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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

A129592

v.

**(Alameda County
Super. Ct. No. C157467)**

MICHAEL WOODS,

Defendant and Appellant.

_____ /

A jury convicted appellant Michael Woods of first degree murder (Pen. Code, § 187, subd. (a)),¹ second degree murder (§ 187, subd. (a)) and two counts of possession of a firearm by a felon (§ 12021, subd. (a)(1)). The jury also found true various sentencing enhancements and a special circumstance allegation (§ 190.2, subd. (a)(3)). The trial court sentenced appellant to state prison.

On appeal, appellant contends: (1) the court abused its discretion by denying his motion to sever the murder charges; (2) the court erred by denying his motion to continue the trial; (3) trial counsel was ineffective; and (4) the court erred by instructing the jury with CALJIC No. 5.17, the instruction on imperfect self-defense.

We affirm.

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

We provide a brief overview of the facts here. We provide additional factual and procedural details in the discussion of appellant's specific claims.

The Murder of Bryant Sills

On the morning of September 14, 2005, an Oakland police officer found Bryant Sills dead behind the wheel of his car on 80th Avenue, near International Boulevard, in Oakland. Sills had died from a gunshot wound near his right eye; experts determined the gun was fired between one inch and four feet from Sills. Sills's face was bleeding and his body was slumped to the right. His left hand was in his lap and his right hand was on the center console.

Sills's car was not running, but the key was in the ignition and a cup of liquid sitting on the dashboard was somewhat warm when the police arrived. The car's front passenger window was open; the driver's side window was shattered. The police found a 9 millimeter shell casing on the floor of the passenger side of the car. Police did not find a weapon or anything resembling a weapon in the car.

Silveria Parker knew Sills and witnessed his murder. Alonzo Lewis, the father of Parker's children, was scheduled to be released from jail on the evening of September 13, 2005. Parker paid a man named Marco to drive her to the jail when Lewis was released. While she was waiting for Lewis to be released from jail, she drove around Oakland with appellant — whom she called "Face" — and Marco. Appellant, Parker, and Marco purchased and used drugs. At some point in the evening, Parker and appellant were alone in Marco's van; they went to the parking lot of the Quarter Pound restaurant. Parker got out of the van and went to a nearby pay phone; she called her mother to see whether Lewis had been released from jail. She also worked as a prostitute.

As Parker stood on the corner waiting for her next client, Sills drove up to Parker and said, "What's up Silveria." Parker explained she was waiting for Lewis to call when he was released from jail. Sills drove away, turning right onto 80th Avenue. Silveria was looking toward 80th Avenue for a potential client when she saw appellant,

driving Marco's van, also turn right on 80th Avenue. Appellant got out of the van, walked up to the passenger side of Sills's car, and shot Sills. The two men did not argue before appellant shot Sills; "it was so quiet out there that [Parker] would have heard it if they were fighting" or she would "have seen it." Appellant shot Sills "for no reason."

After shooting Sills, appellant got back in the van and drove away. Scared, Parker hurried to 84th Avenue. Appellant found her, pointed a gun at her, and said, "you better not say nothing, man. . . . [Y]ou know you have been in the BART station" with two other people. "'Tell me the truth. Weren't you in there? Weren't you in there?'" Appellant was incoherent and hostile; Parker agreed with appellant because she was afraid of him. Appellant eventually let Parker leave.

A few days after the shooting, Parker and Lewis saw appellant. She heard appellant tell Lewis, "'Hey, your bitch better not say anything.' . . . [¶] He kept saying that over and over again, telling [Lewis] to tell [Parker] not to say anything." Lewis assured appellant Parker would not say anything.

