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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NORMAN PAUL LICAS, Defendant and Appellant.	G034891 (Super. Ct. No. 03NF3780) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kazuharu Makino, Judge. Affirmed and remanded with directions.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, and Gary W. Schons, Assistant Attorney General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Norman Paul Licas appeals from his convictions for shooting from a vehicle in violation of Penal Code section 12034, subdivision (c), and for possession of a firearm by a felon in violation of section 12021, subdivision (a)(1). (All further statutory references are to the Penal Code.) Defendant contends (1) the trial court erred by failing to instruct the jury that assault with a firearm in violation of section 245, subdivision (a)(2), is a lesser included offense of shooting from a vehicle, and (2) substantial evidence did not support the finding he shot the victim from inside a vehicle.

We affirm. We hold assault with a firearm is not a lesser included offense of shooting from a vehicle. The offense of shooting from a vehicle does not include the element that the shooter have a "present ability" to commit a violent injury on another person, a requirement of the offense of assault with a firearm. We respectfully disagree with *In re Edward G.* (2004) 124 Cal.App.4th 962 (*Edward G.*) which holds to the contrary. The trial court, therefore, did not err.

We conclude substantial evidence supported the jury's finding defendant was inside a car at the time he shot the victim. Because both the minute order from the sentencing hearing and the abstract of judgment erroneously state defendant was convicted of assault with a firearm, not of shooting from a vehicle, we remand with directions that the trial court correct this error in the trial court record and the abstract of judgment.

FACTS

We view the evidence in the light most favorable to the jury's verdict and resolve all conflicts in its favor. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v.*

Barnes (1986) 42 Cal.3d 284, 303.) Our summary of facts is based on evidence presented at trial and is limited to those facts relevant to the issues on appeal.

In June 2002, Eric Galvan and Lisa Flores and their baby were staying at the Brookhurst Plaza Inn. One month earlier, Galvan and Flores had borrowed $200 from defendant because they were having a hard time paying for their room and agreed to pay back defendant on the first day of the month. They did not pay defendant back as agreed.

On June 10, 2002, Flores was standing with her baby outside the inn when she saw defendant in his vehicle in the parking lot.[1] Flores "got worried," returned to the room she shared with Galvan, and told Galvan defendant had backed his car into a parking stall. Galvan and Flores walked outside the inn and saw defendant's car parked facing a wall. Flores waited with the baby at the entrance of the inn while Galvan walked toward the parking area to talk to defendant and to give him some money. Defendant was inside the car when Galvan walked up to the car. Flores saw Galvan and defendant begin to talk.

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[1] During direct examination, in answer to the question "[w]ere you with [Galvan] when you saw [defendant] that day," Flores testified, "[a]t first, no. I was by myself with my daughter outside." Flores stated she told Galvan that defendant "backed into a parking stall," and she saw Galvan later approach defendant who was inside the vehicle. During redirect examination, Flores further testified as follows:

"Q When did you first see [defendant] on 6/10/2002?

"A When I was outside with my daughter.

"Q. And Galvan was inside the room, right?

"A Yes.

"Q Did you recognize him by his vehicle or his face on that day?

"A After a while I recognized the vehicle. And his face I didn't really see because I was looking up at the sun. So when I looked and like noticed the car it was like kind of blurred, but I recognized the car so I was like 'eeh.'"

It is the province of the jury to determine which portions of Flores's testimony regarding the identification of defendant were credible, and we must presume in support of the judgment the existence of every fact a reasonable trier of fact could deduce from the evidence. (*People v. Ochoa, supra,* 6 Cal.4th 1199, 1206.)

Defendant remained inside the car while Galvan crouched down outside the driver's side door. Flores saw Galvan hand defendant some money. Flores watched Galvan talk "for a little bit," and then "saw the barrel of the gun come out of the window" of defendant's car. After she saw the barrel of the gun point out of the window, Flores screamed and heard "maybe six, seven" shots. While the shots were being fired, Galvan jumped up and ran toward Flores and the baby to get them inside the inn. Flores testified defendant "didn't get out of the car at all" and she just kept hearing shots. After Galvan, Flores and the baby got inside the inn, Flores saw blood around Galvan's shirt. Galvan survived, and the record does not show that either Flores or the baby was hit by the gunshots. The front desk clerk called 911. Defendant later admitted to a friend, Amanda Robledo, that he shot Galvan.

