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

THE PEOPLE,
Plaintiff and Respondent,
v.
GUY ROBERT ARCHINI,
Defendant and Appellant.

A130274
(Lake County
Super. Ct. Nos. CR901358, CR914853,
CR916503-A)

In action No. CR 901358 a jury found defendant Guy Robert Archini guilty as charged by an amended information of being a past-convicted felon in possession of a firearm and ammunition (Pen. Code, former §§ 12021, subd. (a), 12316, subd. (b)(1))¹; dissuading a witness from testifying by force or threat (§ 136.1, subd. (c)(1)); making a criminal threat (§ 422); and two counts of resisting a peace officer in the performance of his duty (§ 69), for which he was sentenced to state prison for an aggregate term of four years and four months.

In action No. CR914853, a separate jury found defendant guilty as charged of the misdemeanor of driving under the influence of drugs or alcohol (Veh. Code, § 23152, subd. (a)), for which he was sentenced to a concurrent term of six months, “concurrent to all other sentences.”

In action No. CR916503-A, a third jury found defendant guilty as charged with assault with a firearm involving the personal use of a firearm (§§ 245, subd. (a)(2),

¹ Statutory references are to the Penal Code unless otherwise indicated.

12022.5); making a criminal threat (§ 422); and being a past-convicted felon in possession of a firearm and ammunition (former §§ 12021, subd. (a), 12316, subd. (b)(1)). for which he was sentenced to state prison for seven years and eight months.

Defendant appeals from the three judgments of conviction, and advances numerous claims of evidentiary, instructional, and sentencing error. We conclude that none of defendant's claims compels reversal, and thus we affirm.

BACKGROUND

The situation before us is that defendant was charged and tried under three informations, convicted of ten felonies and one misdemeanor, and sentenced to a total term of 12 years. However, he does not challenge the sufficiency of the evidence to support any of his convictions. There is certainly no need to recount evidence concerning the various charges defendant was acquitted of committing. In addition, some of defendant's contentions present only issues of law that are essentially independent of the factual matrix of the underlying convictions. In point of fact, it appears that only the evidence from defendant's trial in No. CR916503-A is usefully set forth here in any detail.

The charges in that case arose out of events occurring on August 12, 2008. At that time, defendant was living with Alison Lutz, as he had for 28 years. Jack Johnson and his fiancé Geraldine Clasey, who had known defendant for several weeks, were staying in the same house with Lutz and defendant.

The testimony of Clasey, Johnson, and Lutz was largely in agreement. On the afternoon of August 12, defendant flew into a rage when he could not locate a chainsaw, which he accused Clasey and Johnson of taking. Clasey's and Johnson's denials were not believed. Clasey and Lutz, who was holding a hammer, began shoving each other. According to Clasey, defendant's reaction to this was to announce "I don't fistfight with motherfuckers. I shoot people," whereupon he went to his bedroom, emerged with a shotgun wrapped in a flag which he aimed at Clasey and Johnson, and declared his

intention to “blow [them] away.” As Clasey fled by the front door, Johnson and defendant wrestled for possession of the gun.

The wrestling between Johnson and defendant continued out onto the porch, and then to the driveway. The gun discharged. Clasey was “screaming for someone to call the police,” which a neighbor did. The neighbor also managed to get the weapon away from defendant and Johnson. The neighbor also told defendant to stay put, but defendant fled. Defendant was found minutes later, several hundred yards away, face down in some brush.

According to Johnson, before defendant left the scene he stated: “I’m going to get 10 years for felon in possession of a gun.”

Defendant’s version of the incident was considerably different. He testified that when he returned to the house after searching for the chainsaw in his truck, and about when Lutz and Clasey began their struggle over the hammer, he saw a shotgun by the front door. He tried to put the weapon in his truck, but “I grabbed the wrong keys.” Defendant “went back . . . and grabbed the right keys.” Defendant was trying to get the shotgun out of the house when he and Johnson begun their fight over possession of the shotgun. The gun flew out of their hands when the two of them fell down on the driveway.

Defendant testified that the shotgun was not his, but “was left behind by a guy named Darren” in his daughter’s nearby house. Defendant is a partial owner of the other house, and he had entry to it. It was because “I could have got in trouble for it being in my house” that he tried to move the shotgun to his truck. Defendant left the scene “to cool off.” Defendant did not utter a threat at either Johnson or Lutz, nor did he threaten to shoot them.

