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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. ARLESTER C. GORDON, Defendant and Appellant.	2d Crim. No. B275395 (Super. Ct. No. MA067569) (Los Angeles County)

Arlester C. Gordon appeals after a jury convicted him of willful, deliberate, and premeditated attempted murder (Pen. Code,[1] §§ 187, 664; count 1) and shooting at an occupied building (§ 246; count 2). The jury also found that appellant personally and intentionally discharged a firearm in committing the attempted murder (§ 12022.53, subd. (c)) and had suffered prior serious felony and strike convictions and served a prior prison

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

term (§§ 667, subds. (a)(1) & (b)-(j), 667.5, subd. (b), 1170.12). The trial court sentenced him to 39 years to life in state prison. A concurrent seven-year term was imposed on count 2.

Appellant contends the court erred in allowing his trial to proceed in his absence. He also claims that the sentence on count 2 should have been stayed pursuant to section 654. We agree with the latter claim and shall order the judgment modified accordingly. We shall also order that the judgment on count 2 be modified to reflect the imposition of a $40 security fee and a $30 conviction assessment fine (§ 1465.8, subd. (a)(1); Gov. Code, § 70373, subd. (a)(1)). Otherwise, we affirm.

STATEMENT OF FACTS

After consuming several drinks at a bar, appellant grabbed a waitress and began arguing with the bartender. The bar's security guard, Igor Andrushko, repeatedly asked appellant to leave but he refused to do so.

Andrushko eventually removed appellant from the bar. Appellant threatened to kill Andrushko and asked him, "Do you know who I am?" Appellant raised his fist to punch Andrushko, who pepper-sprayed him in the face. As appellant was about to leave he warned Andrushko, "I'm going to come back and kill you."

Appellant drove back to the bar several hours later. Andrushko saw appellant's car enter the bar's parking lot but mistakenly thought he was an Uber driver for another patron. As Andrushko was approaching the driver's side of the car, appellant screamed, "die, motherfucker" and shot at Andrushko five or six times through the car's open window. Two of the bullets ricocheted close to Andrushko's head. Appellant also shot at the bar's building.

DISCUSSION

Appellant's Voluntary Absence From His Trial

Appellant contends the court violated his statutory and constitutional rights by permitting his trial to proceed in his absence. We disagree.

A criminal defendant's right to be present at trial is protected under the state and federal Constitutions. (*People v. Espinoza* (2016) 1 Cal.5th 61, 72; *People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202.) But that right is subject to waiver and is deemed waived by a defendant who voluntarily absents himself from the trial. (§ 1043, subd. (b)(2); *Espinoza*, at p. 72.) "'In determining whether a defendant is absent voluntarily, a court must look at the "totality of the facts."' [Citation.]" (*Espinoza*, at p. 72.) "The role of an appellate court in reviewing a finding of voluntary absence is a limited one. Review is restricted to determining whether the finding is supported by substantial evidence. [Citation.]" (*Id.* at p. 74.)

Substantial evidence supports the trial court's findings that appellant voluntarily absented himself from his trial. Throughout the course of the proceedings, appellant repeatedly refused to appear in court unless he could be seated in a wheelchair. Overwhelming evidence supports the court's conclusion that appellant did not need to be in a wheelchair. Four letters from the jail's medical staff all so concluded, and appellant offered nothing of substance to contradict those conclusions. Dr. Teophilov, the county jail's Chief Physician, stated that "[appellant] has given conflicting accounts as to why he needs a wheelchair. The orthopedic surgeon examined him . . . and did not find objective evidence of a mobility impairment. There is no medical indication for [appellant] to need to use a

wheelchair. [Appellant] continues to complain of back pain, which . . . is not a medical indication for the use of a wheelchair." The doctor added that "[i]f [appellant] reports difficulty ambulating, a transport chair can be used to take him . . . to the court bus and from the court bus to [the] door of the courtroom. There is no medical reason for [appellant] to be in a wheelchair inside the courtroom."