PROCEDURAL BACKGROUND

Defendant was charged in an information with willful, deliberate, and premeditated attempted murder in violation of sections 664 and 187, subdivision (a) (count 1); shooting from a motor vehicle in violation of section 12034, subdivision (c) (count 2); and possession of a firearm by a felon in violation of section 12021, subdivision (a)(1) (count 3).

As to counts 1 and 2, the information further alleged that during the commission and attempted commission of those offenses, within the meaning of sections 1192.7 and 667.5, defendant (1) intentionally and personally discharged a firearm under section 12022.53, subdivision (c); (2) intentionally and personally discharged a firearm proximately causing great bodily injury to Galvan, under section 12022.53, subdivision (d); and (3) personally inflicted great bodily injury on Galvan, under section 12022.7, subdivision (a). The information also alleged defendant had previously suffered 10 serious and violent felony convictions under sections 1170.12, subdivisions (b) and (c)(2)(A), and 667, subdivisions (d) and (e)(2)(A), and one prior serious felony listed in

section 1192.7. Defendant waived a jury trial on the prior conviction allegations, and requested a court trial on the prior conviction allegations to be bifurcated.

The jury convicted defendant as charged on counts 2 and 3. The jury found true that during the commission or attempted commission of the offense alleged in count 2, defendant intentionally and personally used a firearm within the meaning of section 12022.53, subdivision (c); intentionally and personally discharged a firearm proximately causing great bodily injury to Galvan, within the meaning of section 12022.53, subdivision (d); and personally inflicted great bodily injury on Galvan, within the meaning of section 12022.7, subdivision (a). The jury did not reach a verdict on count 1, and the court declared a mistrial as to count 1. The trial court found true all the prior conviction allegations. Defendant appealed.

DISCUSSION

I.

ASSAULT WITH A FIREARM IS NOT A LESSER INCLUDED OFFENSE OF SHOOTING FROM A VEHICLE.

"We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.] A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, '"that is, evidence that a reasonable jury could find persuasive"' [citation], which, if accepted, '"would absolve [the] defendant from guilt of the greater offense" [citation] *but not the lesser*' [citation]." (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.) "The definition of a lesser necessarily included offense is technical and relatively clear. Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater

cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117.)[2]

Defendant contends the trial court erred by failing to instruct the jury sua sponte on assault with a firearm in violation of section 245, subdivision (a)(2), as a lesser included offense of shooting from a vehicle in violation of section 12034, subdivision (c). Section 12034, subdivision (c) states, "[a]ny person who willfully and maliciously discharges a firearm from a motor vehicle at another person other than an occupant of a motor vehicle is guilty of a felony punishable by imprisonment in state prison for three, five, or seven years." The jury was instructed on section 12034, subdivision (c) with CALJIC No. 9.05 as follows: "Defendant is accused in Count 2 of having violated section 12034(c) of the Penal Code, a crime. [¶] Every person who unlawfully, willfully and maliciously discharges a firearm from a motor vehicle at another person who is not an occupant of a motor vehicle is guilty of a violation of Penal Code section 12034(c), a crime. [¶] A firearm includes a handgun. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person within a vehicle unlawfully discharged a firearm at another person who was not an occupant of a motor vehicle; and [¶] 2. The discharge of the firearm was willful and malicious. [¶] The word 'willful' when applied to the intent with which an act is done means with a purpose or willingness to commit the act in question. The word 'willful' does not require any intent to violate the law, or to injure another, or to acquire any advantage. [¶] The words 'malicious' or 'maliciously' as used in this instruction means a wish to vex, annoy or injure another person, or an intent to do a wrongful act."

