

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LINDSEY SHARELL DEILY,

Defendant and Appellant.

A140964

(San Mateo County  
Super. Ct. No. SC076314A)

This case boils down to a classic swearing contest between two people as to how a physical fight between them transpired, resulting in the conviction of appellant Lindsey Sharell Deily of one count of assault with a deadly weapon (Pen. Code,<sup>1</sup> § 245, subd. (a)) and one count of battery resulting in serious bodily injury (§ 243, subd. (d)). Deily now appeals, claiming the court erroneously instructed the jurors with CALCRIM No. 3472, which informed them that the defendant could not claim self defense if she provoked a fight with the intention of creating an excuse to use force. She claims the evidence did not warrant giving that instruction, and because it may have led the jury erroneously to reject her self-defense claim altogether, she was denied due process and prevented from presenting a defense and receiving a fair trial. We conclude any instructional error was forfeited by failure to object at trial and affirm the convictions.

---

<sup>1</sup> References to statutes are to the Penal Code unless otherwise indicated.

## I. BACKGROUND

### A. Charlie Ly's Testimony

In May 2012, 65-year-old Charlie Ly owned a duplex in San Bruno. He lived in one unit and, in May 2011, rented the other unit to Deily and her four-year-old daughter. Deily received assistance from the Housing Authority of San Mateo County (Housing Authority) in paying her rent. But Ly became dissatisfied with Deily as a tenant and in the spring of 2012 complained to both Deily and the Housing Authority that Deily was behind in her rent, had four or five people living in the apartment when only two were allowed under the lease, and kept two pit bulls there, even though pets were not allowed. With some of his letters, Ly enclosed photographs of alleged lease violations.

By early May 2012 the dispute had developed to the point that the Housing Authority, by letter, authorized Ly to terminate Deily's lease and begin eviction proceedings. Deily agreed to move out on May 31, 2012, but Ly continued to take pictures of what he believed were violations of the lease.

On May 10, 2012, Ly sent another letter to Deily and the Housing Authority warning Deily about the dogs and failure to pay rent. The Housing Authority responded the next day, writing that if Deily continued to violate the terms of the lease, it could affect her ability to receive further housing assistance. Ly believed it was this letter that led to the following events.

After dark on May 28, 2012, Ly returned home in his pickup truck and found a car blocking his driveway. He did not know who was in it. He honked his horn three times to get the car to move out of his way. After the second honk, the driver of the other car "raised the middle finger" at him out of the roof window. After the third honk, the driver's door of the other car opened and Deily stepped out. Two other people, Deily's friends Michelle and Devin, also exited the car.

According to Ly, Deily went to the driver's side door of Ly's truck and said, "You ruined my life. I will kill you. . . . You mother fucker." She reached through the partially opened driver's side window and punched Ly in the face several times with her closed fist. Ly was five foot one or two inches tall and weighed 110 to 115 pounds. Deily was

five foot four inches tall “with shoes on” and weighed 215 to 225 pounds. Deily continued hitting Ly as he tried to raise the truck’s window, and she tried to open the driver’s side door. Ly testified he made no attempt to hit Deily and would never hit a woman. He escaped out of the passenger’s side door. Ly said it was possible Deily sustained injuries when he rolled up the window and he and Deily struggled over the door.

Ly ran across the street and into a neighbor’s garage, hoping for help from four or five people who were sitting in the driveway. Deily pursued him into the garage and hit him on the head. The neighbors ejected both Deily and Ly from the garage because they did not want trouble. Ly then went to the sidewalk and took out his cell phone to call 911, but before the call connected, Deily grabbed his phone and smashed it to the ground. She again hit Ly in the head.

Ly ran through the open door of another neighbor’s house and yelled for help. The house was occupied by Leticia Gomez, her two daughters, Rachel Gomez (age 19) and Natalie Gomez (age 17), her two younger sons (ages 9 and 14), and the children’s father. Ly asked to use the phone to call the police, and Leticia<sup>2</sup> also called 911. According to Ly, as soon as he had made the call, Deily entered the house and again hit him. Leticia asked Ly to go outside and sit in a chair on the porch to wait for the police because the commotion was disturbing her nine-year-old disabled son. As Ly sat there, Deily came onto the porch and hit Ly in the head with her closed fist and kicked him in the chest with the heel of her foot. The chair on which Ly was sitting flipped over and Ly hit his head on the ground. After that, Ly did not remember anything.

When Ly regained consciousness, he was in the emergency room of San Francisco General Hospital. It was the afternoon of the following day. Ly had been admitted to the intensive care unit where he remained for two days. He had suffered trauma to the left side of his face, neck, chest, abdomen, calf, and right wrist, a fractured cheek bone, and a

---

<sup>2</sup> Several witnesses share the last name Gomez. We refer to them by their first names to avoid confusion. No disrespect is intended.

subdural hematoma in his cranium. He remained in the hospital for nine days and suffered continuing pain, lingering memory problems, and impairments to his vision at trial. He had injured his wrist when he fell and had to wear a brace for two to three months.