Additional evidence will be described as necessary to comprehend particular arguments made by defendant.

REVIEW

The Trial Court Did Not Abuse Its Discretion By Excluding Evidence Of Two Victims' Behavior Following Defendant's Arrest

In action No. CR916503-A, the trial court conducted a hearing pursuant to Evidence Code section 402 to consider defendant's request to be allowed to introduce evidence that items of personal property were no longer in his home when he was released following his arrest for the assault on Johnson. Defendant's theory was that in his absence these items were taken by Johnson and Clasey, who had a motive to fabricate their testimony to secure defendant's conviction in order that they could retain these items. After hearing testimony from defendant, Lutz, and their daughter Nicole Lutz in support of the theft theory, Johnson and Clasey testified against it. The court did allow the defense to show that Johnson might have taken a specific leather jacket, but defendant's motion was otherwise denied under Evidence Code section 352 (section 352) because: (1) "the court has not heard any evidence so far that these people did in fact rip you [defendant] off"; (2) "if these people did do this, that . . . would not provide a defense, and so it's not appropriate to bring up in this trial"; and (3) "there's an extreme undue consumption of time in the amount of witnesses and . . . testimony and . . . evidence that's going to need to be presented in order to establish that [i.e., the theft]. And it has either no or . . . very little value . . . that's probative and . . . there's not enough there, like I say, except for the jacket."

Defendant contends that this ruling was an abuse of discretion under Evidence Code section 352 and also violated his due process right to present a defense. We do not agree.

Although a criminal defendant is entitled to present all relevant evidence of significant probative value in his favor, this does not mean that a court must allow unlimited inquiry into collateral matters. (*People v. Marshall* (1996) 13 Cal.4th 799, 836.) "Under Evidence Code section 352, a trial court 'has broad power to control the

presentation of proposed impeachment evidence “ “ “ “to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.”

[Citation.]’ ” [Citation.]’ ” (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1089-1090.)

The trial court’s decision will be overturned only for abuse of that broad power.

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1008.) And if the trial court’s decision is upheld, no constitutional violation is made out. (*People v. Hamilton* (2009) 45 Cal.4th 863, 942-943; *People v. Jennings* (1991) 53 Cal.3d 334, 372.)

Defense counsel mentioned a motive for Johnson and Clasey to fabricate testimony, but he neglected to establish that they had an opportunity to effectuate that motive, a logical gap pointed out by the prosecutor. In other words, the motive to fabricate makes sense only if Johnson and Clasey had resolved on taking the property *prior* to the fight on August 12. If anything, it is far more likely that any larcenous intent arose *after* defendant had been arrested and removed from the scene. Yet the timing undercuts a motive to fabricate, because Johnson and Clasey had already given their version to police. Once Johnson and Clasey were on record with that version, the value of any subsequently acquired improper motive would not be substantial in impeaching that version. Such value would therefore be collateral to the issue of the credibility of the version they had already given to police.

Moreover, developing defendant’s theory would indeed seem to present a ready example of the “trial within a trial” courts strive to avoid. It would in effect require defendant and Lutz to present an inventory of personal effects in the house before August 12 and then establish the absence of those items once defendant returned to the house after being released from jail. The prosecutor might naturally want to undermine defendant’s argument by demonstrating that no police report of any theft by been filed. Defendant would likely respond, as he did at the hearing, that he has been trying while in jail to do just that. The prosecutor could reply that defendant did not file a complaint as soon as he returned home on August 12, and, in any event, nothing stopped Lutz from filing a complaint even if defendant was back in jail. All of this to prove a point that would not furnish a defense and would not directly impeach the trial testimony of

Johnson and Clasey regarding the circumstances of the fight. The point would therefore qualify as a “collateral credibility issue” (*People v. Mendoza, supra*, 52 Cal.4th 1056, 1089-1090), and one whose probative value the trial court was well within its discretion in concluding was outweighed by the “undue consumption of time” it would require to put before the jury.

