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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. DWIGHT EVANS, Defendant and Appellant.	B269394 (Los Angeles County Super. Ct. No. TA135675)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allen J. Webster, Jr., Judge. Affirmed, as modified.

Sally Patrone Brajevich, 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, Victoria B. Wilson, Supervising Deputy Attorney General, and Carl N. Henry, Deputy Attorney General, for Plaintiff and Respondent.

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A jury convicted Dwight Evans (defendant) of attempted premeditated murder (Pen. Code, §§ 187 & 664)[1] and being a felon in possession of a firearm (§ 29800, subd. (a)(1)) after he shot and severely injured a longtime acquaintance at an election day polling facility. On appeal, defendant argues that (1) the trial court prejudicially erred in not giving the jury a written copy of the attempted voluntary manslaughter instruction it read to the jury, (2) substantial evidence did not support the jury's findings that he was the shooter or that he acted with premeditation, and that the evidence actually compels a finding that he acted in the heat of passion and committed attempted voluntary manslaughter, and (3) the trial court imposed an unlawful sentence on the attempted premeditated murder count. We reject his first two arguments and accept his third. We accordingly affirm his convictions, but direct that the abstract of judgment be amended.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

We recount the facts in the light most favorable to the jury's verdict. (*People v. Lee* (2011) 51 Cal.4th 620, 635 (*Lee*).)

Defendant, his wife, and Antonio Barnes (Barnes) had known each other for decades. Defendant and Barnes grew up together and had both belonged to the same gang, the Bounty Hunter Bloods. And Barnes and defendant's wife had had an on-again, off-again romance during that period, despite each being married to others. Barnes admitted that he loved defendant's wife, and in 2012, they posted a photo online of themselves together while defendant was in jail.

On the municipal election day in March 2013, defendant went with his wife to the polling place where she was to work. The polling place was located in an area claimed by the Bounty

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

Hunter Bloods' rival gang. Barnes was also scheduled to work at the polling place that day, and had tried to call defendant's wife several times earlier that morning. When defendant signed in at the polling place and took a name tag, he used a false name ("David" instead of "Dwight"). Barnes arrived at the polling place later that morning, and immediately asked to speak with defendant's wife. As Barnes waited for defendant's wife, defendant walked up to Barnes, and greeted him by saying, "what's up, player, player"; defendant then invited Barnes to "step outside." Their brief interaction was tense. Defendant led the way to the door, and paused and turned around at the door to see if Barnes was following him. Mere seconds after Barnes followed defendant out the door, a gun was fired three times.

Moments later, Barnes stumbled back through the door. Barnes was bleeding profusely, crying for help and calling out the name of defendant's wife. While a janitor tended to Barnes pending arrival of the first responders, Barnes told him that the shooter was his "girl's old man" and that he should not have been "messing around" with her. Police recovered a discarded sweatshirt with a name tag reading "David" less than a block away from the polling place. Despite gunshot wounds to his left hand and forearm, his right lung and his right upper arm, Barnes survived.

II. Procedural Background

The People charged defendant with (1) attempted premeditated murder (§§ 187, subd. (a), 189 & 664), and (2) being a felon in possession of a firearm (§ 29800, subd. (a)(1)). With respect to the attempted murder count, the People further alleged that he personally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)) and that he personally inflicted great bodily injury (§ 12022.7, subd. (a)). With respect to both counts, the People alleged defendant's 2005 and 2009 convictions for being a felon in possession of a firearm (former

§ 12021, subd. (a)(1)) and his 2011 conviction for second degree burglary (§ 459) as prior prison terms (§ 667.5, subd. (b)).

At trial, Barnes and the janitor both recanted their prior statements regarding Barnes's identification of defendant as the shooter.

The trial court instructed the jury orally on the crimes of attempted premeditated murder, on attempted voluntary manslaughter based upon "a sudden quarrel or in the heat of passion" as a lesser included offense to attempted murder, and being a felon in possession, as well as on the enhancements. The court also gave a written packet of instructions to the jury, but the packet did not contain the attempted voluntary manslaughter instruction. The verdict forms, however, included a verdict form for attempted voluntary manslaughter.

The jury convicted defendant of attempted murder and being a felon in possession of a firearm, found that the attempted murder was premeditated, and found that defendant personally discharged a firearm causing great bodily injury and that he personally inflicted great bodily injury.

The trial court sentenced defendant to prison for 50 years to life. For the attempted premeditated murder, the court imposed a base sentence of 25 years to life plus an additional 25 years to life for discharging a firearm causing great bodily injury. For the felon-in-possession count, the court imposed a concurrent three-year prison term. The court struck the enhancement for the infliction of great bodily injury and struck all three prison priors.

