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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.

CRISTIAN DAVID MOREIRA,

Defendant and Appellant.

B294936

(Los Angeles County
Super. Ct. No. VA146634)

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

Larry Pizarro and Emma Gunderson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Charles S. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Christian David Moreira appeals from the judgment of conviction entered after a jury found him guilty of second degree attempted murder (Pen. Code, §§ 187, subd. (a), 664; count 1),¹ attempted carjacking (§§ 215, subd. (a), 664; count 2), and attempted second degree robbery (§§ 211, 664; count 3). The jury further found true the allegations that, in committing these offenses against the victim Daniel Solorzano, Moreira used a knife, causing great bodily injury (§§ 12022, subd. (b)(1), 12022.7, subd. (a)).

The trial court sentenced Moreira to an aggregate prison term of 13 years and 10 months, consisting of the upper term of nine years for the attempted murder and the middle term of 10 months for the attempted carjacking, plus an enhancement of three years for great bodily injury and one year for use of the knife. The court imposed a mid-term sentence of two years for the attempted burglary, stayed pursuant to section 654. Moreira's sentence also included a \$300 restitution fine, a \$40 court operations assessment, and a \$30 conviction assessment.

On appeal, Moreira claims there is insufficient evidence to support his conviction for attempted carjacking, and the trial court erroneously admitted a prior consistent statement by Solorzano. He also requests that we reverse the restitution fine and court assessments imposed against him pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

Finding no merit in these contentions, we affirm.

¹ Unless otherwise indicated, subsequent section references are to the Penal Code.

BACKGROUND

A. The Prosecution's Case

Around 1:40 a.m. on December 31, 2017, Evelio Romero visited Teresa Anguiano at the gas station where Anguiano was working. They sat inside the Food Mart, which faced the gas pumps. The Food Mart was closed, but customers could purchase gas and other items through a service window.

Romero and Anguiano observed a man and woman, later identified as Moreira and Stacey Hernandez, walk into the gas station parking lot and begin looking into parked cars.² During this time, a male customer walked up to the service window to buy something. The customer did not have a car with him. The man caught Moreira's and Hernandez's attention, but they did not approach him. Moreira and Hernandez also watched as two individuals parked their cars at the gas station pumps, exited the cars, and began transferring items between the cars.

Shortly after this, Solorzano drove into the gas station to buy allergy medicine. Solorzano observed Moreira's and Hernandez's conduct and, becoming suspicious, waited until the couple moved away before getting out of his car. Solorzano then approached the service window.

While waiting for his change, Solorzano saw Moreira approach. Moreira punched Solorzano in the face, telling Solorzano he had a gun and demanding money. Solorzano believed Moreira had a gun because Moreira put his hand in his pocket. Solorzano pushed Moreira, then felt a cut on his head.

² Gas station security footage recorded the movements of Moreira and Hernandez, as well as Romero and Anguiano.

Solorzano suspected Hernandez had stabbed him because he felt something wet on his face and saw blood dripping on the ground.

Solorzano turned away and saw Hernandez running towards his parked car. When he turned back around, Moreira hit him on his bottom lip. Solorzano pushed Moreira away, which caused Moreira to fall backwards and allowed Solorzano to pin him down. Hernandez returned to the fray and stabbed Solorzano about 19 or 20 times in the head.

Solorzano grabbed Moreira and Hernandez, and held them down while Romero called 911. Solorzano felt Hernandez reach for the pocket in his jacket that held his car keys. Hernandez did not say anything when she reached for the keys. Solorzano released the couple, got up, and threw his car keys into the service window. Moreira and Hernandez grabbed a trash can lid and began hitting Solorzano with it. While Moreira continued to attack Solorzano, Hernandez approached Solorzano's car and tried to open the door.

Solorzano wanted to stay near the service window because he knew there were security cameras and the police were going to come, but Moreira and Hernandez pulled him back toward the rear of his car. The couple continued to hit Solorzano, and Moreira used a knife to stab Solorzano in the head and face approximately eight times.