The court was also presented with evidence that appellant had been observed walking around his housing unit. Appellant was not in a wheelchair when he committed the crimes, and videos from the jail showed he was able to move to and from a wheelchair and his bed. Moreover, the injuries that purportedly necessitated his use of a wheelchair—fractures to his right leg—occurred in 2011. As Dr. Teophilov noted, "[t]he use of a wheelchair will not treat [appellant's] already healed injuries in 2011. He currently walks without difficulty in the housing unit." Based on the totality of the circumstances, the court reasonably concluded that appellant appeared to be using a wheelchair as a "tactical ploy" to either garner the jury's sympathy or "potentially raise reasonable doubt in the mind of the jury[.]"

Appellant contends the court erred in refusing to allow him to sit in a wheelchair throughout the proceedings because it "was a reasonable accommodation that would not disrupt the trial proceedings." The court reasonably found, however, that appellant was malingering. The court also reasoned that it had an "obligation to protect the integrity of the court proceedings, and to allow [appellant] to dictate the manner in which he is going to appear is simply not appropriate. It is disruptive."

Appellant also contends that the orthopedic physician who evaluated him "acknowledged that appellant experienced pain

from previous leg fractures and noted the pain was alleviated by his use of the wheelchair." Dr. Teophilov merely noted, however, that "'the orthopedic resident physician mentioned that [appellant] had continued to have pain related to his old injuries, and that an assistive device may reduce the pain. The comment does not provide an objective medical justification for a prescription of a wheelchair for [appellant].'"

Aside from appellant's unsubstantiated subjective assertions, the entirety of the evidence demonstrates he did not need to be in a wheelchair. The fact that he refused to even attempt to move into a courtroom chair or accept assistance to do so further supports the conclusion that he was using the wheelchair as a ploy rather than out of medical necessity. Each time he declined to appear, the court reevaluated the issue based on the current circumstances and instructed the jury not to consider his absence for any purpose. Given our limited role on review, there is no basis for us to conclude the court erred in finding appellant had voluntarily absented himself from his trial, such that his trial could proceed in his absence. (*People v. Espinoza*, *supra*, 1 Cal.5th at p. 72.)

Section 654

Appellant contends the court violated section 654 by imposing a concurrent seven-year term on count 2. As appellant points out, the court expressly found that the crime of which he was convicted in count 2, shooting at an occupied building, occurred on the same occasion and arose from the same set of operative facts as the attempted murder of which he was convicted in count 1. Accordingly, the court erred in failing to stay the sentence rather than imposing a concurrent sentence. (*People v. Hernandez* (2005) 134 Cal.App.4th 1232, 1239.)

Although the People concede that a concurrent sentence was erroneously imposed on count 2, they assert that the court "should have imposed a *consecutive* sentence and imposed a stay of that sentence under section 654." (Italics added.) We reject this assertion. A sentence that is stayed under section 654 is neither consecutive nor concurrent. (See *People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1164 ["[T]he imposition of a 'consecutive' and 'stayed' sentence would be meaningless because the stayed sentence would only operate if the principal count were eliminated"]; see also *People v. Bruner* (1995) 9 Cal.4th 1178, 1182, fn. 3 ["A concurrent term is one that begins on the day it is imposed and is not postponed until the completion of a prior term"].) Accordingly, we shall order that the seven-year sentence on count 2 be stayed under section 654.

Fines and Fees on Count 2

The judgment as to count 1 reflects the imposition of a $40 court security fee (§ 1465.8, subd. (a)(1)) and a $30 criminal conviction assessment (Gov. Code, § 70373, subd. (a)(1)). No such fee or assessment was imposed as to count 2. As the People correctly note, a $40 court security fee and a $30 criminal conviction assessment must be imposed on each count of conviction. (*People v. Robinson* (2012) 209 Cal.App.4th 401, 405.) Appellant does not dispute that this error must be corrected, and we shall order it so.

DISPOSITION

The judgment on count 2 is modified to reflect a seven-year sentence that is stayed under section 654. The judgment on count 2 is further modified to reflect the imposition of a $40 court security fee (§ 1465.8, subd. (a)(1)) and a $30 conviction assessment fine (Gov. Code, § 70373, subd. (a)(1)). The superior

court clerk shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Christopher G. Estes, Judge
Superior Court County of Los Angeles

Cynthia L. Barnes, 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, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.