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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICHARD TYRONE GARCIA, Defendant and Appellant.	F087505 (Super. Ct. No. 4004187) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Nancy A. Leo, Judge.

Denise M. Rudasill, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Kimberley A. Donohue, Assistant Attorney General, Ivan P. Marrs and Jennifer M. Poe, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Richard Tyrone Garcia was convicted at a bench trial of attempted murder committed deliberately and with premeditation, attempted dissuasion of a witness, and solicitation of murder. He appeals, arguing that insufficient evidence supports the convictions for attempted murder and attempted dissuasion of a witness and that the trial judge erroneously convicted him of attempted murder using less than a beyond-a-reasonable-doubt burden of proof. The People concede that the evidence failed to prove defendant attempted to dissuade a witness but argue that the trial judge did not use a lesser burden of proof to convict defendant of attempted murder and that substantial evidence supports the verdict. We accept the People's concession, reverse the attempted dissuasion of a witness conviction, and remand for resentencing but affirm defendant's conviction for attempted murder.

PROCEDURAL BACKGROUND

A Stanislaus County grand jury returned an indictment on May 22, 2017, charging defendant with attempted murder with the additional allegation that he acted intentionally, deliberately and with premeditation (Pen. Code,[1] §§ 664, 187; count I), attempted dissuasion of a witness by force or threat of force or violence (§ 136.1, subd. (c)(1); count II), and solicitation of murder (§ 653f, subd. (b); count III). Defendant pleaded not guilty and denied all allegations.

Defendant waived his right to a jury trial, and after an eight-day bench trial, the trial court convicted him of all charges and found true that the attempted murder was premeditated and deliberate on October 26, 2023.

On December 1, 2023, the trial court sentenced defendant to prison for life with the possibility of parole as to count I, a consecutive three-year term as to count II, and a six-year term as to count III, stayed pursuant to section 654. The court also ordered that

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1 Undesignated statutory references are to the Penal Code.

defendant pay $300 in restitution and parole revocation restitution fines (§§ 1202.4, subd. (b), 1202.45), victim restitution (§ 1202.4, subd. (f)), $60 in criminal conviction assessments (Gov. Code, § 70373), and $80 in court operations assessments (§ 1465.8).[2]

Defendant filed a timely notice of appeal on January 23, 2024.

FACTS

On March 3, 2012, three individuals were found dead from gunshot wounds at a residence in Modesto. The grand jury returned an indictment charging defendant, Juan Nila, Armando Osegueda, Robert Palomino, and Ricky Madrigal with multiple counts, including three counts of murder with special circumstances, on December 19, 2012. Nila was interviewed and admitted he drove two individuals to the location before the shooting and from the scene thereafter. Around December 10, 2014, Nila entered into an agreement with the prosecution to testify at the trials of defendant and other codefendants in exchange for a lesser conviction for accessory after the fact.

Although originally placed in witness protection, Nila was returned to custody in 2016. As a Norteño gang dropout, defendant was housed with members of the Northern Ryders, a gang comprised of dropouts. William Castillo, a Northern Ryder member, was Nila's cellmate until the events of October 14, 2016, charged in the instant case. Defendant, known by the moniker "Fox," was a Northern Ryder, having dropped out of the Norteño gang, and was also housed with other Northern Ryders.

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[2] As defendant was convicted of three counts, the court should have ordered him to pay a total of $90 in criminal conviction assessments (Gov. Code, § 70373) and $120 in court operations assessments (§ 1465.8) because, although the court stayed the term of imprisonment as to count III pursuant to section 654, these assessments are not stayed. (See *People v. Crittle* (2007) 154 Cal.App.4th 368, 370 [holding § 654 does not apply to fee pursuant to § 1465.8 because that fee is not punishment]; see also *People v. Sencion* (2012) 211 Cal.App.4th 480, 484 [holding § 654 does not apply to fee pursuant to § 1465.8 or Gov. Code, § 70373 because neither fee is punishment (collecting cases)].) However, because we are reversing the conviction on count II, the amount of these fees will be correct upon resentencing.

Castillo testified in accordance with his agreement with the prosecution and acknowledged several of his own convictions, some occurring after entering into the agreement with the prosecution. Castillo knew defendant since 2001 when they were both active Norteño gang members. Castillo was rearrested in 2016 and, because he was now a member of the Northern Ryders after dropping out of the Norteño gang, he was housed with members of the Northern Ryders. Castillo and his cellmate, Nila, were housed near defendant even after they were all moved to another section of the jail on separate tiers.