Section 245, subdivision (a)(2) states, "[a]ny person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six

[2] The allegation contained in the information regarding count 2 for shooting from a vehicle generally tracks the statutory language of section 12034, subdivision (c).

months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment." Assault, as defined in section 240, is "an unlawful attempt, *coupled with a present ability*, to commit a violent injury on the person of another." (Italics added.) Present ability to commit a violent injury on another, within the meaning of section 240, requires the perpetrator not only be equipped with sufficient means to commit violent injury, but also appear to be within "striking distance" of the victim. (*People v. Valdez* (1985) 175 Cal.App.3d 103, 108, 112-113 (*Valdez*).)

The Attorney General argues assault with a firearm is not a lesser included offense of shooting from a vehicle because the latter offense does not include a requirement that the perpetrator have a present ability to commit a violent injury on another person. We agree.

Nothing in the statutory language of section 12034, subdivision (c) imposes the requirement that one who shoots at someone from inside a vehicle must have a present ability to cause that person violent physical injury. The offense of shooting from a vehicle under section 12034, subdivision (c) requires that the perpetrator shoot from inside a vehicle "at" someone who is not inside a vehicle, and do so willfully and maliciously. (§ 12034, subd. (c).) Webster's Third New International Dictionary (1993) at page 136 states the term "at" is "used as a function word to indicate that which is the goal of an action or that toward which an action or motion is directed." The word "at" does not necessarily connote immediate presence or a location necessarily within striking distance of an intended target.

A person could violate section 12034, subdivision (c) and not have a present ability to cause violent injury to another as required by section 245, subdivision (a)(2). For example, section 12034, subdivision (c) would prohibit a person sitting in a car from shooting in the direction of another person but at too great a distance to strike the person with a bullet. As long as the perpetrator acted willfully and maliciously, section 12034, subdivision (c) would be violated.

Our holding that the element of present ability is not contained in section 12034, subdivision (c) is consistent with the legislative intent of section 12034. As discussed in *In re Ramon A.* (1995) 40 Cal.App.4th 935, 940, Assemblywoman Maxine Waters who sponsored the 1987 amendments to section 12034, which included the addition of subdivision (c), stated, "'[d]rive-by gang shootings threaten the fundamental rights of the public to feel physically secure when walking the streets of our cities. In parts of Los Angeles people are literally afraid to leave their homes because of the intimidating presence of street gangs.'" Section 12034 generally attempts to punish perpetrators of drive-by shootings. Therefore, it seems highly unlikely the Legislature intended to exclude from the scope of subdivision (c) those individuals who shoot at someone from inside a vehicle, but not closely or accurately enough to be within striking distance. To conclude assault with a firearm is a lesser included offense of shooting from a vehicle would require adding the element of "present ability" to section 12034, subdivision (c) offenses. The trial court, therefore, did not err by failing to instruct the jury on assault with a firearm.

Defendant urges us to follow *Edward G., supra,* 124 Cal.App.4th 962, 971 and its holding that "a violation of section 245, subdivision (a)(2), is necessarily included in a violation of section 12034, subdivision (c), based on the same act and the same victim." Citing *Valdez, supra,* 175 Cal.App.3d 103, the *Edward G.* court stated, "[i]t is not possible to 'willfully and maliciously [discharge] a firearm' 'at another person' [citation] without attempting 'to commit a violent injury on the person of another' 'with a firearm' while having a 'present ability' to do so [citations]." (*Edward G., supra,* 124 Cal.App.4th at p. 968.) The *Edward G.* court further stated, "[w]e conclude that it follows from *Valdez* that a person who violates section 12034, subdivision (c), necessarily has the present ability to commit a violent injury on the person of another. A violator of section 12034, subdivision (c), has 'willfully and maliciously discharge[d] a firearm . . . at another person . . . .' If a perpetrator is in a position to fire 'at' a person,

his or her gun is loaded, and he or she actually discharges it at the person, then the perpetrator necessarily has 'maneuvered himself into such a location and equipped himself with sufficient means that he appears to be able to strike immediately at his intended victim.'" (*Id.* at p. 969.)

