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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOSE S. SANCHEZ, Defendant and Appellant.	B197592 (Los Angeles County Super. Ct. No. BA302509)

APPEAL from the judgment of the Superior Court of Los Angeles County. Judith Champagne, Judge. Affirmed.

Alan Stern, under appointment by the Court of Appeal; Kathleen Caverly, California Appellate Project, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

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Jose S. Sanchez appeals from the judgment entered after a jury convicted him of attempted murder. We conclude the jury was properly instructed on voluntary intoxication and its effect on specific intent, that Sanchez did not receive ineffective assistance of counsel in connection with requesting a different intoxication instruction or locating a missing witness, and that there was sufficient evidence to support the judgment. As a result, we affirm.

FACTS AND PROCEDURAL HISTORY

On April 28, 2006, Jose S. Sanchez fired several shots at Jose Castillo, in the mistaken belief that Castillo was either involved with or interested in Sanchez's live-in girlfriend, Delmy Rodriguez. Two rounds struck Castillo in the penis. Sanchez was charged with attempted murder (Pen. Code, §§ 664/187, subd. (a)), along with allegations that the crime was willful and premeditated. The jury convicted Sanchez of attempted murder, but rejected the willful and premeditated allegation. Sanchez was sentenced to 30 years in state prison.

Castillo testified that he knew Sanchez as a nodding acquaintance from their neighborhood, and that he had seen Rodriguez at barbecues hosted by a mutual friend. On April 27, 2006, Castillo was walking home when he saw Rodriguez and their mutual friend talking. Castillo stopped to say hello to the mutual friend but did not speak to Rodriguez. Sanchez drove up in his truck, grabbed Rodriguez by the hair and dragged her into their apartment, then came back out and told Castillo not to speak with Rodriguez. The next day, as Castillo walked toward his house, he saw Sanchez, who was talking to a woman about Sanchez's desire to pay the woman's son for work the son performed for Sanchez. Castillo said nothing to them and walked on by. Sanchez caught up with Castillo and said he wanted to settle their problem. Sanchez, who smelled of alcohol, moved in close to Castillo. Castillo told Sanchez to talk about it later because Sanchez was drunk. Sanchez told Castillo, "Walk, son of a bitch." When Castillo asked what was up, Sanchez said, "Let's get it over with," reached behind his back, and pulled out a gun. Castillo ran away, but heard popping noises and felt a burning pain in his leg.

As a result of the shooting, Castillo lost a testicle and his penis was surgically reconstructed.

Sanchez testified that he was angry because Rodriguez told him Castillo had offered her a job the day before, and because he had seen Castillo looking into Sanchez's window as Castillo washed his car outside. Sanchez believed Castillo was looking at Rodriguez through the window, which made him jealous. Feeling frustrated and depressed, Sanchez drank a bottle of tequila in the hours leading up to the shooting. When Castillo walked by, Sanchez angrily asked what he was doing there. Castillo asked Sanchez "what was my fucking problem?" Sanchez got mad and pushed Castillo a few times, and Castillo responded by hitting Sanchez in the face. During this exchange, Castillo dropped some items he was holding. One of those items was a folding knife that Castillo tried to grab. Sanchez heard a gunshot, got scared, and ran off.[1]

On appeal, Sanchez contends: (1) the jury was not properly instructed on voluntary intoxication as it might affect formation of the specific intent to kill; (2) he received ineffective assistance of counsel because his trial lawyer failed to request the proper voluntary intoxication instruction; (3) he received ineffective assistance of counsel because his trial lawyer failed to locate and call as a witness the woman to whom he was speaking right before he shot Castillo; (4) there was insufficient evidence that he committed an act that was a step toward killing Castillo with the intent to kill; and (5) the judgment must be reversed under the cumulative errors doctrine.

DISCUSSION

1. The Jury Was Properly Instructed on Voluntary Intoxication

The crime of attempted murder requires proof of the specific intent to kill coupled with the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) Evidence of voluntary intoxication is admissible to the extent it bears upon the question whether Sanchez in fact

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[1] Castillo said he was holding a stuffed animal and some small flashlights.

acted with the requisite specific intent. (*People v. Horton* (1995) 11 Cal.4th 1068, 1119.) The jury was instructed with CALCRIM 625 that it could "consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill."