Solorzano broke free and ran to the service window, at which time law enforcement arrived. Moreira and Hernandez attempted to run away, but were apprehended by Huntington Park Police Department officers. One of the officers conducted a pat-down search and found a knife in the front pocket of Moreira's pants. The blade was closed and there was no blood on

it. Officers found a screwdriver with blood on it near the spot where they detained Hernandez.

Solorzano received about 40 wounds on his upper body, which an investigating officer determined were caused by a screwdriver.

B. The Defense Case

Moreira presented no evidence or testimony on his own behalf.

DISCUSSION

A. Moreira's Conviction for Attempted Carjacking Is Supported by Substantial Evidence

Moreira argues we must reverse his conviction for attempted carjacking because there is insufficient evidence of intent to take Moreira's car (as opposed to Moreira's money). As Moreira points out, there were two potential avenues for the jury to find him guilty of attempted carjacking: as a direct perpetrator, and as an aider and abettor helping Hernandez. The People do not argue Moreira was the direct perpetrator, and given this concession, we focus exclusively on whether there was sufficient evidence that Moreira aided and abetted Hernandez.

Moreira argues there was insufficient evidence Hernandez was a direct perpetrator of any attempted carjacking, such that no attempted carjacking occurred for him to aid and abet. To the extent there was sufficient evidence Hernandez attempted a carjacking, Moreira alternatively argues the evidence was insufficient to establish Moreira aided and abetted Hernandez in her commission of the crime.

1. *Standard of Review*

In reviewing a sufficiency of the evidence challenge, we “view the evidence in a light most favorable to respondent and

presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding.'” (*People v. Gray* (1998) 66 Cal.App.4th 973, 983-984.) “Our power as an appellate court begins and ends with the determination whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, to support the judgment.” (*People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1181-1182.) “The test on appeal is not whether we believe the evidence at trial established the defendant's guilt beyond a reasonable doubt, but whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Id.* at p. 1182.)

2. *A Reasonable Trier of Fact Could Infer from the Evidence that Moreira and Hernandez Intended To Commit a Carjacking*

“‘Carjacking’ is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.” (§ 215, subd. (a).)

“A criminal attempt occurs when there is a specific intent to commit the crime and a direct but ineffectual act done toward its commission.” (*People v. Weddington* (2016) 246 Cal.App.4th 468, 478.) “A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the

perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.” (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.)

(a) *Hernandez’s Intent To Commit a Carjacking*

Moreira first urges us to reverse his conviction for aiding and abetting an attempted carjacking because, in his estimation, the evidence does not support a predicate finding that his compatriot Hernandez attempted a carjacking. Specifically, Moreira contends that, although there was evidence the victim thought Hernandez was trying to take his keys, Hernandez herself said nothing while reaching into the victim’s pocket. Therefore, in Moreira’s view, “it is impossible to know whether an attempt to use the keys to steal the car would have been made.”

Direct evidence of intent to commit a carjacking is not required to establish the crime; rather, intent may be proven circumstantially. (*People v. Clark* (2011) 52 Cal.4th 856, 922; accord, *People v. Thomas* (2011) 52 Cal.4th 336, 355 [“Mental state and intent are rarely susceptible of direct proof and must therefore be proven circumstantially”].) The People argue there was sufficient circumstantial evidence to demonstrate Hernandez’s intent.

We agree. Prior to Solorzano’s arrival at the gas station, Moreira and Hernandez walked around the property for several minutes peering into parked cars. A customer then approached the service window on foot, purchased something, and walked away. Although the customer passed near enough to Moreira and Hernandez to be noticed by them, they did not approach him. Solorzano then drove his vehicle into the gas station. After Solorzano got out of his car and approached the service window,

Hernandez and Moreira conferred with each other for approximately one minute before Moreira walked up and punched Solorzano in the face. During the fight, Hernandez approached the car twice and tried to take Solorzano's keys. A jury could reasonably infer that the couple, who had been looking into parked vehicles, collectively decided to pass over the first customer, who did not have a car, in favor of a victim who did have a car, because they intended to take that car.