We disagree with the appellate court's conclusion in *Edward G.*, *supra*, Cal.App.4th at page 969 that a perpetrator who is in a position to shoot "at" another person is necessarily within striking distance of that person. In our opinion, this assumption is unwarranted. The *Edward G.* court's reliance on *Valdez* to support this conclusion is misplaced. In *Valdez, supra,* 175 Cal.App.3d 103, the appellate court analyzed a much different issue—whether substantial evidence supported the finding the defendant had the present ability to injure the victim even though unbeknownst to the defendant, the victim was shielded by bullet-resistant glass. (*Id*. at pp. 106, 108.) The appellate court affirmed the defendant's conviction for assault with a firearm. (*Id.* at p. 106.) The court held that, notwithstanding the presence of the glass, the defendant had a present ability to commit a violent injury because he had a loaded, fully operational gun pointed at the victim when he fired, *and* was "within striking distance"—within 10 feet—of his intended victim. (*Id.* at pp. 112-113.) The court reasoned, "[n]othing suggests this 'present ability' element was incorporated into the common law to excuse defendants from the crime of assault where they have acquired the means to inflict serious injury and positioned themselves within striking distance merely because, unknown to them, external circumstances doom their attack to failure." (*Id.* at p. 112.)

Valdez, supra, 175 Cal.App.3d 103, addressed the scope of the present ability element in the context of the crime of assault with a firearm. Nothing in *Valdez* supports the conclusion that the phrase "discharge[] a firearm from a motor vehicle at another person" in section 12034, subdivision (c) includes that element. Furthermore, nothing in *Valdez* is inconsistent with our analysis.

II.

SUBSTANTIAL EVIDENCE SUPPORTED DEFENDANT'S CONVICTION ON COUNT 2.

"'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] 'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]'" (*People v. Ochoa, supra,* 6 Cal.4th 1199, 1206.)

Defendant's substantial evidence challenge to his conviction for shooting from a vehicle in violation of section 12034, subdivision (c) is limited to the argument there was insufficient evidence to support the finding he was *inside* his car at the time he fired the shots. Flores testified: (1) she saw defendant in his vehicle in the parking lot; (2) she saw the barrel of a gun "come out of the window" of defendant's car; (3) she heard several shots; and (4) while the shots were being fired, she saw Galvan, who had been crouched down outside the driver's side door, run toward Flores and the baby to get them inside the inn. Flores's testimony constituted substantial evidence that defendant was inside the car at the time he fired the shots.

Defendant argues Flores's testimony does not constitute substantial evidence that the shots were fired from inside his car because Flores's testimony was "equivocal" in that she had a "poor view" of the shooting, evidenced by her testimony

she did not see the shooter and she was generally distracted by caring for her baby. Defendant also points to the "unequivocal" testimony of another witness who was in the parking lot at the time of the shooting and who stated the shooter was outside the car when the shots were fired.

Whether Flores saw the person shooting from the car is not dispositive on the issue whether the shots were fired from inside or outside the vehicle. Defendant does not contend the evidence at trial was insufficient to support the finding he was the one who shot Galvan in the parking lot on June 10, 2002. Flores's testimony was sufficient to support the finding the shots were fired from inside the car. It was within the province of the jury to accept Flores's testimony on that point and reject the other witness's testimony regarding the location of the gunman at the time the shots were fired.

III.

WE REMAND TO THE TRIAL COURT TO CORRECT THE TRIAL COURT RECORD AND THE ABSTRACT OF JUDGMENT REGARDING DEFENDANT'S CONVICTION ON COUNT 2.

Although nothing the trial court said on the record as recorded in the reporter's transcript explains this clerical error, the minute order from the sentencing hearing states "defendant having been convicted of 245(a)(2) PC as charged in count 2," instead of stating that defendant was convicted of shooting from a vehicle in violation of section 12034, subdivision (c) as charged in count 2. Consequently, the abstract of judgment erroneously states defendant was convicted of assault with a firearm in violation of section 245, subdivision (a)(2), not of shooting from a vehicle in violation of section 12034, subdivision (c).

DISPOSITION

The judgment is affirmed. We remand and direct the trial court to correct the trial court record to reflect that defendant was convicted of violating section 12034,

subdivision (c) (shooting from a vehicle), not of violating section 245, subdivision (a)(2) (assault with a firearm). We further direct the trial court to amend the abstract of judgment to reflect this correction, and to forward a certified copy of the amended abstract of judgment to the Department of Corrections.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.