Assessing credibility is not a proper part of the analysis demanded by section 352. (*People v. Cudjo* (1993) 6 Cal.4th 585, 610; *People v. Alcalá* (1992) 4 Cal.4th 742, 790-791.) We cannot agree with defendant that the trial court’s ruling is vulnerable to reversal for this reason. Although it might appear that the court perhaps violated this principle by disbelieving the defense version, defendant could only testify that certain items were “missing” and that Johnson was subsequently seen in possession of one of those items, namely, the leather jacket. Theft was a surmise, and a reasonable one. However, the court seems to have been literally correct when it concluded it “has not heard any evidence so far that these people did in fact rip you off,” if by that the court meant that defendant had failed to present direct evidence of larceny that was not dependent on inference or deduction. And even if the trial court crossed the impermissible line of credibility determination, it was only one of three reasons given for the ruling. The foregoing demonstrates that those other two reasons are sound. In sum, we conclude that defendant has not established that the trial court’s ruling constituted either an abuse of discretion under section 352 or an impermissible infringement of his constitutional right to present his defense.

There Was No Instructional Error Concerning Defendant’s Convictions For Violating Section 69

In action No. CR 901358, defendant was charged with two violations of section 69, which provides: “Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand

dollars (\$10,000), or by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment.”

The two counts were alleged as follows:

“COUNT II [¶] . . . defendant on or about the 28th day of May 2004 . . . did unlawfully attempt by means of threats and violence to deter and prevent ERIC KEENER, who was then and there an executive officer, from performing a duty imposed upon such officer by law, and did knowingly resist by the use of force and violence said executive officer in the performance of his duty.” [¶] . . . [¶]

“COUNT VIII [¶] . . . defendant on or about the 12th day of October, 2005 . . . did unlawfully attempt by means of threats and violence to deter and prevent JIM SAMPLES, who was then and there an executive officer, from performing a duty imposed upon such officer by law, and did knowingly resist by the use of force and violence said executive officer in the performance of his duty.”

The evidence concerning these counts was as follows:

Deputy Sheriff Keener stopped in front of defendant’s house after hearing gunshots emanating from the property. Defendant came out of the house, but ran back into it when Deputy Keener ordered him to get on the ground. When Keener ordered defendant to “Get out here and show me your hands,” defendant responded from inside the house: “Fuck you! I have a [bead] on your head and I’ll kill you.” Moments later Keener heard defendant yell “Come on in, I have more ammo than you have.”

Deputy Sheriff Samples and another deputy arrested defendant for being drunk in public and making a false report. Defendant was “pushing back against us and yelling and screaming at us” as he was handcuffed and put in the patrol car. Samples was transporting defendant to the county jail when defendant “started to kick the back of the patrol car cage, screaming and banging around in there . . . then he started making threats towards me and my family.” In addition to threatening to “kick [Samples’s] ass,” “Mr. Archini told me, and I quote, ‘I know where you and your family live. I know you have kids, and I’m going to get you, and you’re dead.’ ” Later, when Samples stopped the car, “opened the car door to try to get him to calm down, . . . he kicked at me.”

The jury was instructed with CALCRIM No. 2651 as follows: “The defendant is charged in Count Two and Eight with trying to prevent or deter an executive officer from performing that officer’s duty in violation of Penal Code Section 69. To prove that the defendant is guilty of this crime, the People must prove that, one, the defendant willfully and unlawfully used a threat of violence to try to prevent or deter an executive officer from performing that officer’s lawful duty; and two, when the defendant acted, he intended to prevent or deter the executive officer from performing that officer’s lawful duty. [¶] Someone commits an act willfully when he does it willingly or on purpose.”

As is evident from its language, section 69 can be violated in either of two ways— with physical force or the use of threats. Here, although there was evidence of the former in defendant’s resistance to Deputy Samples, the prosecution was relying on the latter, specifically, the threatening statements defendant uttered to Deputies Keener and Samples. That makes the offense charged a specific intent crime, that is, the defendant must have had “a specific intent to interfere with the executive officer’s performance of his duties.” (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153; see *People v. Hines* (1997) 15 Cal.4th 997, 1060-1061.) Because the instruction did not convey this requirement with the words “specific intent,” defendant contends the instruction was defective in that it failed to include an element of the offense, thereby lightening the prosecution’s burden to prove every element beyond a reasonable doubt and “violat[ing] the defendant’s rights under both the United States and California Constitutions.” (*People v. Flood* (1998) 18 Cal.4th 470, 479-480.) A comparison of CALCRIM No. 2651 with CALCRIM No. 2652² demonstrates why this contention is without merit.

