defendant's innocence in *Hall* absent in this case, but as a habeas case, *Hall* did not involve a test of the sufficiency of the evidence to support the conviction. The current case, in which there is more evidence supporting the witness's initial statement than his recantation, and in which the witness has an obvious motivation to change his testimony for fear of reprisal, is an example of why "we routinely view recantations with suspicion." (*Id.* at p. 418.)

Reyes cites additional factors that call J.A.'s credibility into question. He notes that it was dark outside at the time of the

shooting, that the shooter's face was covered, and that J.A. was likely focused on the gun, the shots being fired, and the severe pain he was suffering rather than on identifying the shooter. In addition, Reyes notes that J.A. was himself a convicted felon, thus reducing the credibility of his testimony.

In making these arguments, Reyes asks us in essence to reweigh the evidence. That is not our function: "[T]he credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact." (*People v. Misa* (2006) 140 Cal.App.4th 837, 842.) In this case, there was ample evidence to support the jury's conclusion that Reyes, and not someone else, shot J.A. J.A. knew Reyes and told police that he could identify his eyes and voice despite the mask. According to the detective, J.A. identified the photograph of Reyes without hesitation, and the jury viewed footage from the investigating officer's body camera in which J.A. said that Reyes was the shooter. Finally, Reyes's girlfriend testified that, after his arrest, Reyes requested that she destroy Reyes's mask. This was suggestive of Reyes's consciousness of guilt. The evidence was sufficient to support Reyes's convictions.

II. Assault with a Firearm Is Not a Lesser Included Offense of Attempted Murder with a Firearm Enhancement

Reyes contends that his conviction in count 2 for assault with a firearm (§ 245, subd. (a)(2)) must be reversed because it was a lesser included offense of count 1, attempted murder with a firearm enhancement. (§§ 664, 187, subd. (a), 12022.53, subd. (d).) A defendant who has been convicted of a crime may not be convicted of a lesser included offense for the same act. (*People v. Milward* (2011) 52 Cal.4th 580, 585.) We disagree that Reyes's conviction in count 2 was for a lesser included offense of count 1.

Courts apply two tests to determine whether one crime is a lesser included offense of another: "[T]he 'elements' test and the 'accusatory pleading' test. Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227–1228 (*Reed*).) Our Supreme Court has held that "[i]n deciding whether multiple conviction is proper, a court should consider only the statutory elements. Or, as formulated in [*People v.*]*Scheidt* [(1991) 231 Cal.App.3d 162, 165-166], 'only a statutorily lesser included offense is subject to the bar against multiple convictions in the same proceeding. An offense that may be a lesser included offense because of the specific nature of the accusatory pleading is not subject to the same bar.' " (*Reed*, *supra*, 38 Cal.4th at p. 1229.) Enhancements are "not . . . considered in determining" whether a crime is a "lesser included offense." (*People v. Wolcott* (1983) 34 Cal.3d 92, 101.)

Under the elements test, count 2 in this case was not a lesser included offense of count 1. Count 2 required the prosecution to prove that Reyes "commit[ted] an assault upon the person of another with a firearm." (§ 245, subd. (a)(2).) Attempted murder includes no requirement that the defendant use a firearm (see §§ 664, 187, subd. (a)), and we do not consider firearm enhancements for purposes of determining lesser included offenses. (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1398.)

Nevertheless, Reyes contends that count 2 was a lesser included offense of count 1 because in *People v. Halvorsen* (2007) 42 Cal.4th 379 (*Halvorsen*), our Supreme Court described assault with a firearm as "a lesser included offense of the charged offense of attempted murder." (*Id.* at p. 384.) That statement occurs a

single time in the introduction to the Court's opinion in *Halvorsen*, and the opinion contains no subsequent elaboration or discussion of the propriety of the multiple convictions. Indeed, the Court ultimately affirmed the defendant's convictions of both charges (see *id.* at p. 434), indicating that to the extent the Court considered the question at all, it did not regard assault with a firearm as a lesser included offense of attempted murder for the purpose of multiple convictions.

Reyes contends that *People v. Juarez* (2016) 62 Cal.4th 1164 (*Juarez*) compels the conclusion that his conviction was improper. It is true that *Juarez* applied the accusatory pleading test, but it did so to implement the policies of section 1387, which generally permits prosecutors to dismiss and refile a felony charge against a defendant once, but not twice. After an attempted murder count had been dismissed two previous times, the People charged the defendant with conspiracy to commit murder. (See *Juarez*, *supra*, 62 Cal.4th at p. 1168.) Although the two crimes had different elements, our Supreme Court recognized that to allow the People to proceed with a third prosecution against the defendant would have violated the policies behind section 1387: namely, to "protect[] a defendant against harassment and the denial of speedy trial rights that repeated filings cause." (*Id.* at p. 1173.)

This case involves multiple convictions in the same proceeding, and not, as in *Juarez*, a third prosecution after two prior dismissed cases involving different charges based on the same facts. We are therefore bound by our Supreme Court's decision in *Reed*, *supra*, 38 Cal.4th 1224, to apply only the elements test. Under the elements test, assault with a firearm is not a lesser included offense of attempted murder. For that reason, we may not reverse Reyes's conviction in count 2.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.