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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM HARLOW SEEL, Defendant and Appellant.	B143771 (Los Angeles County Super. Ct. No. KA044436)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert C. Gustaveson, Judge. Reversed in part, affirmed in part and remanded.

Law Offices of Dennis A. Fischer, Dennis A. Fischer and John M. Bishop for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Robert F. Katz, Supervising Deputy Attorney General, and Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.

William Harlow Seel appeals from judgment entered following a jury trial in which he was convicted of one count of attempted premeditated murder (Pen. Code, §§ 664, subd. (a) and 187, subd. (a)) and the finding that he personally and intentionally discharged a firearm within the meaning of Penal Code section 12022.53, subdivision (c). He makes numerous claims of error on appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

By way of an amended information, defendant was charged in counts 1, 2, 3 and 4 with attempted willful, deliberate, premeditated murder of Arnel Arcilla, Kevin Isomura (Isomura), Rodel Arcilla, and John Park (Park), respectively. It was further alleged that each offense was a serious felony, that defendant personally and intentionally discharged a firearm, and that he personally used a firearm. Following a jury trial, he was convicted of count 4 and the special allegations in connection with that charge were found true. He was acquitted of the remaining counts. He was sentenced to life in prison with the possibility of parole plus 20 years pursuant to the firearm enhancement.

Defendant did not dispute that he fired shots at the two cars that evening. His counsel argued defendant never denied the shootings but in fact admitted that to the police officers. Rather defendant claimed that he pulled out his gun partly out of fear, and partly out of pride or arrogance. That when he fired shots at the other cars, not the persons but the cars, he had no intention of killing people. Rather he shot to scare them off, to intimidate them; he never wanted to kill anyone; never tried to kill anyone. Defendant specifically aimed at the body of the car in both shootings, not at people.

With regard to counts 1, 2, and 3, of which defendant was found not guilty, the evidence was as follows: On May 1, 1999, Arnel Arcilla, Rodel Arcilla and Isomura were traveling eastbound on Colima when another car drove up next to them and stayed at a steady pace with them. Defendant, the driver of the other car, looked up and shouted out, “you want shit[?]” Arnel Arcilla, the other driver, saw defendant “chamber the gun” meaning to get ready to fire it and decided to turn to his right towards the curb and duck,

to wait for the shots to clear up and then "clear out." He noticed bullets were going through his car; he heard the driver's window shatter and felt a bullet graze his leg. He heard six shots fired and saw defendant speed away. Arnel Arcilla immediately drove home and made a police report. Prior to defendant yelling, "you want shit?" and shooting at him, Arnel Arcilla said nothing to him and made no gestures. No other passenger in his vehicle said anything to defendant or made any gestures toward him. Prior to that evening, Arnel Arcilla had never seen defendant or his passenger. When Arnel Arcilla took his shoe off that evening, a bullet fell out, which he turned over to Detective Haughey.

The second incident, the subject of count 4, took place at around 11:00 p.m. that same evening. Park and three friends, Nathan Yoshizaki (Yoshizaki), Leland Fong (Fong) and Eric Shing (Shing) went for a late dinner at Yoshinoya (also known as Beef Bowl) at the corner of Fullerton and Colima. Yoshizaki drove; Shing sat in the front passenger seat and Fong and Park sat in the back. Yoshizaki parked his car in the parking lot of the restaurant. Park observed defendant and a female companion exit the restaurant and enter defendant's car. While defendant proceeded to leave the parking lot, Park heard gunfire as he stood in front of the door to the restaurant. Park was just a couple of steps from the bumper of Yoshizaki's car and dropped to the ground. He then took cover on the right side of Yoshizaki's car. Park heard two or three shots. Fong was in the doorway to the restaurant and Shing and Yoshizaki were already inside. When the shots rang out, Park saw no other occupied cars in the lot. No one in his group had any words with defendant or his companion and no gestures were exchanged. Neither defendant nor his companion said anything to Park. Park did not understand what was going on and was very startled. He later saw a bullet hole on the side of the left headlight and the bumper of Yoshizaki's car. That was "essentially . . . exactly where [he] walked past as [he was] going into the Beef Bowl." The distance between this second incident and the first was approximately .7 miles.