The Murder of Reese Allen

On the evening of October 5, 2005, Oakland police officers found Reese Allen on the corner of 82nd Avenue and International Boulevard in Oakland. He was dead; he had been shot in the chest. The police found four expended bullet casings near Allen's body. In Allen's back pocket, police found suspected rock cocaine packaged for sale and \$40 in cash. They also found a revolver sticking out of Allen's back pocket. The gun had four live rounds and one casing, indicating it had been fired at some point. The casings found next to Allen's body did not match the casing found in Allen's gun.

Appellant's Interview with the Police

Oakland police eventually learned "Face" was involved in the Allen murder. Two Oakland police officers interviewed appellant at Santa Rita jail — where he was incarcerated for an unrelated parole violation charge — about the Sills and Allen murders. The police *Mirandized* appellant and recorded his statement.² Appellant

² The recording was played for the jury.

claimed he was smoking marijuana in a van with Parker and another companion at 5:40 a.m. on September 14, 2005, when a car playing loud music pulled up next to the van. The man driving the car tried to talk to Silveria, who was in the driver's seat of the van. Appellant was concerned the car's loud music would wake the neighborhood, so he went over to the car and said, "Why don't you go on, man, about your business?" The man responded, "What's up?" and "started like bendin' over, reachin' like he's pullin'— reachin' for a pistol or something." Appellant explained, ". . . you know, from my experience a bein' shot at and all kind a thing, I'm thinkin' he's reachin' for a gun or somethin', so I panic. I pull out my gun and I shoot him." Appellant told the police he did not "mean to shoot him" and was "just shootin' to be shootin'." Appellant explained that he carried a 9 millimeter handgun for protection because he had been shot at in the past. Appellant threw the gun out of the van after the shooting.

Another Oakland police officer interviewed appellant about the Allen murder. Appellant told the officer he knew Reese and got along well with him. Appellant claimed he shot Reese in self-defense. He explained that he and Reese had a disagreement about money earlier in the day preceding the murder, but by the afternoon, they had patched things up and had smoked marijuana together. Appellant went to a room in an abandoned house and took a nap; when he came out of the house at approximately 10:00 p.m., he played some dice, sold some drugs, and got high.

Around 1:00 or 2:00 a.m. on October 5, 2005, appellant approached Allen and told him he wanted to buy some rock cocaine. Allen refused and said, "What was up with that little shit, um, earlier, though, bruh?" Appellant told Allen he thought it was settled and said Allen he must be "off a ecstasy pill or somethin'" because he was "grittin' his teeth" and moving around quite a bit. Then Allen "started . . . makin' a reach for . . . his back pocket." That made appellant "take[] a step back, 'cuz he constantly like reachin[.]" At that point, appellant saw "the butt [of] the gun" in Allen's back pocket. Appellant panicked and thought Allen "was gonna try to reach and pull out his pistol or somethin' and hit me." Allen had flashed his gun at some unspecified prior date and "been known to act a fool around, too, with that gun." Appellant thought Allen was

going to do more than flash the gun — he thought Allen was “gonna try to make a point . . . this time” because his demeanor was “aggressive.” Appellant pulled out his gun and shot Allen. It happened quickly and appellant “was kinda high, too, so [he] didn’t even know. It just happened real quick.” After he shot Allen, appellant ran into an abandoned house.

The “Hit List”

In 2007, a deputy sheriff at Santa Rita jail saw a note being passed from appellant’s cell. It appeared to be a hit list. The note listed eight people on “Face tha Basketcase[’s]” “Bad News List,” including Parker and Lewis. The note stated, “[t]he only ones who are ‘real critical’ to my case is . . . Parker. . . . All them other names is hear-say statements, but they still ‘mention my name’ so they made statements period, it’s all bad. They still need to be eliminated based on ya dig “[strategically] eliminating all opposition.”’ It’s tha ‘mob’ men organize bizznizz money over bullshit. 7 Love Facemob[.]” The court admitted the note into evidence.