Defendant's cellmate, Armando Gonzalez, yelled from his cell to Castillo that Gonzalez would be sending Castillo a written communication (known as a "kite"). The kite read in part: "Your celly told on Fox [defendant.] He was in the witness protection. Everything Fox got, the P doves [paperwork] on him. Fox is reembraced," meaning he is back in good standing with the gang, "we just want you to know we can't tell you how or what to do but we felt obligated to inform you." (Some capitalization omitted.) Castillo did not notify Nila that he had received this kite and did not act based on the kite at that time.

Defendant then verbally asked Castillo, speaking from defendant's own tier, whether Castillo had received and understood the kite. Castillo replied that he did. Based on the kite, Castillo understood that defendant had status and a high position in the Northern Ryders. Castillo was expected to do something to Nila because he was a rat and defendant was a fellow Northern Ryder, and Castillo would become a target himself and killed if he showed disloyalty by failing to act. Castillo, as a Northern Ryder, was expected and obligated to do as defendant requested.

Defendant told Castillo that Castillo would receive a kite for Castillo's eyes only, and Castillo received the second kite directly from defendant a day later. (People's exhibit 14). It read in part: "My love in full—All the compas send theres. I'm going to send a coffee bag with a little coffee with a tool inside for you to handle that when you

feel the time is right—OK—I love you brotha and just let D—know when you want that OK Do you want it before yard? After when you guys get back?" (Some capitalization omitted.) Castillo interpreted the kite as advising that defendant would send Castillo a shank to kill Nila and Castillo was obligated to do so. After receiving the kite, defendant verbally told Castillo to "take [Nila's] wind," meaning to stop Nila from breathing and to kill him.

Defendant later sent Castillo a coffee package[3] that contained a four-inch knife and a shank made from a razor blade, also known as a "tomahawk." However, he flushed the knife down the toilet as guards walked by but kept the package containing the tomahawk.

Castillo did not want to kill Nila and showed Nila the second kite. Nila was confused because he was still receiving friendly messages from defendant. Castillo believed defendant did that so that Nila would let his guard down. Castillo instructed Nila to contact the district attorney or Nila's own attorney. When they went to the yard, Nila contacted his mother and the district attorney's office. Castillo and Nila also advised custody officers of the threat.

After returning from yard with Nila, defendant and Gonzalez communicated with Castillo three to four times to see if he intended to take care of the request. Castillo told defendant that he would get back to him and eventually began to ignore the inquiries. At one point, Gonzalez communicated to Castillo that they felt something funny was going on because Nila was still alive.

Nila told Castillo about defendant and Nila's involvement in the triple homicide. Castillo feared defendant because defendant could order somebody to be killed. Castillo believed that someone would come after him because he had not killed Nila as ordered.

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3 After reviewing People's exhibit 8, we note the coffee package referred to throughout this opinion is an instant hot cocoa package. We refer to this package as coffee as it was referred to during testimony for ease of reference.

Since 2016, when he failed to comply with defendant's directive to kill Nila, Castillo was shot in the stomach by a Northern Ryder, stabbed, and later sexually assaulted. Defendant also headbutted Castillo when they were transported to court and, while in court, threatened Castillo again. Castillo believed that defendant had seniority with other gang members and had urged them to victimize Castillo because of his disloyalty.

On October 14, 2016, Officer Ryan Mauldin contacted Castillo and Nila at the jail. Castillo advised that members of the Northern Ryders gang had put a hit on Nila, his cellmate, and requested that Castillo kill Nila. Castillo did not want to harm Nila and told Nila what was planned. Castillo advised that he had received a kite from another inmate that instructed him to "take out his celly" using a razor blade hidden in a bag of coffee. Nila also told Mauldin that Northern Ryders were after him and provided a kite relating to his claims (People's exhibit 14).

Nila testified pursuant to an agreement with the prosecution in which his murder charges were reduced to accessory after the fact. He also acknowledged several of his own convictions, some occurring after entering into the agreement with the prosecution. In October 2016, Nila was housed in the same section of the jail as defendant. He knew that Northern Ryders would take on individuals who cooperate with the police, and defendant knew Nila was cooperating because defendant had sent Nila a kite warning him. The kite was addressed to Nila's street moniker, "Mono," and read in part: "Mono—my love and respects in full! … And after you get out this time, make sure you be cool. You took the opportunity to get out on a hot one in order to change and have a productive life on the streets.… Remember were [*sic*] … dying for your freedom so make our death penalty worth it like Ricky and Jr and Neito" (some capitalization omitted). Nila testified that he had been verbally notified that defendant would be sending the kite and he recognized defendant's handwriting. When defendant wrote that Nila had traded his freedom for the lives of the other individuals involved in the triple homicide, Nila understood that defendant knew he was cooperating with the prosecution.

