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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR RAY DEERE, SR., Defendant and Appellant.	E044300 (Super.Ct.No. BLF003311) OPINION

APPEAL from the Superior Court of Riverside County. John J. Ryan, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

George O. Benton, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch, William

M. Wood, and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Arthur Ray Deere, Sr., appeals his conviction for attempted murder and other offenses. He contends that the court committed reversible error when it denied his motion for acquittal, arguing that there was insufficient credible evidence that he harbored the intent to kill, and that it committed reversible instructional error pertaining to specific intent as well. Finding no error, we affirm.

PROCEDURAL HISTORY

Defendant was charged with one count of deliberate, premeditated attempted murder (Pen. Code,[1] §§ 664, 187, subd. (a); count I); assault with a firearm (§ 245, subd. (a)(2); count II); possession of a firearm by a felon (§ 12021, subd. (a); count III); and possession of stolen property (§ 496, subd. (a); count IV). In connection with the attempted murder charge, the information alleged that defendant personally used a firearm and intentionally discharged a firearm. (§§ 1192.7, subd. (c)(8), 1203.06, subd. (a)(1), 12022.53, subd. (c), 12022.5, subd. (a).) (An additional firearm use allegation, under section 12022.53, subdivision (e)(1), was stricken on motion of the prosecutor.) As to the assault charge, the information alleged that defendant personally used a firearm. (§§ 1192.7, subd. (c)(8), 12022.5, subd. (a).) Finally, the information alleged that defendant had three prior serious felony convictions and three prior strike convictions. (§§ 667, subds. (a), (c), (e)(1), 1170.12, subd. (c)(1).)

[1] All statutory citations refer to the Penal Code.

Defendant admitted the prior conviction element as to count III, and the court struck the firearm use allegation under section 12022.5, subdivision (a) as to count I. The jury convicted defendant on all counts, but deadlocked on the deliberation and premeditation allegation. A mistrial was declared as to that allegation, and it was later dismissed. The jury also found the firearm allegations true as to counts I and II. In a bifurcated trial, the court found the prior conviction allegations true.

The court sentenced defendant to seven years to life on count I, with a term of 40 years to life for the firearm discharge enhancement and 10-year terms for each of the three prior serious felony convictions. Terms of 25 years to life on count II and on the associated firearm use enhancement were imposed and stayed pursuant to section 654. Terms of 25 years to life were imposed on counts III and IV, to run concurrently with the term on count I. Defendant filed a timely notice of appeal.

FACTS

For purposes of the charge of unlawful possession of a firearm, defendant stipulated that he had a prior felony conviction. On October 13, 2004, at the time of the incident which resulted in his current conviction, defendant was in possession of items stolen in a residential burglary which was committed the day before. On the night of October 13, 2004, defendant was riding in a car when he realized that the police were following the vehicle. He had been told by a family member that the police had raided his

mother's house a day or so earlier, and he had "been running ever since."[2] He was armed with a .22-caliber pistol "for protection." His goal was not to get caught, "[w]hatever it cost."

Defendant ordered the driver to stop the car. He removed the gun from his waistband and removed the safety. He got out of the car and ran into an alfalfa field.[3] Riverside Sheriff's Deputy Phipps, who had stopped the vehicle, tracked defendant with his spotlight as he ran into the field. He saw defendant fall, but did not hear defendant's gun discharge.[4] Phipps learned defendant's name from the driver. He recognized the name as that of a person wanted for a parole violation and as a burglary suspect. Phipps radioed for assistance in setting up a perimeter around the field.

Other sheriff's units arrived within the next few minutes. Sergeant Miller, who had responded to the call, called for a border patrol canine unit to assist in locating defendant. Border Patrol Agent Supervisor Altamirano responded with his dog. Altamirano and the dog went into the field, with Miller following as backup. After jogging a few steps into the field, Altamirano heard a gunshot, which sounded close. He dropped to the ground and shouted, "Shots fired." Miller heard the shot and saw a

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[2] The quoted material in this paragraph is derived from defendant's interview with police after his arrest, as described by the officer who conducted the interview.

[3] These events took place in a county area near Blythe.

[4] In his subsequent in-custody interview, defendant said that his gun discharged when he tripped and fell.

horizontal muzzle flash in the direction of Altamirano. Miller broadcast that a shot had been fired, and shouted commands for the shooter to surrender. Miller then approached the location from which the muzzle flash had emanated and discovered defendant lying prone with his arms outstretched. As Miller was handcuffing defendant, he saw a .22-caliber pistol on the ground a few feet from defendant's left hand. Defendant was 10 to 20 feet from where Altamirano had been when the shot was fired. At the time the shot was fired, Altamirano was silhouetted in the lights of Miller's vehicle, making him an easy target for someone in defendant's position.