² “The defendant is charged [in Count ____] with resisting an executive officer in the performance of that officer’s duty [in violation of Penal Code section 69]. To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant [unlawfully] used force [or violence] to resist an executive officer; 2. When the defendant acted, the officer was performing (his/her) lawful duty; AND 3. When the defendant acted, (he/she) knew the executive officer was performing (his/her) duty.” The

CALCRIM No. 2652 deals with actual resistance, which is a general intent crime. (*People v. Rasmussen* (2010) 189 Cal.App.4th 1411, 1419.) The use notes to CALCRIM Nos. 2651 and 2652 make clear that No. 2651 is intended to be the specific intent version of No 2652. This is also apparent from the plain language of No. 2651, which told the jury that conviction requires to the prosecution to prove that when defendant acted “willingly”—that is, “on purpose”—“he intended to prevent or deter the executive officer from performing that officer’s lawful duty.” This is a sufficient communication of the specific intent element. Thus, we agree with Division Five of this District that “CALCRIM No. 2651 provides that preventing or deterring an executive office from performance of his/her duty requires specific intent.” (*Rasmussen, supra*, at p. 1420, fn. 6.) In other words, the jury *was* instructed on specific intent as defendant claims it should have been.

Next, based on Deputy Samples’ testimony that defendant was arrested for public intoxication so pronounced that he deemed field sobriety tests unfeasible, defendant argues that his trial counsel was constitutionally incompetent for not requesting instructions that defendant’s voluntary intoxication could negate defendant’s ability to form the specific intent required for conviction under section 69.

Our Supreme Court has explained a defendant’s Sixth Amendment right to counsel as follows: “ ‘Petitioner had the right to the effective assistance of counsel at trial, and thus was “entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate.” [Citation.] A defendant claiming ineffective representation bears the burden of proving by a preponderance of the evidence both (1) that counsel’s performance was deficient, i.e., that the representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been more favorable to

instruction continues with same definition of “executive officer” used in CALCRIM No. 2651.

defendant, i.e., a probability sufficient to undermine confidence in the outcome.
[Citations.]’ [Citations.]

“The United States Supreme Court has recently reemphasized that, in applying these principles, ‘a court must indulge a “strong presumption” that counsel’s conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.’ [Citation.] Accordingly, a court must ‘view and assess the reasonableness of counsel’s acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.’ [Citations.]” (*In re Scott* (2003) 29 Cal.4th 783, 811-812.)

Because defendant’s trial counsel was never asked for, or provided an explanation for failing to request what amounts to a pinpoint instruction on intoxication (see *People v. Saille* (1991) 54 Cal.3d 1103, 1119-1121), the presumption of competence becomes virtually conclusive for purpose of this direct appeal unless no reasonable explanation is possible. (*People v. Wilson* (1992) 3 Cal.4th 926, 936; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Even if counsel had requested the instruction, it would only have applied to one of the two ways in which section 69 can be violated; it would have no impact on the general intent manner in which section 69 can be violated. (See *People v. Atkins* (2001) 25 Cal.4th 76, 81 [“Evidence of voluntary intoxication is inadmissible to negate the existence of general criminal intent”].) Thus, even if the jury believed defendant was sufficiently intoxicated that he could not form a specific intent, it would not impair the jury’s ability to convict defendant based on the uncontradicted testimony from Deputy Samples that defendant actually resisted being taken into custody. Counsel could have made the eminently sound tactical decision not to ask the jury to believe Samples’s testimony about defendant’s level of intoxication, but to disbelieve the same testimony about defendant’s level of resistance. In other words, the instruction might have simply focused the jury’s attention on the easier route to convicting defendant. (See *People v. Hawkins* (1995) 10 Cal.4th 920, 945 [“A reasonable defense counsel may have concluded

that the risks of . . . a limiting instruction . . . were not worth the questionable benefits such instruction would provide.”].)

Defendant’s claim that the count involving Deputy Samples must be reversed by reason of the “cumulative” error of instructional error and attorney incompetence fails because it is based on nonexistent predicates.

There Was No Instructional Error Concerning Defendant’s Conviction For Violating Section 422

In action No. CR916503-A, the jury found defendant guilty of violating section 422, which was charged as follows: “that said defendant on or about the 12th day of August 2008, . . . did willfully and unlawfully threaten to commit a crime which would result in death and great bodily injury to GERALDINE CLASEY and JACK JOHNSON, with the specific intent that the statement be taken as a threat.” Because the jury heard evidence that defendant made two statements that might qualify as prohibited threats, i.e., “I don’t fistfight with motherfuckers. I shoot people,” and he would “blow away” Johnson and Clasey, defendant contends the trial court was obligated to give the unanimity instruction³ even in the absence of a request by the defense. The contention is without merit.