Nila had driven two individuals to a residence that he believed they intended to rob and only learned as he drove them away that they had killed the three victims. At that time, the individuals said that defendant had instructed them to kill the victims.

Nila heard defendant call out to Castillo that defendant would be sending Castillo a kite. Castillo told Nila that defendant had instructed Castillo to kill Nila and defendant would be sending Castillo a weapon to do so. Castillo did not want to kill Nila, and Nila alerted his attorney to the danger.

During a subsequent search of Castillo and Nila's cell, officers seized additional kites. Deputy James Shelton, assigned to the classification unit at the jail, took custody of the kites and weapon obtained from Castillo, Nila, and the search of their cell and conveyed the items to District Attorney Investigator Kirk Bunch. The evidence was provided to a Department of Justice laboratory and analyzed for fingerprints. Defendant's fingerprint was identified on his kite to Nila.

Victor Navar also testified at trial pursuant to an agreement with the prosecution. In exchange for his cooperation in the instant case and one other case, Navar's murder charge was reduced to voluntary manslaughter. He also acknowledged several convictions of his own and a parole violation that occurred after entering into the agreement with the prosecution. Navar was defendant's cellmate in October 2016. Defendant told Navar that he was in custody related to a triple homicide resulting when he ordered a hit on his ex-girlfriend. Defendant said that Nila agreed to cooperate with the prosecution and defendant wanted to get rid of him. Defendant sent a kite to Castillo and then yelled to Castillo to ask if he would handle the problem. Castillo responded, "I got you, compa," and defendant made the weapon, told Navar that it was to be used to kill Nila, and put it inside a coffee package. Castillo told defendant that he would perform the hit when they went to commissary, and later advised he would act when they went to the yard, but nothing happened. Defendant worried when Castillo and Nila returned from yard and nothing had happened. Defendant also expressed anger and

worry when they saw a guard remove Nila from his cell and when Castillo failed to respond to defendant thereafter.

DISCUSSION

I. Defendant's conviction for attempted dissuasion of a witness is not supported by sufficient evidence that defendant's acts occurred before the indictment was filed.

Defendant argues that his conviction for count II, attempted dissuasion of a witness by force or threat of force or violence (§ 136.1, subd. (c)(1)), must be reversed under the holding of *People v. Reynoza* (2024) 15 Cal.5th 982 (*Reynoza*), a decision which was issued after his trial. The People agree, as do we.

"[S]ection 136.1, subdivision (b)(2) makes it a crime to attempt to dissuade a victim or witness from '[c]ausing a complaint … to be sought and prosecuted, *and* assisting in the prosecution thereof.' "[4] (*Reynoza, supra*, 15 Cal.5th at p. 986, first bracketed insertion added.) In *Reynoza*, the jury convicted Reynoza based only on conduct occurring entirely after a criminal complaint had been filed. (*Ibid.*)

The issue before the Supreme Court was whether section 136.1, subdivision (b)(2), "requires proof of an attempt to dissuade a witness from causing a charging document to be sought and prosecuted … or whether the statute also independently applies where a defendant dissuades a witness only from 'assisting in the prosecution' of a case *after* the charging document has already been filed." (*Reynoza, supra*, 15 Cal.5th at p. 989.) Put another way, can the statute support a "*disjunctive* interpretation—in which the statute independently applies where a defendant dissuades a witness from 'assisting in the prosecution' of a case after the charging document has already been filed—or whether a

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[4] It is a felony for an individual to knowingly and maliciously commit the acts described in section 136.1, subdivision (a) or (b) when accompanied by force or an express or implied threat of force or violence. (§ 136.1, subd. (c)(1).)

conjunctive interpretation precludes a conviction under such circumstances." (*Id.* at p. 986.)

The court concluded that because section 136.1, subdivision (b)(2) "is equally susceptible to both the conjunctive and disjunctive constructions," the rule of lenity points to an " 'interpretation more favorable to the defendant.' " (*Reynoza, supra*, 15 Cal.5th at p. 987.) As a result, the statute must be read in "the conjunctive construction, which does not permit a conviction to be based solely on proof of dissuasion from 'assisting in the prosecution' of an already-filed charging document." (*Ibid.*) Consequently, because Reynoza's "conduct amounted to, at most, dissuasion after a complaint was filed," the conviction had to be reversed. (*Ibid.*) Therefore, "[w]here criminal charges have already been filed, postcharging dissuasion alone does not constitute an offense under section 136.1[, subdivision](b)(2)." (*Id.* at p. 1013.)