Park believed he was sitting in the right back passenger seat and walked around the back of the car after he exited it. As he and his friends walked to the restaurant, they walked almost in single file, and Park was the last in the line. Park glanced over at defendant's vehicle because he "heard the exhaust." He "glanc[ed]" at the car more than once, because he heard it and it just caught his attention.

An examination of the vehicle revealed an area in the left front fender by the headlight consistent with the passage of a bullet, which penetrated the fender and penetrated or broke part of the left headlight. The damage was consistent with "a straight across shot, not too elevated and not too much in a downward angle," "somewhat level." Typically bullets or handgun rounds do not go through items such as concrete or trees, but they typically do go through at least one side of a vehicle. They will go through the left side or the right side; occasionally they will pass through the entire vehicle depending on how many "mechanisms" they strike. The weapon used in the shooting was a semiautomatic nine-millimeter pistol; each shot fired on that weapon requires a deliberate trigger pull. Each time it would require at the very minimum six pounds.

Deputy John Haughey questioned defendant following advisement and waiver of his constitutional rights. Defendant stated he was in the parking lot at the Beef Bowl restaurant in his 1994 Black Honda Accord. He had gone to the restaurant to pick up Shanda Bustamante (Bustamante), who was working there. When she came out of the restaurant and entered his car, he noticed a two-door purple Honda parked in front of the restaurant. Four males got out of the car; and as defendant approached the south driveway of the parking lot, the four males started walking towards his vehicle. Defendant thought they might break the windows of his car. He panicked and obtained a nine-millimeter Ruger semiautomatic pistol from inside of his car and reached across Bustamante's lap and fired several rounds out the open right front passenger window into the air to scare off the men. He then drove away. He saw many police units and thought they might be looking for him. He then drove into a Wal-Mart parking lot and told Bustamante to throw the gun out the window, which she did.

Regarding the first shooting, defendant said the other car drove up along side of him, a passenger in that car "threw up his hands as if he knew [defendant]" and the other occupants shouted obscenities. Defendant said it appeared that the front passenger was reaching for something, possibly a weapon, at which time defendant fired first, firing several times to scare off the occupants of the other car.

Defendant testified in his own defense. On the way to taking Bustamante to work at the Beef Bowl, he stopped at a park and smoked methamphetamine. He had used methamphetamine for approximately five years. Within five minutes of leaving the park, he encountered the vehicle involved in the first shooting. There was eye contact with the occupants and obscenities. When the passenger appeared to reach for something, defendant knew "something bad" was going to happen and he reached under his seat for his gun, pointed to the bottom of the car door and started shooting. He did not plan to kill or harm anyone but just to "mess up" the car and scare the occupants off. After taking Bustamante to work, he went to a friend's house where he used more methamphetamine. Upon receiving a page from Bustamante, he returned to the Beef Bowl to pick her up. He was in his car in the restaurant parking lot when a car with four men drove up and parked one space away from him. The men were yelling, and defendant felt there was going to be trouble. One or two of the men got out of their car and defendant entered the restaurant to get Bustamante. Defendant and Bustamante left the restaurant; and while walking back to his car, defendant and the other males looked at each other. After getting into the car and while waiting to leave the parking lot, defendant became increasingly fearful because of the way the four men were looking at him. Additionally, Bustamante told him that one of the men had flicked a cigarette at his car; defendant believed this was going to lead to something that would harm him.

Defendant had exited the parking lot and was on the street when he fired his gun, "toward the air like above their car, around that area." He believed he fired three rounds. The light had just turned green, there was nothing blocking his route and he could have

driven down the road, but he fired the shots because he panicked. He "felt kind of paranoid and stuff." He did not plan to kill or hit Park and did not even know him.

Defendant kept the gun in his car for protection. Previously he had been in fights and had been injured. The amount of methamphetamine that he used before going to the Beef Bowl was similar to the amount he would normally use on a daily basis. Before the day of the incident, he had been feeling paranoid or fearful of persons. On the day of the incident, he felt worse; it was difficult for him to stay awake. He was not claiming that his drug use excused his behavior in any way.