The California Constitution requires a unanimous jury verdict in a criminal case. (Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) This requirement “ ‘is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all jurors agree the defendant committed.’ ” (*Id.* at p. 1132.) Thus, when applicable, a trial court has a sua sponte duty to instruct the jury that it must unanimously agree on which act constitutes the charged offense. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.)

³ “The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed.” (CALCRIM No. 3500.)

“The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a ‘particular crime’ [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed [the defendant] guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate ‘when conviction on a single count could be based on two or more discrete criminal events,’ but not ‘where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.’ [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.” (*People v. Russo, supra*, 25 Cal.4th 1124, 1134-1135.)

We are not convinced that a unanimity instruction was required. “ ‘ “A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.” [Citations.] ’ ” (*People v. Champion* (1995) 9 Cal.4th 879, 932.) But a unanimity instruction is not required where the evidence shows multiple acts in a continuous course of conduct (*People v. Maury* (2003) 30 Cal.4th 342, 423), that is “when the acts alleged are so closely connected as to form part of one transaction. [Citations.] The ‘continuous conduct’ rule applies when the defendant offers essentially the same defense to each of the acts and there is no reasonable basis for the jury to distinguish between them. [Citation.]” (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) “ ‘[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury’s understanding of the case.’ ” (*People v. Beardslee* (1991) 53 Cal.3d 68, 93.)

Defendant denied making any threat to Johnson or Clasey. There was consequently no basis for believing that he made one threat but not the other, or that he threatened Johnson but not Clasey, or vice versa. In addition, the circumstance that the

threats were made virtually at the same time removes another ground for differentiation. The threats, if their making was credited by the jury, occurred in a way that they were not “discrete” but a single transaction that did not require a unanimity instruction. (*People v. Russo, supra*, 25 Cal.4th 1124, 1134-1135; *People v. Beardslee, supra*, 53 Cal.3d 68, 93; *People v. Stankewitz, supra*, 51 Cal.3d 72, 100.)

**The Trial Court Did Not Err By Instructing That
Defendant’s Felony Conviction Could Be Considered In
Evaluating His Credibility**

In action No. CR 916503-A, the jury knew that defendant had been convicted in 1998 of the felony of being an accessory, in violation of section 32.⁴ The jury was instructed with CALCRIM Nos. 316 and 3100 that it could consider that conviction in assessing defendant’s credibility. Defendant attacks these instructions as improper because “that crime is not necessarily an offense involving moral turpitude.” Our Supreme Court has concluded otherwise: “[The] crime of violating Penal Code section 32 . . . necessarily involves moral turpitude since it requires that a party has a specific intent to impede justice with knowledge that his actions permit a fugitive of the law to remain at large.” (*In re Young* (1989) 49 Cal.3d 257, 264.) Based on a Ninth Circuit decision that a violation of section 32 is not a crime of moral turpitude for the purposes of federal immigration law (*Navarro-Lopez v. Gonzales* (9th Cir. (2007) 503 F.3d 1063 (en banc)), defendant submits “*In re Young* . . . is distinguishable because that case involved attorney discipline by the California State Bar.” The language of our Supreme Court is categorical. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We therefore decline to discuss whether a federal immigration law discussion is less persuasive than a state disciplinary proceeding.

⁴ Which provides: “Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.” (Section 32.)

The Trial Court Did Not Err In Instructing On Self-Defense

The trial court instructed the jury with CALCRIM No. 3471 as follows: “A person who engages in mutual combat or who is the initial aggressor has a right to self-defense only if, one, he actually and in good faith tries to stop fighting; and two, he indicates by word or conduct to his opponent in a way that a reasonable person would understand that he wants to stop fighting; and three, he gives his opponent a chance to stop fighting. If a person meets these requirements, he then has a right to self-defense if the opponent continues to fight. A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.”