Here, as the parties agree, all the facts introduced by the prosecution in support of the dissuading charge occurred in October 2016, after defendant was indicted with three counts of murder and other charges on December 19, 2012. Therefore, the dissuasion conviction is not supported by sufficient evidence and must be reversed.

II. The trial court did not convict defendant using a burden of proof less than beyond a reasonable doubt.

A. Background

Defendant argues that the trial court abused its discretion and violated his due process rights by improperly using the lower strong suspicion or probable cause standard applicable at a preliminary hearing to hold a defendant to answer (see *People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 5–7 (*Decker*)) rather than the beyond-a-reasonable-doubt burden of proof applicable to criminal trials.

After the close of evidence, the parties submitted their closing arguments in writing. Defendant's written brief was captioned "RICHARD GARCIA'S COURT TRIAL ARGUMENT" and did not include any legal argument but argued that the court

should reject the testimony of witnesses that had entered into agreements with the prosecution as lacking credibility. The prosecution's brief was captioned "PEOPLE'S BRIEF IN SUPPORT OF COURT'S HOLDING DEFENDANT GARCIA TO ANSWER." (Boldface omitted.) The introduction, however, provided that it was submitted in support of the "Court's Verdict of guilty on all counts." As to count I, the prosecution relied upon three decisions that addressed what acts were sufficient as "the direct but ineffectual act toward accomplishing the intended killings" required for attempted murder: *Decker, supra*, 41 Cal.4th at page 8 (addressing legal principles of attempted murder in the context of an appeal from a magistrate's finding sufficient evidence to hold a defendant to answer); *People v. Ervine* (2009) 47 Cal.4th 745, 786 (trial evidence sufficient to support attempted murder conviction); and *People v. Morales* (1992) 5 Cal.App.4th 917, 926–927 (trial evidence sufficient to support attempted murder conviction).

At the hearing, defense counsel argued that the direct evidence provided by witnesses cooperating with the prosecution was not credible and concluded, "So I don't think that the Court should rely upon that to find beyond a reasonable doubt that [defendant] engaged in an attempted murder of Juan Nila."

The prosecution argued that the facts were sufficient to establish that defendant committed a direct but ineffectual act to accomplish the intended killing and compared them to those found sufficient in *Decker, supra*, 41 Cal.4th 1, which addressed "the law as it applies to someone who doesn't actually pull the trigger or … isn't the one who actually commits the crime of murder itself."

The trial court commented, "Initially I was kind of concerned as to Count I, that the facts didn't really support an attempted murder, but I do think the *Decker* case is right on point." (Italics added.) The court then found defendant guilty of attempted murder, intimidating a witness, and solicitation to commit murder.

B. Standard of Review and Applicable Law

The due process clause of the Fourteenth Amendment "requires that each element of a crime be proved to a jury beyond a reasonable doubt." (*Hurst v. Florida* (2016) 577 U.S. 92, 97; see also *In re Winship* (1970) 397 U.S. 358, 364 ["we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"].) California law provides: "A defendant in a criminal action is presumed to be innocent until the contrary is proved …, but the effect of this presumption is only to place upon the state the burden of proving him or her guilty beyond a reasonable doubt." (§ 1096.)

In the absence of evidence to the contrary, it is presumed the court was aware of and applied the proper burden of proof. (See Evid. Code, § 664.) "[S]cores of appellate decisions, relying on this provision, have held that 'in the absence of any contrary evidence, we are entitled to presume that the trial court ... properly followed established law.' " (*Ross v. Superior Court of Sacramento County* (1977) 19 Cal.3d 899, 913; accord, *People v. Ramirez* (2021) 10 Cal.5th 983, 1042 ["Absent evidence to the contrary, we presume that the trial court knew the law and followed it."]; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1390; *People v. Thomas* (2011) 52 Cal.4th 336, 361; *People v. Stowell* (2003) 31 Cal.4th 1107, 1114; *People v. Martinez* (2017) 10 Cal.App.5th 686, 728.) Moreover, appellate courts "presume that a judgment or order of the trial court is correct," and " ' "[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." ' " (*People v. Giordano* (2007) 42 Cal.4th 644, 666; accord, *Martinez*, at p. 728.) "Thus, where a statement of reasons is not required and the record is silent, a reviewing court will presume the trial court had a proper basis for a particular finding or order." (*Stowell*, at p. 1114; accord, *In re Julian R.* (2009) 47 Cal.4th 487, 499.)