Verdict and Sentencing

The People charged appellant with the murders of Sills and Allen (§ 187, subd. (a)) and with two counts of being a felon in possession of a firearm (§ 12021, subd. (a)(1)). The information also alleged various enhancements and prior convictions. Appellant admitted the prior convictions. A jury convicted appellant of all charges and found the enhancements true. The court sentenced appellant to state prison.

DISCUSSION

I.

The Court Did Not Abuse Its Discretion by Denying Appellant’s Motion to Sever

A few days before trial, appellant moved for separate trials on the two murder charges. Appellant acknowledged the murders were “of the same class of crimes” but claimed joining the charges was improper because the evidence was not cross-admissible and because joinder would prejudice him. The People opposed the motion.

Following a hearing, and relying on several cases, including *Frank v. Superior Court* (1989) 48 Cal.3d 632, 639 and *People v. Sandoval* (1992) 4 Cal.4th 155, 172-173, the court denied the motion. The court considered the four relevant factors set out in *Sandoval* and determined there was “at least some cross-admissibility” of evidence, including a police officer who investigated both crimes, appellant’s statement that he killed both men in self-defense, and the “hit list,” which listed witnesses to both offenses. The court also determined neither the murder charges nor the firearm possession charges were “inherently more inflammatory than the other. They are both obviously very serious charges, but there’s no disparity in the inflammatory effect of one versus the other.” The court also concluded “it would not appear . . . that this is a situation where a weak case has been joined with a strong case or where two weak cases have been joined together.” Finally, the court determined the fourth factor was irrelevant because the People were not seeking the death penalty.

Section 954 expresses the legislative preference for joint trials of similar offenses committed by a defendant. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 557.) Where, as here, “the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant’s severance motion.’ [Citation.] “““The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.” [Citation.] . . .’ [Citation.]” (*Id.* at p. 557.)

“We review the trial court’s ruling for abuse of discretion, which will be found ‘when the trial court’s ruling “falls outside the bounds of reason.”” [Citation.] [Citation.] ‘In determining whether there was an abuse of discretion, we examine the record before the trial court at the time of its ruling.’ [Citation.] “““The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial.’ [Citation.] . . . [Citation.]” ‘The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a

weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.’ [Citations.]” (*Sullivan, supra*, 151 Cal.App.4th at p. 557.)

Appellant concedes the murder charges meet the statutory requirement for joinder because they are of the same class of cases; he contends, however, the denial of his motion to sever the murder charges “constituted an abuse of discretion and a violation of due process.” First, appellant argues severance was inappropriate because the evidence supporting the charges was not cross-admissible. Even assuming for the sake of argument the evidence was not cross-admissible, appellant’s claim fails. That the evidence would not be cross-admissible in separate trials does not, by itself, “establish prejudice or an abuse of discretion by the trial court in declining to sever properly joined charges. [Citation.] Indeed, section 954.1 . . . codifies this rule—it provides that when, as here, properly joined charges are of the same class, the circumstance that the evidence underlying those charges would not be cross-admissible at hypothetical separate trials is, standing alone, insufficient to establish that a trial court abused its discretion in refusing to sever those charges.” (*People v. Soper* (2009) 45 Cal.4th 759, 775, fn. omitted.)

We are not persuaded by appellant’s claim that the court erred by failing to appreciate that trying two murder charges together “geometrically increase[d] the prejudice” to him “because of the very identity of the two offenses.” Our high court has considered and rejected a similar argument. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1208-1209 (*Alcala*)). In *Alcala*, the California Supreme Court affirmed the trial court’s denial of the defendant’s motion to sever, concluding, among other things, that the joinder of five murder charges was not “‘unusually likely to inflame’ a jury” against the defendant. (*Id.* at p. 1227.) The court explained, “[t]he sexual assaults and murders at issue in the Los Angeles County cases certainly are aggravated charges—but we conclude they are not ‘unusually likely to inflame’ a jury that, in any event, properly will hear testimony concerning the abduction and brutal murder of Robin Samsøe, a vulnerable 12-year-old girl whose unclothed body was found with her face smashed in.