Moreira cites *People v. Gomez* (2011) 192 Cal.App.4th 609 (*Gomez*) in support of his argument that Hernandez lacked the requisite intent to commit a carjacking. In that case, the onsite maintenance manager of an apartment complex left his apartment at 1:00 a.m. to perform a security check. (*Id.* at p. 614.) His wallet, money, and truck keys were in his pockets. As he was finishing his rounds, four men, including the defendant, got out of a car and approached him. The manager's behavior and surroundings did "not suggest to his [soon-to-be] assailants that he was on his way to or from any vehicle." (*Id.* at p. 619.)

After a verbal exchange about where the manager lived and where he was from, one of the four men began hitting the manager. He escaped to a stairway. The men ran after the manager and knocked him down, hitting him with their fists and concrete blocks. (*Gomez, supra*, 192 Cal.App.4th at p. 614.) At some point, one of the men obtained the keys to the manager's truck. (*Ibid.*) The assailants were "'alerted'" to something, ran from the scene, and drove away. (*Ibid.*) Shortly thereafter, the men returned. Two of the men tried to enter the manager's apartment without success. They then went to the manager's

truck, and used the stolen keys to access the truck and drive it away. (*Id.* at pp. 114-115.)

The defendant contended these circumstances were insufficient to show he intended to deprive the manager of the truck at the time of the assault. (*Gomez, supra*, 192 Cal.App.4th at p. 618.) The court agreed. The defendant did not know the manager had a vehicle at the time of the attack, and did not demand a vehicle or keys. (*Id.* at pp. 619-620.) It was also unclear whether the truck keys were taken from the manager's jacket pocket during the fight, or whether the defendant stole the manager's jacket and only later found that the jacket contained keys. (*Id.* at p. 621.) Finally, the truck was not stolen until the defendant returned to the property. In the view of the *Gomez* court, this evidence did "not support a reasonable inference that [the defendant] (or anyone) formed an intent to take [the manager]'s truck prior to the end of the assault." (*Id.* at p. 622.)

Moreira attempts to draw a parallel between the facts of *Gomez* and his own case, arguing that Hernandez did not gain possession of the keys, said nothing about the car or the keys during the altercation (instead having Moreira demand money), and Solorzano was not in his car at the time Hernandez used force against him. The facts here, however, are distinguishable from *Gomez*. Unlike the defendant in *Gomez*, Hernandez and Moreira were specifically looking for cars before the assault. They passed on attacking another individual without a car, waiting until Solorzano appeared with his car. While Solorzano was defending himself against Moreira, Hernandez walked to Solorzano's car and looked inside. After looking inside the car, Hernandez returned to the men and reached for the car keys in Solorzano's pocket. Solorzano was sufficiently concerned

Hernandez was trying to take the keys that he gave up the position of physical advantage he had gained in the fight, releasing Moreira so Solorzano could toss his car keys to safety, which resulted in the perpetrators being freed to inflict significant additional injury on Solorzano.

Although the record may also support an alternative inference that Hernandez intended to rob Solorzano of money or the belongings in the car, we must construe the evidence favorably to support the judgment and make all reasonable inferences in support of the judgment. (*People v. Hecker* (1960) 179 Cal.App.2d 823, 828.) The circumstantial evidence is meaningfully stronger than in *Gomez*, and Hernandez's actions both before and during the attack constitute substantial evidence that she had the requisite intent to take the car.

(b) *Moreira's Intent to Aid and Abet Hernandez*

Moreira also argues that, even if Hernandez intended to steal the car, there is insufficient evidence to find that he intended to aid her in that effort. Moreira asserts that, at best, his and Hernandez's collective intent, when viewed through the lens of the gas station security footage, was ambiguous. Specifically, Moreira points to the period of time before Solorzano appeared on the scene, when Moreira and Hernandez watched without acting as two individuals exited their cars parked at the gas station pumps and began transferring items between the cars. Moreira notes that neither he nor Hernandez attempted to approach these drivers to steal their cars, apparently implying that, had he and Hernandez intended to commit a carjacking, they would have done so at their first opportunity.

This fact does not supersede or outweigh the reasonable inferences to be drawn in support of the judgment from the other

evidence showing coordinated activity between Moreira and Hernandez. An equally plausible explanation for why Moreira and Hernandez did not approach these drivers is that there were two of them, which mathematically reduced the two attackers' chance of success. Quite simply, a two-on-one fight would naturally be more favorable than a two-on-two fight.