"[T]he rule encompasses a presumption that the trial court applied the proper burden of proof in matters tried to the court." (*Ross v. Superior Court of Sacramento County, supra*, 19 Cal.3d at pp. 913–914.) An appellant contending a trial court failed to follow established law bears the burden of rebutting the presumption to the contrary. (See *People v. Valdez* (2012) 55 Cal.4th 82, 176.)

"As a broad general proposition, cases have stated that a trial court's remarks in a bench trial cannot be used to show that the trial court misapplied the law or erred in its reasoning. [Citations.] These statements are founded on the principle that, in a criminal bench trial, the trial court is not required to provide a statement of decision and that any explanation of his or her decision a trial judge provides is not part of the record on appeal." (*People v. Tessman* (2014) 223 Cal.App.4th 1293, 1302.)

The presumption that the trial court knew the law and followed it "has been subjected to an important limitation." (*People v. Tessman, supra*, 223 Cal.App.4th at p. 1302.) "[W]e may nonetheless consider a judge's statement when, *taken as a whole*, the judge's statement discloses an incorrect rather than a correct concept of the relevant law, 'embodied not merely in "secondary remarks" but in [the judge's] basic ruling.' " (*Ibid.*, first bracketed insertion added.) Under this approach, "[t]he oral opinion of the trial court may be used in interpreting the court's action in its decision of the case if it unambiguously discloses the mental processes of the trial judge in reaching his conclusion." (*People v. Butcher* (1986) 185 Cal.App.3d 929, 936.) A criminal defendant may seek reversal on appeal if the trial court's statements in delivering its ruling "*unambiguously* disclose that, in his or her ruling, the trial judge applied an erroneous interpretation of the law." (*Tessman*, at p. 1303; see *In re Jerry R*. (1994) 29 Cal.App.4th 1432, 1440 ["An exception to this general rule exists when the court's comments unambiguously disclose that its basic ruling embodied or was based on a misunderstanding of the relevant law."].)

C. Analysis

We must presume that the trial court knew and applied the correct law in the exercise of its official duties, including its awareness that it was conducting a court trial and that it was to determine defendant's guilt by the beyond-a-reasonable-doubt standard. Defendant attempts to overcome this presumption by relying on the People's error in captioning its written closing argument as in relation to the court's holding defendant to answer. However, we note that the body of the prosecution brief correctly explained that it was submitted to support the court's verdict of guilty on all counts. Additionally, defendant's brief was captioned correctly as relating to defendant's court trial argument.

In *People v. Sangani* (1994) 22 Cal.App.4th 1120, Sangani argued that the trial court used an improper legal standard in convicting him for dumping and illegal storage of hazardous waste based on the People's use of an improper standard during argument. (*Id.* at pp. 1137–1138.) The *Sangani* court found that the People's citation of an improper standard was insufficient to overcome the presumption that the court acted properly, especially where the defendants cited the correct standard in their written closing. (*Id.* at p. 1138.) Here, neither the People nor the defense included any discussion or reference to the applicable burden of proof. While the People miscaptioned their brief, it correctly referenced that defendant's guilt was the issue before the court, as did the defense. Additionally, in oral argument, defense counsel argued that the evidence did not prove defendant's guilt beyond a reasonable doubt.

The court record reveals that the trial judge was assigned to defendant's case "for all purposes including trial" and presided over defendant's scheduled hearing for arraignment on the indictment on July 19, 2022. Therefore, the trial judge would be aware no preliminary hearing was necessary because defendant had already been indicted. After continuing the case approximately five times, the trial judge granted defendant's additional motion to continue to permit him to file a section 995 motion to dismiss the indictment, again precluding any belief that defendant was entitled to a

preliminary hearing. The trial judge arraigned defendant on July 19, 2022, and after approximately seven additional hearings, the trial judge denied defendant's motion to dismiss the indictment on February 6, 2023.

That the trial judge was presiding over a trial as opposed to a preliminary hearing is further shown when the trial judge accepted defendant's limited time waiver for jury trial on September 18, 2023, and later denied the prosecution's motion to consolidate trial of the instant case with defendant's case charging his involvement in the triple homicide on September 28, 2023. Additionally, the trial judge accepted both parties' waiver of their right to a jury trial and commenced defendant's court trial on October 4, 2023. The trial judge also heard argument on the parties' motions in limine (motions which address the admissibility of trial evidence), unsealed the grand jury testimony (affirming that defendant had been indicted and did not require a preliminary hearing), and provided both parties the opportunity to make opening statements, which are customarily made at the commencement of a trial. The trial judge announced at the commencement of the trial proceedings: "This matter is set for court trial."