The evidence underlying each of the five charges is ‘similar in nature and equally gruesome.’” (*Id.* at p. 1227, quoting *People v. Carter* (2005) 36 Cal.4th 1114, 1155.) The same is true here. The evidence supporting both murder charges is “similar in nature and equally gruesome[:]” appellant shot two men at close range and for no apparent reason. (*Alcala*, at p. 1227.)

Next, appellant suggests severance was required because his claim of self-defense in the Allen murder was stronger than his claim of self-defense in the Sills murder. We disagree. We conclude appellant’s self-defense claims were weak in both cases. With respect to the Sills murder, Parker testified appellant and Sills did not argue before appellant shot him. She also testified appellant shot Sills “for no reason.” In addition, appellant admitted to police that he did not “mean to shoot” Sills and was “‘just shootin’ to be shootin.’” Moreover, the police did not find a weapon, or anything resembling a weapon, in Sills’s car. With respect to the Allen murder, appellant did not tell the police he feared Allen, or that Allen had threatened him. Nor did he tell the police Allen had pointed his gun at him. That Allen’s gun had been fired — at some unknown date — does not alter our conclusion. Joining the cases did not, as appellant contends, prejudice him or prevent him from presenting a defense.

II.

The Court Did Not Abuse Its Discretion by Denying Appellant’s Motion to Continue; Trial Counsel Was Not Ineffective

Trial began on June 15, 2010, after appellant’s case had been pending for nearly five years. The parties and the court discussed the trial schedule: they agreed to try to complete jury selection and opening statements, and to begin the “evidentiary part” of the case by July 7, 2010. The prosecution would conclude its case by July 20, 2010; the defense would conclude on July 22 and the jury would begin deliberating on July 28, 2010. During jury selection, the court advised the jury that the case would likely conclude in early August 2010.

On June 28, 2010, defense counsel informed the court that Dr. Douglas Tucker, the defense psychiatric expert, was scheduled to be out of the country from July 18 to

August 11, 2010 and could not reschedule his trip.³ After expressing its concern that postponing Dr. Tucker's testimony would delay the completion of the case until late August, the court told defense counsel he could subpoena Dr. Tucker to force him to testify despite his vacation, or find a new expert. Defense counsel urged the court to allow Dr. Tucker to testify after his vacation because he had interviewed appellant, "been involved with [appellant] for over a year and a half," and had "put together his entire examination." Counsel explained that he did not have another expert and did not think it was "practical or possible" to find such an expert. He opined, "[t]here's no way anyone else can pick this up." Counsel proposed allowing the prosecution to complete its case, suspending the proceedings, and reconvening when Dr. Tucker returned from vacation.

The court rejected this suggestion and denied counsel's request for a continuance. The court explained, "I don't see any real reason why someone else cannot come into this case, review the reports of the prison health service and whatever other materials that Dr. Tucker has reviewed, review Dr. Tucker's report, perhaps talk to Dr. Tucker. He or she would be in a way perhaps even a more advantageous position than Dr. Tucker himself."⁴ The court noted, "it's not at all unusual to get another expert to stand in for someone. There's plenty of time remaining to accomplish that. . . . We haven't even picked a jury yet."

The prosecution completed its case on July 22, 2010. A few days later, Dr. Jeffrey Gould testified on appellant's behalf "in the area of the effects of drug and alcohol abuse, and the state of one's mental state." Dr. Gould, a board certified forensic psychiatrist and an assistant professor at the University of California, San Francisco, described his extensive experience completing court-ordered evaluations and testifying as an expert in criminal cases.

³ Dr. Tucker planned to testify about appellant's "prior psychiatric condition" and how his use of alcohol and drugs, in connection with his condition, would affect appellant's "mental ability" and the formation of the intent to commit the alleged crimes. Dr. Tucker told counsel about the vacation before trial began, but the vacation was not an issue at that time because the case was to be tried in late May or early June 2010.