Deputy Sheriff Jaime Rivera was trained to recognize symptoms of individuals under the influence of methamphetamine, i.e., dilation of the pupils, sweating, rapid speech, poor attention span; the individual is often itchy or scratchy and uneasy. Rivera observed defendant at the time of his arrest and it was Rivera's opinion that defendant did not display symptoms of being under the influence of methamphetamine. Rivera was not an expert in the long-term effects of methamphetamine and had no knowledge as to how it affects a person after one has been using it for approximately five or six years. Methamphetamine does, however, make someone paranoid and delusional after using it for a long period of time.

I.

MOTION FOR CONTINUANCE
AND DISCHARGE OF ATTORNEY BOYLE

On February 28, 2000, defendant made a motion for substitution of attorney. The court noted the matter had been pending since July 1999. Proposed counsel, Mr. Conn, stated he was not prepared to try the matter presently and would need some time to prepare. Conn had just spoken to defendant's family and had been handed the discovery that morning and needed a reasonable period of time. Conn argued that since defendant was "looking at a life sentence in this case," a "short reasonable period of time" was

needed. The court stated it did not intend to allow the substitution unless the matter was prepared to go forward.

Mr. Boyle, defense counsel of record, stated that even though the case had been pending for a while, it was only recently that an offer had been made by the prosecution. The prosecution offered defendant "38 years." Boyle stated that he had made a mistake in discussing defendant's exposure with defendant's family and did not realize the error until Mr. Conn had advised him that defendant's family had contacted him and that defendant was facing an additional 20-year enhancement because of the firearm allegation. This drastically changed Boyle's thinking of the case, whether it was a case that should go to trial or be settled. Boyle stated he considered it "a significant misstep on [his] part when [he] discussed this with them . . . ." Boyle reiterated the basis of his request for a continuance, i.e., the seriousness of the case because defendant was looking at life imprisonment, the fact that defendant had chosen another attorney who could be ready within an extremely short period of time, and the fact that present counsel had erred in discussing defendant's exposure.

The prosecution argued it was prepared to go forward and the witnesses were lined up; it appeared that defendant "just wants to shop around for attorneys, this would be his third attorney. . . . Mr. Escobar started the case, he handled the preliminary hearing. After the preliminary hearing, Mr. Boyle then substituted in, Mr. Boyle has been his attorney of record. It appears that [defendant] has been comfortable with Mr. Boyle for a significant amount of time, perhaps until the offer was conveyed because it's such a substantial offer, but that has to do with the people, and that does not have to do with counsel."

Defense counsel Boyle also stated that he had an operation scheduled and had to be hospitalized on March 7, and that if trial was started immediately, "it would be very close to being done."

The court advised, "[b]efore Mr. Boyle indicated his forthcoming surgery, [its] inclination was to trail the matter until about eight of ten, without allowing the

substitution. If at that time [Conn] appear[ed] and sa[id] he [was], in fact, ready [the court] was going to allow the substitution, [and] send the matter out for trial. [¶] But the difficulty is this: If I were to do that now, that would have put us right around the 7th or 8th of March. Mr. Boyle has surgery scheduled. He says the 7th. I have no reason to disbelieve his representation. The People indicated that they have stated they would be unavailable as of the 9th. [¶] Based upon all of that, my intention right now is to deny the request for continuance and sen[d] the matter out for trial."

Conn responded and asked "if the court could . . . just trail it until Friday" and that he would be ready by that time. Conn suggested that Boyle could then be excused so that he could receive his surgery.

The prosecution objected, arguing "eight of ten was Thursday. The People answered ready, so did defense counsel, unless counsel is ready to try it today, then that complicates the prosecutors. This is a specially assigned case. We will not be done in time, and I have --essentially paid flight arrangements on that date of the 9th, your honor." The court denied the request for continuance noting that if Conn wished to substitute in as co-counsel for trial, that would be allowed but Boyle would not be relieved. Defendant agreed that Conn could join the case as co-counsel along with Boyle. Conn indicated he was privately retained counsel.

When jury selection was complete, Boyle requested that he be relieved as counsel since Conn had answered ready, was lead counsel and defendant's family wished Conn to take over the case. When the court asked Conn whether Boyle's assistance would be of any value to him, Conn answered he was confident that he could handle the case; while he had asked the court initially for additional time to prepare, that had been denied and he had spent a lot of time preparing the case since then; he had all day Monday and all of the present day to prepare and in light of what Boyle had done in connection with the case, felt confident that he was able to proceed with the case. Rather than relieving Boyle altogether, the court excused him from attending the court sessions if he agreed to be in telephonic communication with Conn and to come in or confer with him if necessary.