The pistol's safety was off when it was retrieved from the field. The pistol had nine rounds in its 10-round magazine. An expended shell was in the firing chamber, which indicated that the gun had jammed when it was fired. It could not fire again until the jam was cleared.

LEGAL ANALYSIS

DEFENDANT'S MOTION FOR ACQUITTAL WAS PROPERLY DENIED

The purpose of a motion for acquittal, under section 1118.1, is to "'weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case.' [Citations.]" (*People v. Stevens* (2007) 41 Cal.4th 182, 200.) In ruling on the motion, the trial court must determine whether there is sufficient evidence to present the matter to the jury. (*Ibid*.) We review the issue de novo. (*Ibid*.) The trial court and the reviewing court apply the same standard, "'that is, "whether from the evidence,

including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged."' [Citation.]" (*Ibid.*)[5]

Defendant contends that the court was required to grant his motion for acquittal because the testimony of Sergeant Miller and Agent Altamirano was insufficient to establish beyond a reasonable doubt that defendant knew where Altamirano was standing when he fired the shot or that the shot was actually fired in Altamirano's direction. He carefully parses their testimony and demonstrates that neither man could say with certainty the direction in which the shot was fired. He concludes by saying that "[T]he best prosecution evidence is as consistent with the inference that [the shot] was [fired] by chance, with the intent to scare off or distract his pursuers, as with the inference that he intended to kill." That sentence alone is sufficient to demonstrate the flaw in the argument. Substantial evidence review requires us to view the evidence as a whole, in the light most favorable to the judgment, and to draw all reasonable inferences which could be drawn in support of the judgment. (*People v. Smith* (2005) 37 Cal.4th 733, 742 (*Smith*).) We do not weigh the evidence or determine which one of multiple conflicting inferences is stronger or more credible. Rather, if one of several inferences supported by the evidence would suffice to support a guilty verdict, we must uphold the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) Because defendant concedes that one

[5] Defendant argues that the trial court appeared not to understand that the evidence must be sufficient to support the necessary factual findings beyond a reasonable doubt. Because we review the sufficiency of the evidence independently, we are not concerned with the basis for the trial court's ruling.

possible inference supported by the evidence is that he acted with the intent to kill, we need not address his argument. Nevertheless, we will briefly discuss the evidence which supports the inference that defendant intended to kill.

Intent to kill may be inferred "from all the circumstances of the attempt, including the putative killer's actions and words." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946; see also *Smith, supra,* 37 Cal.4th at pp. 740-742.) Defendant was a convicted felon. He had in his possession property which was stolen from a residence the day before. He knew that his mother's house had been "raided" the day before, and when he realized that the car in which he was riding was about to be stopped by Deputy Phipps, he took his gun from his waistband and removed the safety. He stated that his sole goal was to avoid being caught "[w]hatever it cost." His freedom and safety were all that mattered to him; everything else was irrelevant. He said that if the police fired at him, "it would have been a free-for-all" and that he would have "shot dead-on, even though it was the cops." He said that "once you get to a point, you might as well say fuck it," and that that night, he *did* say "fuck it." He said that when Miller fired at him, he was "mad as a mother fucker" and that if his gun hadn't jammed, "it would have been on" and that he would have fired toward the sound of the shots. These actions, words and circumstances reasonably support the conclusion that defendant acted with the intent to kill.

Defendant contends that other statements he made after his arrest support the inference that he did not intend to kill. He points to his statements that he did not want to be the aggressor and did not want to ambush the officers, that he did not see Altamirano

and that he did not shoot at the "cops." The jury is not, however, required to accept or reject a witness's statements in their entirety; it may believe some statements while rejecting others. (*People v. Wickersham* (1982) 32 Cal.3d 307, 328, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201.) Defendant also asserted that his gun discharged accidentally when he fell and that when he was lying on the ground knowing the dogs and the officers were coming, he fired two shots into the ground to "distract" them, hoping it would buy him time to escape. These statements were belied by the physical evidence, which showed that defendant's gun was fired only once: Only one bullet was missing from the 10-round magazine, and that bullet was lodged in the firing chamber. The gun could not be fired again until the jammed bullet was removed. This is consistent with the testimony of Deputy Phipps, who saw defendant fall but did not hear a shot fired at that time, and with the testimony of Miller and Altamirano, each of whom heard only a single shot when they were approaching defendant's location in the field. Defendant's demonstrably false statements could reasonably cause jurors to conclude that defendant was also lying about not having shot at Altamirano and that in fact he did fire the single shot toward where he believed Altamirano was.