⁴ Dr. Tucker had not yet prepared a report.

Dr. Gould testified he spoke to Dr. Tucker and reviewed various case-related documents, including transcripts of witness interviews and the record of appellant's criminal history. Dr. Gould also reviewed appellant's medical records, records from the California Department of Social Services, and notes from Dr. Tucker's interview with appellant. Medical records indicated appellant was diagnosed with "[o]veranxious disorder of childhood, attention deficit hyperactivity disorder and considered oppositional defiant standard" and a "specific developmental disorder not otherwise specified."

After interviewing appellant, Dr. Gould concluded he suffered from cocaine, marijuana, and alcohol dependence. Dr. Gould determined appellant was not psychotic and did not suffer from a psychotic disorder, but opined appellant could have experienced psychotic symptoms when he used cocaine. Dr. Gould noted "there is no documentation of Mr. Woods suffering psychotic symptoms . . . in any of the mental health records. . . ." Dr. Gould explained that appellant "told Dr. Tucker that he experienced both hearing voices as well as seeing things since a young age, and becoming paranoid" and that these symptoms were "greatly exacerbated when he used cocaine." Dr. Tucker did not opine on the veracity of appellant's statements.

Dr. Gould testified appellant had suffered head injuries, but concluded these injuries did not affect appellant's behavior.⁵ He noted, however, that a person who has suffered a head injury and who uses stimulants may "get more impulsive" and have "reflective delay." Dr. Gould noted the absence of evidence regarding the quantity of drugs or alcohol in appellant's system at the time of the offenses.

Appellant contends the court abused its discretion by denying trial counsel's request for a continuance. "A continuance in a criminal case may be granted only for good cause. [Citation.] Whether good cause exists is a question for the trial court's discretion. [Citation.] The court must consider ""not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be

⁵ If Dr. Gould had possessed more time before testifying, he would have had appellant undergo a neurological test to determine the extent of his head injuries.

accomplished or defeated by a granting of the motion.”” [Citation.] While a showing of good cause requires that both counsel and the defendant demonstrate they have prepared for trial with due diligence [citation], the trial court may not exercise its discretion ‘so as to deprive the defendant or his attorney of a reasonable opportunity to prepare.’” (*People v. Doolin* (2009) 45 Cal.4th 390, 450, quoting *People v. Sakarias* (2000) 22 Cal.4th 596, 646.) An order denying a continuance “‘is seldom successfully attacked.’” (*People v. Beeler* (1995) 9 Cal.4th 953, 1003, quoting 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Trial, § 2502, p. 3002.)

Appellant does not contend he was denied the opportunity to prepare for trial. Instead, he contends the court abused its discretion by denying his motion to continue because counsel forgot about Dr. Tucker’s vacation and because the court did not make a “hard promise” to the jury that the case would be completed by early August. Appellant has not demonstrated an abuse of discretion. (*Doolin, supra*, 45 Cal.4th at p. 451; *People v. Riggs* (2008) 44 Cal.4th 248, 296.) In denying the motion to continue, the court properly considered defense counsel’s failure to remember his expert witness’s vacation schedule and the effect a continuance would have on the jurors and on the administration of justice in a case that had been pending for almost five years.

Moreover, the denial of the continuance did not prejudice appellant. Trial counsel retained Dr. Gould, who had sufficient time to review appellant’s medical records, interview appellant, and formulate an opinion about his substance abuse issues and medical history. Dr. Gould was amply qualified to replace Dr. Tucker. And Dr. Gould informed the jury about appellant’s head injuries and his dependence on drugs and alcohol and noted appellant could have experienced psychotic symptoms when he used cocaine.