For these reasons, we find the evidence was sufficient to support Moreira's conviction for aiding and abetting an attempted carjacking.

B. The Trial Court Did Not Err in Admitting Solorzano's Prior Consistent Statement from the Preliminary Hearing

Moreira next contends that the trial court abused its discretion by admitting a hearsay statement Solorzano made at the preliminary hearing that Moreira stabbed him during the attack. The People argue Moreira forfeited his right to make the argument because he failed to properly preserve his current objection to the evidence at trial, having objected on other grounds below. Because we find the admission of Solorzano's preliminary hearing statement was not an abuse of discretion, we not need not address the People's forfeiture argument or whether the admission of the evidence resulted in any improper prejudice to Moreira.

1. Standard of Review

We review a trial court's ruling relating to the admissibility of evidence, along with its determination of issues regarding the hearsay rule, for abuse of discretion. (*People v. Clark* (2016) 63 Cal.4th 522, 590.) Discretion " 'must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior*

Court (Alvarez) (1997) 14 Cal.4th 968, 977.) Under this standard, we will not disturb a trial court's ruling unless it exercised its discretion "in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

2. *The Trial Court Did Not Abuse its Discretion in Admitting the Evidence*

At trial, Solorzano testified that he saw Moreira stab him with a knife. However, Solorzano did not tell this to the responding officers, because paramedics took him to the hospital shortly after police arrived on the scene. Following the attack, Solorzano was hospitalized for two days with stitches in his face and approximately 13 staples in his head. After he was released on January 2, 2018, Solorzano visited the police station and was interviewed by Detective Cervantes for approximately 10 to 20 minutes.

Prior to interviewing Solorzano, Detective Cervantes reviewed a police report of the incident written by two other officers. Over a hearsay objection by the prosecution, Detective Cervantes testified on cross-examination that none of the reports he read prior to interviewing Solorzano indicated that Solorzano told the responding officers Moreira had stabbed him. Detective Cervantes also testified that Solorzano did not mention during the January 2 interview that Moreira stabbed him.

On redirect examination of Detective Cervantes, the prosecution sought to rehabilitate Solorzano by introducing a portion of his May 4, 2018 preliminary hearing testimony, where Solorzano stated Moreira stabbed him with a knife about five or six times. The following colloquy then took place at sidebar:

“[Defense counsel]: So I believe that what [the prosecution] is wanting to do is introduce—

“The Court: Prior testimony of the preliminary hearing.

“[Defense counsel]: Right, of Mr. Solorzano. So first of all, I think that is an inappropriate way to introduce it because the declarant, the person who made those statements at the preliminary hearing, is not on the stand. The person being asked about those statements is a police officer and he’s being asked about what he heard, and also I don’t believe there is a hearsay exception at this point for the introduction of those things. [¶] . . . [¶]

“The Court: We could bring the victim back, but I’m going to allow the testimony of the preliminary hearing [to] come in because it’s not coming in for the truth of the matter asserted. It’s coming in for the fact that the victim, on a previous occasion, claimed he was stabbed, not as you point out when he was being interviewed by the police, but at the preliminary hearing.”

Moreira asserts the introduction of Solorzano’s preliminary hearing testimony about being stabbed was error, because the testimony was hearsay not subject to any exception. The People respond, and we agree, that the statement was properly admitted as a prior consistent statement.

Hearsay “is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) “[A] statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with [Evidence Code] section 791.” (Evid. Code, § 1236.) Under Evidence Code section 791, a prior consistent

statement “is inadmissible to support [the credibility of the witness] unless it is offered after [either] [¶] (a) [e]vidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) [a]n express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.”

Subdivision (b) of Evidence Code section 791 applies when a witness is impeached by his or her prior silence. “‘[R]ecent fabrication may be inferred when it is shown that a witness did not speak about an important matter at a time when it would have been natural for him to do so,’ and in such a circumstance, ‘it is generally proper to permit rehabilitation by a prior consistent statement.’ [Citations.]” (*People v. Riccardi* (2012) 54 Cal.4th 758, 803.) Admission of a prior consistent statement requires examination of two factors: (1) whether at the time of the witness’s “initial silence[,] he suffered from an incapacity that prevented him from speaking,” and (2) whether “he made the prior consistent statement at the ‘earliest opportunity’ after the incapacity was removed. [Citation.]” (*People v. Lopez* (2013) 56 Cal.4th 1028, 1068.)