We further note that after the completion of evidence, the trial judge granted defendant's motion for a continuance to permit the submission of written closing arguments and later announced at the continued hearing that defendant was "on for judgment and consideration of counsels' arguments."

Therefore, the court record is clear that the trial judge was aware that she was presiding over defendant's trial as to his guilt or innocence of the charges and not whether sufficient evidence had been presented to hold defendant to answer to the charges, a decision made at a preliminary hearing, which was not necessary because defendant had already been indicted by a grand jury. Considering the three-year procedural history over which the trial judge presided, we conclude that the prosecution's caption on its written closing argument is not sufficient evidence to rebut the presumption that the trial court applied the proper legal standard in determining defendant's guilt.

Defendant cites to no case or statute that required the court to state the burden of proof applicable at a court trial. In fact, "[w]hen a jury trial is waived, the judge or justice before whom the trial is had shall, at the conclusion thereof, announce his findings … the form prescribed for the general verdict of a jury" (§ 1167), and a "general verdict" is defined as "either 'guilty' or 'not guilty' " (§ 1151). The principle that no person shall be convicted of a crime except upon proof beyond a reasonable guilt is well established even among individuals who have no legal background. (Cf. *People v. Esparza* (2015) 242 Cal.App.4th 726, 742–743 [the defendant's showing that court erroneously relieved prosecution of burden of proof defeated presumption that trial court followed established law where prosecution's burden was not " 'established' " law and court required defense counsel to proceed first in presenting evidence and argument].)

In attempting to rebut the presumption of regularity, defendant relies principally on the court's oral comment that it initially was concerned "that the facts didn't really support an attempted murder," but it found "the *Decker* case is right on point." (Italics added.) Because *Decker, supra*, 41 Cal.4th 1, 5–7, 9–13 addressed the sufficiency of evidence regarding a preliminary hearing in an attempted murder case and applied its lower burden of proof, defendant argues that the trial judge misapplied the applicable law. It is true that *Decker*'s procedural posture required a lesser burden of proof than at a trial, but our Supreme Court also addressed the legal concept of the slight-acts rule of attempt and its application in cases where a defendant obtains the assistance of third party. (*Id.* at pp. 8, 11 ["[t]he controversy in [the] case, as the parties readily concede, is whether there was also a direct but ineffectual act toward accomplishing the intended killings" where a defendant hires another individual to perform the murder].) It's legal analysis as to the elements of attempted murder and the nature of the direct but ineffectual act supporting an attempt to commit a crime is relevant regardless of whether the court is addressing sufficiency of evidence to prove that element. In fact, we also rely upon *Decker*'s articulation of the elements of attempted murder in the next section when addressing

defendant's sufficiency of evidence challenge even though the Supreme Court ultimately determined that the evidence was sufficient under the lesser standard. (*Id.* at p. 14.)

The court's oral statement was neither inherently incorrect nor an indication that in reaching its verdict, the court applied a lesser burden of proof. Additionally, because the trial court's reliance on *Decker* could have referred to whether the facts proven beyond a reasonable doubt could legally satisfy the element of attempt requiring "a direct but ineffectual act toward accomplishing the intended killings," the trial judge's comment is at most ambiguous and therefore insufficient to rebut the presumption of regularity and its supporting evidence. (*Decker, supra*, 41 Cal.4th at p. 8; see *People v. Valdez, supra*, 55 Cal.4th at pp. 178–179 [trial judge's comments were ambiguous regarding whether judge had fulfilled duty to review guilt phase record and were therefore insufficient to overcome presumption and supporting evidence, where judge never "affirmatively state[d] that he had *not* reviewed the guilt phase record"].)

III. Substantial evidence supports defendant's conviction for attempted murder.

Defendant argues that insufficient evidence supports his conviction for attempted murder because substantial and credible evidence does not prove that his actions went beyond preparation. We reject defendant's argument.