Appellant contends the trial court erred by refusing to grant a brief continuance to permit new defense counsel time to adequately prepare for trial. He also claims the court erred by failing to discharge Boyle who had ineffectively represented defendant in plea negotiations. While it is true that at the pleading and bargaining phase, a defendant is entitled to effective assistance of counsel (see *In re Alvernaz* (1992) 2 Cal.4th 924, 933) and that misadvice on sentencing exposure may violate a defendant's right to effective assistance of counsel (see *People v. Johnson* (1995) 36 Cal.App.4th 1351, 1355-1357), appellant has failed to show prejudice warranting reversal. Appellant fails to show he was prepared to accept the 38-year term once he was correctly advised of his sentence exposure. At the end of the discussion on whether substitution of counsel would be permitted, the trial court told defendant to consider the offer, if it was still available, until later that day. There was no comment from the deputy district attorney that the offer was not still available. Appellant has made no record indicating he attempted to accept the 38-year offer thereafter. Absent prejudice, counsel cannot be found ineffective. (See *Strickland v. Washington* (1984) 466 U.S. 668.)

After being allowed to associate into the case as co-counsel, and, thereafter, when asked by the court to be completely candid, Conn told the court, that after the continuance had been denied, he had spent a lot of time preparing for trial and was confident he could handle the trial at that point. He reiterated that he was confident he was able to proceed with the case. We find no basis for concluding the trial court abused its discretion in denying a continuance of the trial.

II.

SUFFICIENCY OF EVIDENCE

Appellant contends the judgment of conviction for attempted murder must be reversed in that the evidence is insufficient to establish that he possessed the specific

intent to kill.[1] "One who intentionally attempts to kill another does not often declare his state of mind either before, at, or after the moment he shoots. Absent such direct evidence, the intent obviously must be derived from all the circumstances of the attempt, including the putative killer's actions and words. Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact. While reasonable minds may differ on the resolution of that issue, our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.]" (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946.)

Defendant's act of firing a firearm from his vehicle three times, which required three separate pulls, and, at least one of which was in a "straight across shot, not too elevated and not too much in a downward angle," "somewhat level" in the direction of the victim of whom defendant stated he was fearful, supports the conclusion that defendant intended to kill the victim.

Appellant additionally contends there was no substantial evidence of premeditation and deliberation. "*People v. Anderson* (1968) 70 Cal.2d 15, 26-27 . . . identified three categories of evidence typically used to resolve this issue: planning activity, motive, and manner of killing. . . . *Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.] [¶] Of course, the appellate court does not substitute its judgment for that of the jury but affirms the verdict if a rational trier of fact could find premeditation and deliberation beyond a reasonable doubt. [Citation.]" (*People v. Pride* (1992) 3 Cal.4th 195, 247.)

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[1] Specific intent to kill is a requisite element of attempted murder and implied malice is an insufficient basis upon which to sustain such a charge. (See *People v. Lashley* (1991) 1 Cal.App.4th 938, 945.)

"In this context, 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citations.] The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

In the present case, there was no evidence of planning activity. While defendant had a loaded gun in his vehicle, he testified that he had been keeping a gun in his car for protection. The fact that he had loaded it sometime after the earlier shooting does not in and of itself amount to sufficient evidence of premeditation and deliberation. As to any past relationship with the victim or conduct with the victim from which a motive to kill reasonably could be inferred, there was none. Defendant and Park did not know each other before the encounter and only exchanged glances immediately before the shooting. There was no evidence that Park was a member of a gang or any group to which defendant was hostile. There was no evidence that would give rise to a motive for defendant to kill Park. Additionally, the method of the "attempted murder" was far from a particular and exacting method to kill. Defendant fired three shots, but only one struck within six to eight feet of Park. The finding of premeditation and deliberation, therefore, must be reversed and the matter remanded for retrial on the penalty allegation. (See *People v. Bright* (1996) 12 Cal.4th 652, 671.)