Defendant presents three contentions against the validity and applicability of this and other instructions addressing the topic of self-defense. His first claim is that the court erred by deleting this definition of mutual combat in CALCRIM No. 3471: “A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim of self-defense arose”⁵ and because “there was no evidence of a pre-arrangement to fight” between him and Jackson. Second, defendant claims that this instruction and CALCRIM No. 3472 on contrived self-defense were erroneously given because they “failed to distinguish between deadly and non-deadly aggression and there was no evidence to support a claim of contrived self-defense.” Lastly, defendant claims the self-defense instructions were defective because they “failed to instruct the jury as to Archini’s right to use a firearm in self-defense,” which would excuse his possession of otherwise

⁵ The existence of a definition in the instruction refutes the Attorney General’s argument that the concept of “mutual combat” is a “commonly used term” that the jury needed no help in comprehending. (See *People v. Ross* (2007) 155 Cal.App.4th 1033, 1044-1045 [“the lay meaning of ‘mutual combat’ is too broad to convey the correct legal principle” because “[i]n ordinary speech . . . ‘mutual combat’ might properly describe any violent struggle between two or more people, however it came into being,” whereas “[t]he mutuality triggering the [self-defense] doctrine inheres not in the combat but in the *preexisting intent to engage in it.*”].)

prohibited firearm and ammunition. None of these contentions establishes reversible error.

The trial court also instructed the jury with CALCRIM No. 3470 on self-defense as follows:

“Self-defense is a defense to Penal Code section 245. The defendant is not guilty of those crimes [*sic*]⁶ if he used force against the other person in lawful self-defense or the defense of another. The defendant acted in lawful self-defense or the defense of another if, one, the defendant reasonably believed that he or someone else was in imminent danger of suffering great bodily injury; two, the defendant reasonably believed that the immediate use of force was necessary to defend against that danger; and three, the defendant used no more force than was reasonably necessary to defend against that danger. Belief in future harm is not sufficient no matter how great or how likely the harm is believed to be. The defendant must have believed that there was imminent danger to himself or someone else. The defendant’s belief must have been reasonable and he must have acted in that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense or defense of another.

“When deciding whether the defendant’s beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant’s beliefs were reasonable, the danger does not need to have actually existed. The defendant’s belief that he was threatened may be reasonable even if he

⁶ Although the trial court may have intended to address only the assault charge, self-defense is available to a felon charged with the illegal possession of a firearm, if the possession is momentary. (*People v. Martin* (2001) 25 Cal.4th 1180, 1191-1192; *People v. King* (1978) 22 Cal.3d 12, 15; see former § 12021, subd. (h).) The jury was instructed with CALCRIM No. 2510 about this principle. The same is also true with respect to the charge of illegally possessing ammunition (former § 12316, subd. (d)), and the jury was so instructed with CALCRIM No. 2591.

relied on information which was not true. However, the defendant must have actually and reasonably believed that the information was true.

“If you find that Jack Johnson threatened or harmed the defendant or others in the past, you may consider that information deciding whether the defendant’s conduct and beliefs were reasonable. If you find that the defendant knew that Jack Johnson had threatened or harmed others in the past, you may consider that information in deciding whether the defendant’s conduct and beliefs were reasonable. Someone who has been threatened or harmed by a person in the past is justified in acting more quickly for taking greater self-defense measures against that person.

“A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself, if reasonably necessary, to pursue an assailant until the danger of death or great bodily injury has passed. This is so even if the safety could have been achieved by retreating.

“The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense or in defense of another. If the People have not met this burden, you must find the defendant not guilty of Penal Code section 245, assault with a firearm.”

At this point the court instructed with CALCRIM No. 3471 as already quoted. The instructions on self-defense concluded with CALCRIM No. 3472: “A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.”

Defendant’s initial contention is not persuasive. He attacks the absence of a definition of mutual combat while also maintaining that there was no evidence of the required mutual agreement, which meant that the jury did not hear about a pre-arrangement to fight when there was no evidence of such an arrangement. In other words, defendant is attacking the omission of the instruction that could have had no application to the case. If the factual predicate of CALCRIM No. 3471 was absent, the jury would logically apply the less restrictive concept of self-defense embodied in CALCRIM No. 3470. Put another way, if there was no evidence to support the existence

of a mutual combat, we would assume the jury would follow the CALCRIM No. 200 and ignore the instruction dealing with that subject. (*Francis v. Franklin* (1985) 471 U.S. 307, 324-325, fn. 9; *People v. Hovarter* (2008) 44 Cal.4th 983, 1005.)