Defendant timely appealed.

DISCUSSION

I. Instructional Error

The trial court orally instructed the jury on the lesser included offense of attempted voluntary manslaughter due to heat of passion, but did not include that instruction in the written packet given to the jury. Defendant argues this

constitutes reversible error. We review instructional issues de novo (*People v. Jimenez* (2016) 246 Cal.App.4th 726, 731), and conclude that any error was harmless.

Because the trial court gave the attempted voluntary manslaughter instruction to the jury orally but not in writing, the court's omission is not treated as the failure to give the instruction altogether and is consequently not of constitutional dimension. (See *People v. Trinh* (2014) 59 Cal.4th 216, 234 ["[t]he failure to provide written instructions is not tantamount to giving no instructions at all"]; *People v. Seaton* (2001) 26 Cal.4th 598, 674 ["'[t]here is no constitutional right to have a physical copy of the jury instructions with the jury during deliberations'"]; *People v. Ochoa* (2001) 26 Cal.4th 398, 447 [same].) Defendant argues that the error in this case is nevertheless of constitutional dimension because the trial court also told the jury, before reading them the instructions, just to listen and not to take notes because written instructions would be supplied later. We disagree and do so for two reasons. To begin, the trial court still read the instruction. More importantly, the court told the jury not to take notes so it could *listen*, not so it would disregard what the court was saying.

The trial court's omission nevertheless appears to have violated section 1093, which obligates a trial court to provide "a written copy of the jury instructions" upon either party's request. (§ 1093, subd. (f).) However, this error was harmless in light of the fact that the court gave the jury the attempted voluntary manslaughter instruction orally, the parties argued that theory in closing, and the jury was given a verdict form for attempted voluntary manslaughter. Because the attempted voluntary manslaughter theory was actively at play in the trial, it is not "reasonably probable" that the jury would have reached a different verdict if they had received an additional written copy of the attempted voluntary manslaughter instruction following the

court's oral instruction. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

II. Sufficiency of the Evidence

Defendant raises two distinct categories of challenges to the sufficiency of the evidence. First, he argues that both of his convictions must be vacated because there was insufficient evidence that *he* was the shooter. Second, he contends that the jury's finding that he acted with premeditation must be vacated because there was insufficient evidence and because the evidence that he acted in the heat of passion was so overwhelming as to compel a finding of heat of passion and thus attempted voluntary manslaughter.

In evaluating whether there is sufficient evidence to support a jury's finding, "'"we review the record in the light most favorable to the [verdict] to determine whether it discloses . . . 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."'" (*People v. Salazar* (2016) 63 Cal.4th 214, 242 (*Salazar*).) We do not reweigh the credibility of witnesses or "resolve . . . evidentiary conflicts"; instead we "accept [all] logical inferences that the jury might have drawn from the . . . evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396, 403.)

A. As to identity

Viewing the evidence in the light most favorable to the jury's verdict, there was sufficient evidence to support the jury's finding that defendant was the shooter. Barnes contemporaneously identified him as such when he said his "girl's old man" shot him for "messing around." Circumstantial evidence independently supported such a finding: Barnes had an on-again, off-again romantic relationship with defendant's wife; Barnes and defendant had a tense exchange of words inside the polling place; defendant invited Barnes outside and made sure he followed; Barnes was shot mere seconds after walking out the

door with defendant; and defendant and his wife immediately departed, even though Barnes—a longtime friend—had been shot.

Defendant effectively raises two challenges to this evidence. First, he argues that the evidence of his identity is entirely circumstantial because no forensic evidence tied him to the shooting and because the only person who directly identified him—Barnes—later recanted and identified someone else as the shooter. What defendant ignores is that direct evidence is not required and that circumstantial evidence *can be*, and in this case *was*, enough to support a jury's finding. (*People v. Lopez* (2013) 56 Cal.4th 1028, 1069-1070, overruled in part on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192.) He also ignores that the jury was well within its province to conclude that Barnes was telling the truth when he contemporaneously identified defendant and was lying when he denied it at trial, especially when the People's gang expert explained that fellow gang members are not allowed to cooperate with law enforcement against one another and that other witnesses fear gang retaliation. (*People v. Jackson* (2014) 58 Cal.4th 724, 749 ["'it is the exclusive province of the . . . jury to determine the credibility of a witness,'" including conflicts in a witness's testimony].)

Second, defendant asserts that he presented evidence supporting a cogent alternate scenario of what happened—namely, that an unknown rival gang member gunned down Barnes while Barnes was in rival gang territory, and that defendant and his wife fled to avoid further gang reprisal. But it was up to the jury to either accept or reject this alternate theory, and we are not permitted to gainsay its determination when the theory pointing to guilt is supported by substantial evidence. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.)