Appellant claims Dr. Tucker’s “testimony was the centerpiece of the defense case” and contends Dr. Tucker’s “testimony about appellant’s mental state would have been more unequivocal and had greater force.” Appellant, however, does not actually describe or summarize the “more effective expert testimony” Dr. Tucker would have provided. Although appellant told Dr. Tucker he suffered from psychotic symptoms, Dr. Tucker did

not conclude appellant was psychotic or that he was suffering from psychotic symptoms at the time of the offenses. It is highly unlikely Dr. Tucker would have provided any forceful testimony that appellant suffered from some sort of mental illness or psychotic condition sufficient to negate the malice required for murder.

Appellant also contends trial counsel’s “negligence in scheduling the witness” constituted ineffective assistance of counsel. This claim fails because, for the reasons discussed above, appellant cannot demonstrate trial counsel’s failure to remember the dates of Dr. Tucker’s vacation prejudiced him. (*People v. Jones* (2009) 178 Cal.App.4th 853, 860 [“a court may reject an ineffective assistance of counsel claim if it finds counsel’s performance was reasonable or the claimed error was not prejudicial”].) Appellant has not — and cannot — demonstrate “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 860, quoting *Strickland v. Washington* (1984) 466 U.S. 688, 694.)

III.

The Court Did Not Err by Instructing the Jury with CALJIC No. 5.17

The court instructed the jury with CALJIC No. 5.17 on imperfect self-defense. The instruction provided, “A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril or great bodily injury kills unlawfully, but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing or knowing the same facts, would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary manslaughter.

“As used in this instruction, ‘an imminent peril or danger’ means one that is apparent, present, immediate and must be instantly dealt with or must so appear at the time to the slayer. [¶] *However, this principle is not available and malice aforethought is not negated if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary’s use of force, attack, or pursuit.* [¶]

This principle applies equally to a person who kills in purported self-defense or purported defense of another person.” (Italics added.)

Appellant’s third and final claim is the court erred by including the italicized language in the CALJIC No. 5.17 instruction because it placed “an improper limitation” on his claim of imperfect self-defense. Appellant contends this language — which is not found in the corresponding CALCRIM instruction — “represents a misunderstanding of the law.”⁶ According to appellant, CALJIC No. 5.17 “is cast in objective terms and takes no account of the defendant’s subjective belief as to the situation, purports to disqualify imperfect self-defense for the defendant who makes a mistake of fact as well as for the defendant who either violates the law knowingly or who makes a mistake of law unknowingly.”

⁶ CALCRIM No. 571 provides in relevant part, “A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because (he/she) acted in (imperfect self-defense/ [or] imperfect defense of another). [¶] If you conclude the defendant acted in complete (self-defense/ [or] defense of another), (his/her) action was lawful and you must find (him/her) not guilty of any crime. The difference between complete (self-defense/ [or] defense of another) and (imperfect self-defense/ [or] imperfect defense of another) depends on whether the defendant’s belief in the need to use deadly force was reasonable. [¶] The defendant acted in (imperfect self-defense/ [or] imperfect defense of another) if: [¶] 1. The defendant actually believed that (he/she/ [or] someone else/ <insert name of third party>) was in imminent danger of being killed or suffering great bodily injury; AND [¶] 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; BUT [¶] 3. At least one of those beliefs was unreasonable.

“Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. [¶] In evaluating the defendant’s beliefs, consider all the circumstances as they were known and appeared to the defendant. [¶] [If you find that [the decedent] threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant’s beliefs.] [¶] [If you find that the defendant knew that [the decedent] had threatened or harmed others in the past, you may consider that information in evaluating the defendant’s beliefs.] [¶] [If you find that the defendant received a threat from someone else that (he/she) reasonably associated with [the decedent], you may consider that threat in evaluating the defendant’s beliefs.] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in (imperfect self-defense/ [or] imperfect defense of another). If the People have not met this burden, you must find the defendant not guilty of murder.”