Sanchez contends this was error because the instruction did not tell the jury it could consider his intoxication to determine whether he had the *specific* intent to kill. We disagree. The jury was instructed with CALCRIM 252 that the crime of attempted murder required proof of a "specific intent or mental state," which would be explained in the separate instruction for that crime. CALCRIM 600 described the elements of attempted murder and told the jury that in order to convict Sanchez of that crime, it had to find he "intended to kill" Castillo. By reading these together (*People v. Curry* (2007) 158 Cal.App.4th 766, 790), we conclude the jury was told that the intent to kill required by CALCRIM 600 was the specific intent required for an attempted murder conviction mentioned in CALCRIM 252. As noted above, CALCRIM 625 told the jury that it could consider evidence of Sanchez's voluntary intoxication to determine whether he acted with the intent to kill. When combined with these other instructions, we hold the jury was properly instructed to consider voluntary intoxication as it related to Sanchez's specific intent to kill Castillo.

2. *Sanchez Did Not Receive Ineffective Assistance of Counsel*

Sanchez contends he received ineffective assistance of counsel because his lawyer did not conduct a proper investigation, or obtain the testimony, of the woman he was speaking to right before the shooting. In order to prevail on this theory, Sanchez must show that his lawyer's performance was deficient because it did not meet an objective standard of reasonableness under prevailing professional standards, and that, absent counsel's error, a different result was reasonably probable. (*In re Andrews* (2002) 28 Cal.4th 1234, 1253.)

All that is known of this witness's testimony comes from a letter to Sanchez from his appointed appellate counsel concerning her efforts to locate and interview the

witness.[2] According to the lawyer, an investigator who spoke to the witness two years after the shooting reported that she recalled speaking with Sanchez about money owed to her son. The investigator reported: "He gave her money and she continued walking to her home. The encounter was very brief and she did not converse beyond this with Mr. Sanchez. She did not know whether or not he had been drinking and can offer no opinion as to his sobriety. She had not met him before this day." Sanchez contends the witness's testimony was somehow important to showing he lacked the specific intent to kill when he shot Castillo. It is unclear to us how his encounter with the witness before Castillo came on the scene had any bearing on Sanchez's actions or intentions once he spotted and confronted Castillo. Therefore, assuming for discussion's sake only that his trial counsel should have located the witness and called her to testify at trial, we conclude that a different result was not reasonably probable.

Sanchez also contends he received ineffective assistance of counsel because his lawyer did not request a proper instruction on voluntary intoxication. Because we held in section 1., *ante*, that the jury was properly instructed on that issue, it follows that his lawyer did not err by failing to request some other instruction.[3]

3. *There Was Sufficient Evidence That Sanchez Took a Direct But Ineffectual Step Toward Killing Castillo*

Sanchez contends there was insufficient evidence to support a finding that he took a direct but ineffectual step toward killing Castillo with the intent to kill. An attempt to commit murder requires a direct but ineffectual step toward the commission of the killing. (*People v. Smith*, *supra*, 37 Cal.4th at p. 739.) In essence, Sanchez reargues the evidence, contending the jury should have found he was intoxicated and acted out of

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[2] The letter is part of this court's file. Sanchez described this passage in a supplemental brief he filed after appellate counsel filed a brief under *People v. Wende* (1979) 25 Cal.3d 436.

[3] Sanchez raised these issues and others in a separate petition for habeas corpus based on allegations of ineffective assistance of counsel. We have summarily denied that petition in a separate order.

anger and in the heat of passion. The jury was instructed to consider Sanchez's voluntary intoxication and was also instructed to consider whether Sanchez acted in self defense or attempted manslaughter because he acted in the heat of passion. The jury rejected Sanchez's version of the evidence and found he acted with the intent to kill.

We may not substitute our judgment for the jury's. Instead, we review the record favorably to the judgment to determine whether there is evidence to support the verdict. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1143.) Firing a gun at Castillo is sufficient evidence of the intent to kill. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1242.) We are hard pressed to think of a more direct but ineffectual step toward killing someone than firing a gun at them and inflicting non-lethal gunshot wounds. Accordingly, there is ample evidence to support the guilty verdict.

4. *Cumulative Error*

Sanchez contends we must reverse due to the cumulative effect of the various errors he asserts. We have assumed for discussion's sake only that one error occurred – counsel's failure to call as a witness the woman who spoke with Sanchez right before the shooting – and found that error harmless. Accordingly, there are no errors to accumulate.

DISPOSITION

For the reasons set forth above, the judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BAUER, J.*

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