Taken all together, the evidence permits the inference that defendant actually shot at Altamirano with the intention to kill in order to facilitate the only outcome that was acceptable to him: to escape capture. Defendant's statements that his freedom and safety were all that mattered, that everything else was irrelevant, and that he just said "fuck it" (which inferably indicates indifference to the consequences of his efforts to avoid capture

and suggests that he was willing to kill to achieve that goal) all support the inference that despite his claims to the contrary, defendant shot at the officer with the intent to kill. That other inferences are possible is irrelevant. (*People v. Bean*, *supra*, 46 Cal.3d at pp. 932-933.)

Defendant also appears to argue that the evidence was insufficient as a matter of law to support a finding that he acted with the intent to kill. Citing *People v. Ratliff* (1986) 41 Cal.3d 675, 695, he asserts that the intent to kill cannot be presumed from the aiming and firing of a gun. We agree that the act of aiming and firing a gun is not necessarily sufficient, as a matter of law, to compel the conclusion that the defendant intended to kill, which is what we understand the court to be saying in *People v. Ratliff*, *supra*, at page 695. Additional circumstances supported by the evidence may, however, *permit* that conclusion. As the California Supreme Court discussed more fully in *Smith*, *supra*, 37 Cal.4th 733, intent to kill is often inferred from all of the circumstances of the crime. (*Id.* at pp. 740-742.) In *Smith*, the court stated that firing at a victim at close range in a manner that could have resulted in a mortal wound if the bullet had been on target is sufficient to support the inference that the defendant acted with the intent to kill. (*Id*. at p. 741, quoting *People v. Lashley*, *supra*, 1 Cal.App.4th at p. 945, and *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) In this case, as we have discussed, there was additional evidence which, taken all together, supports the conclusion that defendant shot toward Altamirano's position with the intent to kill him.

We also note that the fact that the evidence suggests that defendant did not actually see Altamirano does not render the evidence insufficient to support the conclusion that he shot with the intent to kill. Defendant stated that just before he fired—into the ground, as he described it—he could hear people walking toward him and talking, and that he knew "it was the cops." Jurors could reasonably infer that he shot in the direction of the voices, or one of them, with the hope that the bullet would find and kill one of the targets.

Because the evidence reasonably supports the inference that defendant intended to kill when he fired the shot described by Altamirano and Miller, the court did not err by denying the motion for acquittal.

THE COURT ADEQUATELY ADDRESSED QUESTIONS POSED BY THE JURY

Defendant contends that the court failed to respond adequately to a question from the jury concerning whether intent is automatically inferred from the act of firing at an officer. He contends that the court's response effectively allowed jurors to conclude that a conclusive presumption of intent to kill arises from the act of aiming and firing a gun. The Attorney General responds that the jury's question was factual in nature and that the court's response was appropriate.

The issue arose as follows. During deliberations, the jury requested "clarification on 'intent.'" The court responded in writing, directing the jury to several pertinent jury

instructions.[6] Later the same day, the jury asked, "If an action is a 'rash response' can it still be considered 'intent?'"

The court perceived the question as a factual one, rather than a legal one. Defense counsel did not disagree. The court had the jury return to the courtroom. After some colloquy which is not pertinent to the issue before us, the court addressed the jury's concerns about "rashness" and intent:

"Juror No. 12: I think it's more of the rash, [*sic*] meaning the time frame involved in making that decision and the sequence of events. Was it spur of the moment? I think as far as rash, that part of the consideration would be the time. Split second? Or two minutes? And you know what I mean.

"The Court: Okay. That [is] covered in the instruction . . . on deliberation and premeditation. . . . [¶] . . . [¶]

"The Foreperson: Your honor, we had a question about intent being in the count itself, and then premeditation, deliberation being in right underneath it in the next section.

"The Court: Yes.

"The Foreperson: So we didn't understand the relationship between . . . deliberation, premeditation as it relates to intent; we didn't know . . . what that connection was.

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[6] For some reason, it omitted reference to Judicial Council of California Criminal Jury Instructions, CALCRIM No. 225, which discusses proof of intent by means of circumstantial evidence.

"The Court: Well, any attempted murder requires a specific intent to kill. And all crimes, for our purposes, require an action and an intent. So at the time of the action, there has to be an intent as defined by the law. So that's one question. [¶] So if . . . a juror, for example, said, okay, there was an action; to wit: aiming a gun and pulling the trigger, and at that time, whomever it might have been, intended . . . another person to die, in other words, I intend to kill that person, that's one issue. [¶] And . . . don't read anything into what I'm saying. Okay. 'Cause . . . I am not making any findings on facts. [¶] But if . . . a juror said, okay, there was an intent, then and only then do you go to the next question as to whether or not there was premeditation and deliberation."