B. As to premeditation

To convict a defendant of attempted *premeditated* murder, the People must prove beyond a reasonable doubt that the

defendant acted with deliberation and premeditation. (§ 189 [first degree murder includes any "willful, deliberate, and premeditated killing"] & 664, subd. (a) [proscribing mandatory life sentence for attempted premeditated murder].) "[D]eliberation means a "'careful weighing of considerations in forming a course of action'"" (*Salazar*, *supra*, 63 Cal.4th at p. 245), and ""'premeditation" means thought over in advance'" (*People v. Sandoval* (2015) 62 Cal.4th 394, 424). "'The process of premeditation and deliberation does not require any extended period of time,'" what matters is the "extent of the reflection, not the length of time." (*Salazar*, at p. 245; *People v. Mayfield* (1997) 14 Cal.4th 668, 767, overruled in part on other grounds by *People v. Scott* (2015) 61 Cal.4th 363.) We look to three factors, identified by our Supreme Court, to determine whether a defendant has acted with deliberation and premeditation: (1) defendant's motive; (2) prior planning activity; and (3) the manner of killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27; *People v. Streeter* (2012) 54 Cal.4th 205, 242.)

Viewed in the light most favorable to the jury's finding of premeditation, there was substantial evidence to support that finding. Defendant concedes that he had the motive to kill Barnes because Barnes was sleeping with his wife. There is also evidence of planning because defendant brought a gun with him to the polling place and wrote a false name on his name tag. (E.g., *Lee*, *supra*, 51 Cal.4th at p. 636 [bringing "a loaded handgun . . . indicat[es]" that a defendant was "consider[ing] the possibility of a violent encounter"]; *In re McClendon* (2003) 113 Cal.App.4th 315, 321-322 [same].) Defendant also calmly (but tensely) invited Barnes outside of the building—and out of the view of potential witnesses—before he opened fire. Lastly, the multiple shots indicate a singular intent to kill Barnes. (Accord, *In re Gray* (2007) 151 Cal.App.4th 379, 407-409 ["execution-style" killing is evidence of premeditation].)

Defendant makes two further categories of arguments. First, he asserts that there was no evidence that he knew Barnes would be at the polling place and questions why he would sign in if he was planning to commit a crime. However, the evidence shows that Barnes and defendant's wife were both poll workers and that Barnes had tried to call her several times that morning; it is a reasonable inference that defendant, who arrived at the polling place with his wife, was aware of one or both of those facts and thus had some sense Barnes would be there. Further, defendant may have signed in, but he did so under a false name.

Moreover, defendant argues that not only was there insufficient evidence of premeditation, but that there was such overwhelming evidence that he acted in the heat of passion that we are compelled as a matter of law to vacate the attempted premeditated murder verdict and instead enter a verdict for attempted voluntary manslaughter. (See *People v. Bridgehouse* (1956) 47 Cal.2d 406, 413 [ordering entry of verdict of voluntary manslaughter as a lesser included offense where there is insufficient evidence to sustain the greater offense and the evidence compels a finding of the lesser "as a matter of law"], overruled in part on other grounds by *People v. Blakeley* (2000) 23 Cal.4th 82.) We disagree. As we explain above, there *was* sufficient evidence of premeditation. And the evidence that defendant acted in the heat of passion was far from overwhelming. Defendant certainly argued that he either did not shoot Barnes or that he did so in a jealous rage, but the evidence could reasonably support a contrary conclusion given that defendant calmly (albeit tensely) exchanged words with Barnes in the polling place, invited him outside, and patiently waited for him to follow. These acts reflect a calm and patient deliberateness that does not require us to conclude, *as a matter of law*, that he acted in the heat of passion.

III. Sentencing

Defendant argues that the trial court erred in imposing a base prison sentence of 25 years to life for the attempted premeditated murder charge. We agree this was error. The mandatory sentence for attempted premeditated murder is a life sentence with the possibility of parole. (§ 664, subd. (a); *Porter v. Superior Court* (2009) 47 Cal.4th 125, 142.) Because the mandatory sentence of 25 years to life for the enhancement for personal discharge of a firearm causing great bodily injury was also imposed on that count, the proper sentence on the attempted murder count is life with the possibility of parole plus 25 years to life.

DISPOSITION

The abstract of judgment is ordered amended to reflect that defendant is sentenced to life with the possibility of parole plus 25 years to life for the enhancement under section 12022.53, subdivision (d) on count 1. The Clerk of the Superior Court is to amend the abstract of judgment and forward an amended copy to the Department of Corrections. In all other respects, the judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.