A. Standard of Review and Applicable Law

In reviewing the sufficiency of evidence to support a conviction, we examine the entire record and draw all reasonable inferences therefrom in favor of the judgment to determine whether it discloses substantial credible evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Brooks* (2017) 3 Cal.5th 1, 57.) "The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on ' "isolated bits of evidence." ' " (*People v. Cuevas* (1995) 12 Cal.4th 252, 261.) Resolving conflicts and inconsistencies in the testimony is the jury's "exclusive province." (*People v. Young* (2005) 34 Cal.4th

1149, 1181.) We do not redetermine the weight of the evidence or the credibility of witnesses. (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*); see *Young*, at p. 1181.) "Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*Young*, at p. 1181.)

We must accept logical inferences that the trier of fact might have drawn from the evidence even if we would have concluded otherwise. (*People v. Streeter* (2012) 54 Cal.4th 205, 241, overruled on other grounds as stated in *People v. Harris* (2013) 57 Cal.4th 804, 834.) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Albillar, supra*, 51 Cal.4th at p. 60.)

The reviewing court need not address "assertions of conflicts in the evidence" or "alternative theories regarding the inferences that should have been drawn from the evidence." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 162.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*Decker, supra*, 41 Cal.4th at p. 7.) "For an attempt, the overt act must go beyond mere preparation and show that the killer is putting his or her plan into action; it need not be the last proximate or ultimate step toward commission of the crime or crimes [citation], nor need it satisfy any element of the crime. [Citation.] However, as we have explained, '[b]etween preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.' [Citations.] ' "[I]t is sufficient if it is the first or some

subsequent act directed towards that end after the preparations are made." ' " (*Id.* at p. 8, third & fifth bracketed insertions added.) "Although a definitive test has proved elusive, we have long recognized that '[w]henever the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt.' " (*Ibid.*)

B. Analysis

Viewing the evidence in favor of the verdict, as we must, the evidence is sufficient to support the trial court's verdict that defendant is guilty of attempted murder. Navar testified that defendant wanted to kill Nila because he provided information as to defendant's involvement in orchestrating the triple homicide and agreed to testify against him. Castillo testified that he received kites from defendant and individuals acting on behalf of defendant that advised him Nila was cooperating against defendant and which, due to the structure and operation of the Northern Ryders, required Castillo to commit an act of violence on Nila at defendant's request. Castillo did not immediately act against Nila, nor did Castillo advise Nila of defendant's kite until the following day after receiving additional kites.

Navar testified that after Castillo received the first kite, defendant asked Castillo verbally if he would handle the problem, and Castillo agreed. Castillo testified that he received an additional kite that promised to send him a "tool … to handle that when you feel the time is right" and asked him to let defendant know when Castillo wanted it and whether it would be needed before or after going to the yard. Thereafter, defendant verbally told Castillo to take Nila's wind, meaning to kill Nila.

Navar then saw defendant make a knife and a shank using a razor blade, hide the weapons in a package of coffee, and send it Castillo. Navar testified that Castillo initially told them he would perform the act when he and Nila went to the commissary, but later Castillo said he would take care of it in the yard. Castillo testified that he received the

weapons before going to the yard, he told Nila about it because he did not intend to do as asked, and Nila reached out to his mother and the district attorney's office for assistance. Navar testified that defendant became aware that Castillo did not intend to kill Nila when Nila and Castillo returned from the yard and Nila was unharmed. Defendant was angry and worried when he saw a guard remove Nila from his cell.

Defendant argues the evidence is insufficient to establish that defendant intended to kill Nila. Defendant could have been requesting Castillo assault or injure Nila because neither of the kites to Castillo used the term kill. While the kites may be subject to such an interpretation, Castillo's testimony that defendant told Castillo to take Nila's wind and Navar's testimony that defendant told Navar that defendant wanted Castillo to kill Nila establishes that defendant had the specific intent to kill Nila. The kites, therefore, support their testimony.

Regarding the second element of attempted murder, we find the evidence sufficient to establish that defendant committed a direct but ineffectual act towards killing Nila. (See *Decker, supra*, 41 Cal.4th at p. 7.) As recognized and reaffirmed in *Decker*, " '[w]henever the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt.' " (*Id.* at p. 8.) Defendant argues that the slight-acts rule is not applicable in this case because the kites written by defendant are not specific as to his intent that Nila be killed. However, as we noted, the testimonies of Castillo and Navar provide the necessary evidence that defendant intended that Nila be killed.