After some further discussion of premeditation and deliberation, which is not pertinent to our issue, the foreperson asked, "[W]hat we are stuck on is, if you fire at an officer, does that automatically mean intent? [¶] . . . [¶] How could you not have intent, is where we're stuck. [¶] . . . [¶] You can't answer that, can you?" The court replied, "No. I could give you lots of answers, and they would all create a problem." The foreperson responded, "Yeah, we were hoping you could just solve ours." The court responded by saying that the jury takes care of all factual issues, while the court takes care of the legal issues. After some discussion off the record, the court had the jury return to the jury room for further deliberations. Following this colloquy, the court asked if counsel had any comment. Defense counsel had none.

Section 1138 imposes upon the trial court a duty to provide the jury "with information the jury desires on points of law." (*People v. Smithey* (1999) 20 Cal.4th 936,

985, fn. omitted.) On the other hand, the court may not provide direction as to how the jury should decide questions of fact if by doing so it "'"usurp[s] the jury's exclusive function as the arbiter of questions of fact and the credibility of witnesses." [Citation.]' [Citation.]" (*People v. Sanders* (1995) 11 Cal.4th 475, 531.) Although the court "has a primary duty to help the jury understand the legal principles it is asked to apply," the court has discretion under section 1138 to determine what additional explanation, if any, will be sufficient to satisfy the jury's request for information. (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) Thus, while the court necessarily abuses its discretion if it fails to consider giving a further explanation in response to a jury question, it need not elaborate on the standard instructions if it considers the request and concludes that the instructions adequately convey the information the jury is seeking. (*Ibid*.)

Although the thrust of the foreperson's two questions is not all together clear, the first question certainly appears to ask, as defendant contends, whether the law required it find intent to kill from the bare fact of firing a gun at an officer. However, the question "How could you not have intent" under those circumstances appears to indicate, as the Attorney General asserts, that some jurors, at least, believed as a factual matter that a person who takes aim at another person and fires does intend to kill. While we agree with defendant that ideally the court should have responded to the implicit legal question by telling the jury that it was not required, as a matter of law, to find the existence of intent to kill from the bare facts that defendant shot at the officer (assuming that the jury *did* find that he intentionally shot at the officer), we do not agree that by failing to do so, the

court left the jury with the erroneous impression that such a conclusion was compelled by operation of law.

In reviewing a claim of instructional error, we consider the jury instructions as a whole, and we consider each instruction in the context of the entire charge to the jury. (*People v. Haskett* (1990) 52 Cal.3d 210, 235; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.) We will reverse a conviction only if there is a reasonable likelihood that, in the context of the instructions as a whole, the jury understood the court's explanation as the defendant asserts. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526.) Here, during the same colloquy in which the foreperson asked the questions which are at issue, the court had explained to the jury that before addressing the question of deliberation and premeditation, the jury must first decide if the shooter had the intent to kill when he aimed the gun and pulled the trigger. The court explained that only if the jury found that there was such an intent would it go on to determine whether the shooting was deliberate and premeditated. Then, in response to the question at issue on appeal, the court reiterated that intent is a factual question which was solely up to the jury to determine. Under the circumstances, we conclude that the court's response was adequate to dispel any notion the jurors might have that they were compelled to reach any particular conclusion on the issue of intent as a matter of law, and that there is no reasonable probability that any of the jurors were left with the impression that they were required to reach any particular conclusion. Accordingly, reversal of defendant's conviction is not required. (*Ibid*.)

Because we have concluded that the instructions and the court's explanation adequately informed the jury of the standards it was to apply to determine whether defendant acted with the specific intent to kill, we reject defendant's contention that his trial attorney's failure to request an additional explanation or clarification constituted ineffective assistance of counsel.[7]

[7] In *Strickland v. Washington* (1984) 466 U.S. 668, the United States Supreme Court held that a criminal defendant has a constitutional right to the effective assistance of trial counsel. To prevail on a claim of ineffective assistance, the defendant must show that his attorney failed to act in a manner within the range of competence demanded of attorneys in criminal cases and that the defendant was prejudiced by counsel's act or omission. (*Id.* at pp. 687-688.) To establish prejudice, the defendant must show a reasonable probability that the outcome of the trial would have been more favorable in absence of the error or omission. (*Id*. at p. 694.) Because both prongs are necessary to finding that the defendant was deprived of his constitutional right to effective assistance of trial counsel, a claim of ineffective assistance of counsel may be rejected if the defendant fails to establish prejudice, without regard to whether counsel's performance met objective standards of competence. (*Id*. at p. 697.) The same standard applies under the California Constitution. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.)

DISPOSITION

The judgment is affirmed.

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/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ King
J.