Moreira argues Evidence Code section 791 does not apply because Solorzano failed the latter part of the *Lopez* test: he “failed to mention that [Moreira] stabbed him when he came to speak with Det[ective] Cervantes [on January 2] after being released from the hospital,” or at any time prior thereto. However, *Lopez* does not strictly define “‘earliest opportunity’ ”

as the first time a witness has the opportunity to speak with law enforcement. (*People v. Lopez, supra*, 56 Cal.4th at p. 1068, fn. 15 [refusing to deem inadmissible a prior consistent statement on the ground that the earliest opportunity for a witness to speak was during a police interview].) The witness must also be free from any incapacity. (*Id.* at p. 1068.)

In this case, Solorzano testified that, on January 2, he told Detective Cervantes “what [he] remembered more or less,” but that he “was still under the influence of the drugs from the hospital.” This was also only two days after a vicious attack that left Solorzano with approximately 40 stab wounds, stitches in his face and 13 staples in his head. In light of Solorzano’s post-hospitalization condition, we find it was not “arbitrary, capricious, or patently absurd” for the trial court to admit Solorzano’s prior consistent statement made after the police interview on January 2, 2018, for purposes of rehabilitation. (*People v. Guerra, supra*, 37 Cal.4th at p. 1113.)

C. The Trial Court Did Not Err in Imposing a Restitution Fine and Assessments

The trial court imposed a \$300 restitution fine, a \$40 court operations assessment, and a \$30 conviction assessment against Moreira. Moreira requests that we reverse these amounts because the trial court did not first ascertain his ability to pay them, relying on *Dueñas, supra*, 30 Cal.App.5th 1157. We decline to do so.

The People argue that Moreira’s failure to object below to the fines and assessments, or to raise the issue of inability to pay, caused him to forfeit any such argument on appeal. The Courts of Appeal are divided on the issue of forfeiture in these circumstances. (Compare *People v. Johnson* (2019) 35

Cal.App.5th 134, 138 [no forfeiture] and *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [same], with *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [forfeiture] and *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154-1155 [same].) We find it unnecessary to weigh in on this debate because in our view *Dueñas* was wrongly decided. (*People v. Kingston* (2019) 41 Cal.App.5th 272; see also *People v. Caceres* (2019) 39 Cal.App.5th 917, petn. for review pending, petn. filed Oct. 22, 2019.)³

In *Kingston*, we agreed with the opinion of our colleagues in Division Two of this district in *People v. Hicks, supra*, 40 Cal.App.5th 320 that, contrary to the analysis in *Dueñas*, “due process precludes a court from imposing fines and assessments only if to do so would deny the defendant access to the courts or result in the defendant’s incarceration.” (*People v. Kingston, supra*, 41 Cal.App.5th at p. 279, citing *Hicks, supra*, at pp. 325-326.) Here, the “imposition of the [restitution fine] and fees in no way interfered with [Moreira]’s right to present a defense at trial or to challenge the trial court’s rulings on appeal” (*Kingston, supra*, at p. 281.)

Moreira has over 13 years to make bona fide efforts to repay the restitution fine and assessments. At this point in time, due process does not deny Moreira the opportunity to try to satisfy these obligations. (*People v. Hicks, supra*, 40 Cal.App.5th

³ Other courts have also disagreed with *Dueñas*. (See *People v. Allen* (2019) 41 Cal.App.5th 312, 326, petn. for review pending, petn. filed Nov. 22, 2019; *People v. Hicks* (2019) 40 Cal.App.5th 320, 329, review granted Nov. 26, 2019, S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067-1068; *People v. Kopp* (2019) 38 Cal.App.5th 47, 93-98, review granted Nov. 13, 2019, S257844.)

at p. 327.) The trial court accordingly did not violate Moreira's due process rights by imposing the restitution fine and assessments without first ascertaining his ability to pay them.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

WEINGART, J.*

We concur:

JOHNSON, Acting P. J.

BENDIX, J.

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