In *Decker*, our Supreme Court found that the uncontradicted evidence established that Decker specifically intended to kill his sister. (*Decker, supra*, 41 Cal.4th at p. 7.) He expressed his intent to others, researched hiring an assassin, saved money for the payment, and communicated with the assassin as to how to execute the killing. (*Ibid.*) The direct act necessary to satisfy this element must go beyond mere preparation and show that the killer is putting the plan into action but need not be the last step. (*Id.* at

p. 8.) The Supreme Court found that Decker met with the assassin, agreed on a price, agreed on the time frame for the killing, provided all the necessary information concerning his sister, gave the assassin a down payment, and told the assassin he was positive that he wanted her killed. (*Id.* at p. 9.) On these facts, the court found that Decker's intention was clear, and it was equally clear that he was putting his plan into action. (*Ibid.*) "Although Decker did not himself point a gun at his sister, he did aim at her an armed professional who had agreed to commit the murder." (*Ibid.*)

We recognize that *Decker*, unlike the instant case, involved a solicitation to commit murder "combined with a completed agreement to hire a professional killer and the making of a downpayment under that agreement." (*Decker, supra*, 41 Cal.4th at p. 11.) In this case, however, defendant was the member of a gang that obligated other members to commit a killing if requested by a gang member of higher status. As such, defendant's intent to kill and kite to Castillo that Castillo kill Nila, combined with Castillo's obligation to act and verbal communication to defendant that he would take care of it, provided assurance to defendant that his order to kill would be followed. Defendant's manufacturing of the intended murder weapon and transferring of that weapon to Castillo is the direct act that satisfies the second element of attempted murder. (See *id.* at p. 13.) The Supreme Court recognized that "even under Decker's analysis, evidence of a solicitation to commit murder can tend to support a finding of attempted murder if the defendant then 'provides the hit man the instrument or other means to procure death,' " and found the result should be the same where the hit man had a weapon and the defendant instead began payment under the contract to kill. (*Ibid.*)

Defendant attempts to distinguish *Decker* by arguing that the evidence in *Decker* was "indisputably credible" because the witness was a law enforcement officer who had posed as the assassin and meetings with *Decker* were videotaped. Defendant argues that in the instant case, another inmate could be responsible for the kite and used paper defendant previously handled. He further argues that the witnesses against him had

criminal records and motive to lie to receive benefits from the prosecution. Defendant's arguments misapprehend the standard of review applicable to challenges to the sufficiency of the evidence.

We may not address "assertions of conflicts in the evidence" or "alternative theories regarding the inferences that should have been drawn from the evidence." (*People v. Letner and Tobin, supra*, 50 Cal.4th at p. 162.) Defendant argues that the credibility of the witnesses is subject to our review because we must find substantial evidence to support the verdict, and substantial evidence is defined as evidence that is reasonable, credible, and of solid value. However, as used in this context, the term "credible" does not relate to witness credibility as we are not to redetermine the weight of the evidence or the credibility of witnesses. (See *Albillar, supra*, 51 Cal.4th at p. 60.) The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, the trier of fact is the exclusive province to resolve conflicts and inconsistencies in the testimony, and the testimony of a single witness may support the conviction, "unless the testimony is physically impossible or inherently improbable." (*People v. Young, supra*, 34 Cal.4th at p. 1181.)

"The inherently improbable standard addresses the basic content of the testimony itself—i.e., could that have happened?—rather than the apparent credibility of the person testifying. Hence, the requirement that the improbability must be 'inherent,' and the falsity apparent 'without resorting to inferences or deductions.' [Citation.] In other words, the challenged evidence must be improbable ' "on its face" ' [citation], and thus we do not compare it to other evidence …. The only question is: Does it seem *possible* that what the witness claimed to have happened actually happened?" (*People v. Ennis* (2010) 190 Cal.App.4th 721, 729.) "To be improbable on its face the evidence must assert that something has occurred that it does not seem possible could have occurred under the circumstances disclosed." (*People v. Headlee* (1941) 18 Cal.2d 266, 268.)

Defendant's challenges to witness testimony fail to argue or demonstrate that it is improbable on its face, but resorts to inferences and deductions based upon each witness's character, considering their criminal history, possible motive to falsify, and the benefits of their cooperation agreement. By focusing on conflicts in the evidence and alternate inferences that may be drawn from the evidence, defendant has failed to persuade us that this is the rare case in which evidence supporting his conviction is unbelievable per se or wholly unacceptable to reasonable minds. Therefore, the evidence upon which the trial court relied is not incredible, and we conclude that defendant's conviction for attempted murder is supported by substantial evidence.

DISPOSITION

The conviction on count II for attempted dissuasion of a witness is reversed, and the judgment is otherwise affirmed. The matter is remanded for resentencing.

HILL, P. J.

WE CONCUR:

LEVY, J.

HARRELL, J.