Defendant's second contention is that the term "initial aggressor" is incomprehensible to the average juror without specific definition. Unlike the concept of "mutual combat" (see fn. 5, *ante*), defendant can point to no authority sustaining him on this point. The concept of "initial aggressor" does not strike us as exceeding the mental competence of average jurors. (*Boyde v. California* (1990) 494 U.S. 370, 380-381; *People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

Defendant argues: "Here, at trial, the evidence was undisputed that Archini initiated a verbal dispute with Johnson and Clasey because Archini found that a chainsaw was missing. However, there was no evidence that Archini fabricated a quarrel as an excuse to provoke Johnson to attack him so he could respond with contrived self-defense. Accordingly, the contrived self-defense instruction [CALCRIM No. 3472] should not have been given." Again, if there was no evidence to support the existence of a contrived fight, we would assume the jury would follow the CALCRIM No. 200 and disregard the instruction addressing it. (*Francis v. Franklin, supra*, 471 U.S. 307, 324-325, fn. 9; *People v. Hovarter, supra*, 44 Cal.4th 993, 1005.)

Defendant further argues: "Moreover, the first aggressor instruction was inadequate because it failed to distinguish between the use of deadly and non-deadly force and the use of verbal and non-verbal aggression." These are either subjects for a separate pinpoint instruction that defendant had to request (*People v. Hughes* (2002) 27 Cal.4th 287, 361), or which are adequately covered by CALCRIM No. 3470.

Defendant's final contention is that "The trial court prejudicially failed to instruct the jury as to Archini's right to use a firearm in self-defense as to the possession of a firearm and possession of ammunition counts." It has already been noted that we cannot determine with assurance whether the jury was told that self-defense would apply to all the charges against defendant except the threat count. (See fn. 6 and accompanying text,

ante.) If this ambiguity is treated as error,⁷ it would not qualify as prejudicial. If the instructions are construed as restricting self-defense to the assault count, the jury's rejection of the defense for that count leaves scant basis for concluding the jury would have accepted self-defense for the possession counts. If there was error, it was harmless. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 835-836.)

The Trial Court Had Jurisdiction To Sentence Defendant For Driving Under The Influence

Defendant's final contention is based on circumstances that are hard to credit. On September 25, 2008, the jury in action No. CR914853 returned its verdict finding defendant "GUILTY of violating section 23152(a) of the California Vehicle Code, driving a vehicle under the influence of an alcoholic beverage or drug or the combination of alcohol or drugs, a misdemeanor, as charged in Count II of the information." Two months later, on December 19, 2008, the prosecutor, Mr. Moffatt, announced to the court: "I'm going to make an oral motion at this time, Your Honor, to dismiss this case, 914593, in the interests of justice. The People cannot prove this case beyond a reasonable doubt." The court then stated: "Okay. For the reasons stated by Mr. Moffatt, case 914583 is dismissed. The defendant is ordered discharged on that case." The minutes for that date recite that "On motion of the District Attorney, per PC 1385, the information in this case is Ordered dismissed and the Defendant is ordered discharged on this case only."

This situation came up when defendant was about to go into an omnibus sentencing hearing, before a judge who had not ordered the dismissal, and a different prosecutor. The prosecutor pointed out that his predecessor probably intended only to dismiss the other counts of the information, the ones on which the jury had been unable

⁷ Defense counsel in closing argument mentioned self-defense only in connection with the assault count. More significantly, the prosecutor told the jury that "self-defense only applies to Count Two [the assault count]. Can't use [it] . . . for . . . Count One, Count Three, or Count Four." We may legitimately consider these arguments in concluding whether the error claimed by defendant occurred. (*People v. Holt* (1997) 15 Cal.4th 619, 699; *People v. Jaspar* (2002) 98 Cal.App.4th 99, 111.)

to reach a decision. Without stating a position, the court continued the matter. At the time of sentencing, there was no further discussion, and no objection by defendant, when he was sentenced to the concurrent term of six months. Defendant’s final contention is that because of the dismissal of “the case” the court lacked jurisdiction to sentence on one of the counts in the case, even if that count had gone to verdict.

The Attorney General points to another part of the record, where the prosecutor who requested the dismissal explained to yet another judge that he—Mr. Moffatt—merely sought dismissal of “the remaining Count, Count One only.” We have no doubt that this was what was intended, but it cannot be reconciled with the minutes. No such reconciliation is necessary, however, because the purported dismissal was ineffective because it does not include the statement of reasons mandated by section 1385. (See *People v. Bonnetta* (2009) 46 Cal.4th 143, 153.) Because the dismissal itself was defective, there can be question of the court lacking sentencing jurisdiction.

DISPOSITION

The judgments of conviction are affirmed.

Richman, J.

We concur:

Kline, P.J.

Haerle, J.