As both parties recognize, the challenged portion of the instruction is parallel in its material aspects to language in *In re Christian S.* (1994) 7 Cal.4th 768. In that case, the California Supreme Court wrote, “It is well established that the ordinary self-defense doctrine — applicable when a defendant *reasonably* believes that his safety is endangered — may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary’s attack or pursuit is legally justified. [Citations.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances.” (*Id.* at p. 773, fn. 1.)

Our Supreme Court has reiterated this principle on several occasions. For example, in *People v. Seaton* (2001) 26 Cal.4th 598, 664, the court cited *In re Christian S.* and concluded, “[b]ecause, however, defendant’s testimony showed him to be the initial aggressor and the victim’s response legally justified, defendant could not rely on unreasonable self-defense as a ground for voluntary manslaughter.” (See also *People v. Randle* (2005) 35 Cal.4th 987, 1001, overruled on another point in *People v. Chun* (2009) 45 Cal.4th 1172.) Most recently, in *People v. Enraca* (2012) 53 Cal.4th 735, the California Supreme Court determined the trial court properly instructed the jury with CALJIC No. 5.17. (*Id.* at p. 761.) There, the trial court, “[i]n response to requests by both the prosecution and the defense, . . . instructed the jury on the law” of perfect and imperfect self-defense. (*Ibid.*) “It gave CALJIC No. 5.55: ‘The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense.’ Pursuant to CALJIC No. 5.17, the jury was also instructed that the principle of imperfect self-defense ‘is not available, and malice aforethought is not negated, if the defendant[,] by his unlawful or wrongful conduct[,] created the circumstances which legally justified his adversary’s use of force.’” The *Enraca* court determined the instructions were clearly supported by the record and cited *In re Christian S.* with approval. (*Ibid.*)

Appellant seems to contend CALJIC No. 5.17 is an incorrect statement of law because it fails to differentiate between mistakes of fact and mistakes of law. He

suggests *In re Christian S.* refers only to mistakes of law and should not be read to prohibit one who makes a mistake of fact from claiming imperfect self-defense. He argues, “[t]hus, if a defendant who is objectively the aggressor in a situation actually believes his opponent is the aggressor and is threatening imminent harm to him, then defendant has made an unreasonable mistake of fact to which the doctrine of imperfect self-defense nonetheless applies to mitigate the crime.” We conclude the *In re Christian S.* court was well aware of the distinction between mistakes of fact and mistakes of law because the opinion discusses the application of mistakes of fact and mistakes of law in a later portion of the decision. (See *In re Christian S.*, *supra*, 7 Cal.4th at p. 779, fn. 3.) The challenged portion of CALJIC No. 5.17 is in accord with *In re Christian S.*, *Seaton, Randle*, and *Enraca*.⁷ We are bound to follow opinions of the California Supreme Court. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Moreover, any error in giving CALJIC No. 5.17 was harmless because the evidence in this case does not support a claim of imperfect self-defense. “For [a] killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. [Citation.] If the belief subjectively exists but is objectively unreasonable, there is ‘imperfect self-defense,’ i.e., ‘the defendant is deemed to have acted without malice and cannot be convicted of murder,’ but can be convicted of manslaughter. [Citation.] . . . Moreover, for either perfect or imperfect self-defense, the fear must be of imminent harm.” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082, fn. omitted.) Here, there was no evidence that appellant was in imminent danger from Sills or Allen. Thus, any error in an instruction on the forfeiture of an imperfect self-defense claim was harmless.

⁷ In addition, appellant overlooks *People v. Hardin* (2000) 85 Cal.App.4th 625, where a division of this court rejected the defendant’s claim that the “‘unlawful or wrongful conduct created the circumstances which legally justified his adversary’s use of force’ language in CALJIC No. 5.17 was unjustified, misleading, and prejudicial to his claim of imperfect self-defense.” (*Id.* at p. 632.) We explained, “[t]his instruction was legally correct.” (*Id.* at p. 634.)

DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Needham, J.

Bruiniers, J.