III.

EXPERT TESTIMONY ON THE
EFFECTS OF METHAMPHETAMINE USE

The defense sought to present the testimony of a psychiatrist as an expert witness to testify regarding the effect of the long-term use of methamphetamine; primarily paranoia. Defense counsel represented that defendant was going to testify that he was under the influence of narcotics at the time of this incident, which would explain to some extent his behavior.

Thereafter, at a hearing pursuant to Evidence Code section 402, defense counsel made an offer of proof, that while the expert had not examined the defendant, not read the police reports, and was not going to be rendering an opinion concerning the defendant's actual state of mind at the time of the commission of the crime, his testimony would corroborate the testimony of defendant in regard to narcotics and the impact of narcotics. Defendant testified that at the time of the commission of the crime, he was feeling paranoid and scared and the defense wanted to demonstrate through the testimony of the witness that methamphetamine has those effects. The defense argued, "If the jury is aware of the fact that [defendant] legitimately felt in fear, then they might very well conclude it is more likely that the defendant shot to scare away these people rather than to kill them." Defense counsel continued, "What he will testify to is . . . both about the long term and short term effects of narcotics, of this specific form of narcotics and he will talk about paranoia, its impact upon, you know, the reasoning ability and so forth, poor judgment, anxiety, fear, and . . . the relationship between those various terms that he is using."

The court refused to let the witness testify stating that if the jury believed the witness, that defendant was afraid, a person who was afraid was just as likely to kill someone than not. Maybe more so. If one was really afraid, there was a strong possibility that he had the intention to kill them. The court also disallowed the testimony

pursuant to Evidence Code section 352, finding that the testimony would totally confuse the jury.

The contention that the trial court prejudicially erred in refusing to allow defendant's expert to testify is without merit. The purported relevance of the evidence was that long-term use of the drug causes feelings of paranoia. Defendant, himself testified that he felt paranoid and Deputy Rivera agreed that use of methamphetamine can cause paranoia. There was no total preclusion of evidence to support defendant's defense. (Cf. *People v. Reyes* (1997) 52 Cal.App.4th 975, 986.) Further, additional evidence from defendant's proposed expert witness that defendant felt paranoid was of limited relevance because there was no logical link between one's feelings of paranoia and the absence of an intent to kill. The exclusion of the proposed testimony was harmless. (See *People v. Romero* (1999) 69 Cal.App.4th 846, 852.)

IV.

INSTRUCTIONS ON UNCHARGED LESSER OFFENSES

Appellant contends the trial court committed prejudicial error by failing to instruct the jury on uncharged lesser offenses necessary to proper understanding of the case and in allowing the prosecutor to mislead the jury into believing the court had determined that attempted premeditated murder was the only offense appropriate to defendant's conduct. We disagree.

Appellant observes that with respect to the second incident, the information as originally filed charged defendant only with discharging a firearm at Fong, Yoshizaki, Shing, and Park from a motor vehicle, assault with a deadly weapon on Park, and possessing a controlled substance with a firearm. Appellant asserts that "by eliminating several serious charges as to which appellant's guilt was clear, [and adding a fourth charge of attempted murder] the People 'roll[ed] the dice in a high stakes game of chance' [citation] and the 'gamble' [citation] was partially successful--after all, appellant is serving consecutive sentences of life plus 20 years."

In *People v. Birks* (1998) 19 Cal.4th 108, the Supreme Court made it clear that the discretion to charge crimes lies with the prosecution and the "insinuation that the accusatory pleading is obligated to state every charge supported by the evidence is false." (*Id.* at p. 129.) The statement by the deputy district attorney that "there's four counts of attempted murder and that's all because that's what defendant's conduct amounted to. There's nothing more and nothing less. Otherwise you would have it," was not misleading. The jury was only being asked to determine if defendant committed the four charged counts, nothing more and nothing less.

DISPOSITION

The finding with regard to count 4 that the attempted murder of victim Park was committed willfully, deliberately, and with premeditation pursuant to Penal Code section 664, subdivision (a), is reversed and the matter is remanded to the trial court for further proceedings. In all other respects, the judgment is affirmed.

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LILLIE, P.J.

We concur:

WOODS, J.

PERLUSS, J.