### **B. Deily's Version of the Events and Ly's Responses**

Deily testified at trial, and her version of the encounter was considerably different. She said Ly had been harassing her and her daughter for some time prior to the incident by taking her daughter's picture "inappropriately" and peering through the skylight of her apartment 10 to 12 times, including while she was dressing. He knocked on her door daily, looked through a dryer vent while Deily was on the toilet, and once tried to break into her daughter's bedroom. She did not request a restraining order against Ly because she "just didn't have time to get down to Redwood City and file" one.

Deily testified that during the day of May 28, she had been at a barbecue with friends and had one beer about 2:00 p.m. She was not intoxicated when she returned home. When Ly pulled up and honked his horn that night, he also took pictures of her daughter and Michelle's five-year-old daughter, who were in their bathing suits. Deily "felt extremely violated," so she went to Ly's truck "[t]o take the camera away from him." She "yanked" open the driver's side door, called Ly a "pervert," grabbed the camera from Ly's hands, and threw it on the ground. Ly denied that Deily was yelling at him about taking photographs of the children when Deily approached his car. He testified he did not have his camera in his truck; it was in his house.

Nonetheless, according to Deily, after she broke his camera, Ly grabbed her hair and slammed the side of her head into the truck's door frame. She punched him with her closed fist on his head. Ly pulled his truck door closed on Deily's hand and laughed as he got out of his truck on the passenger's side. Ly ran across the street and Deily followed him.

Deily testified that, during the time they were in the garage, Ly pulled out his cell phone and again began taking pictures. Deily grabbed the phone and threw it on the ground, and Ly hit her again in the head with a closed fist. After the neighbors across the

street ejected Ly and Deily from the garage, Deily followed Ly into Leticia's house, "ranting" about what Ly had done. Deily testified that, when Leticia pushed Ly out of the front door, he called Deily a liar and threw a bottle at her. It struck her leg. Deily "ran up on the porch and punched" Ly. He grabbed her hair and bent her forward and they both fell to the ground, with Ly on top of Deily. She claimed he "bit . . . [her] boob" and choked her.

Deily got up, turned around, and tried to walk away when she heard Michelle yell, "Lindsey, turn around." Ly had picked up a magazine rack and was swinging it at Deily. Deily reached out and knocked the rack out of his hands. The force of her action "swung [Ly] around," causing him to fall and hit his head on the rim of a tire.

Deily denied ever kicking Ly and denied hitting him in the face 15 times. She claimed to have sustained injuries but did not seek medical assistance. She denied being drunk at the time of the altercation.

On cross-examination, Ly acknowledged that Deily had previously accused him of looking through the skylight into her duplex unit. A San Bruno Police officer testified that she had been dispatched to the duplex a month before the altercation because Deily complained that Ly had peered through her skylight. Ly told the officer that Deily had complained the skylight was leaking and he was attempting to fix it. Deily acknowledged she had asked Ly to fix the skylight. The officer did not believe Ly had committed any crime.

### **C. The Police Testimony about Their Investigation of the Altercation**

When the police arrived after the confrontation on May 28, Deily was hysterical and told the responding officer that Ly had been taking pictures of her kids. Ly, meanwhile, appeared dazed and had swelling on the left side of his face above his left eye. The responding officer called for an ambulance. Another police officer noticed a "strong odor of alcohol" about Deily and her eyes were "slightly bloodshot, red, [and] watery." She was in "[k]ind of a state of disarray and she appeared through her speech and overall physical condition . . . that she . . . had been drinking some alcohol that night." Her shirt was torn and she had some scrapes and marks on her chest, arms and hands.

#### **D. The Neighbors' Testimony Supporting Ly's Version**

Ly's version of the events was supported by Leticia, Rachel and Natalie Gomez, who confirmed that Ly entered their house to call the police on the evening of May 28, 2012. Leticia and Natalie were sitting on the front porch as Ly ran towards the Gomez house, followed by Deily. Ly yelled for Leticia to call the police, but Deily told her not to. Deily was "angry" and "reeked very much of alcohol." Deily accused Ly of taking pictures of her and her kids when they were naked. Leticia called 911. Ly was only in the house long enough to call the police.

After Ly left the house, Natalie saw Deily approach him and push and hit him on his face more than ten times. Ly had not touched Deily. Ly only put his hands up to try to protect his face. Natalie remembered Ly falling into the corner of the porch with Deily on top of him, hitting him. Natalie thought Ly picked up the newspaper rack after Deily cornered him on the porch and was hitting him. Natalie did not see Ly swing the rack at Deily or use it as a weapon. Natalie remembered Ly getting off the porch and walking into the street while Deily continued hitting him. Ly fell near a car and hit his head. At no time did Natalie see Ly hit, kick, touch, or grab the hair of Deily.

Leticia also saw Deily hit Ly with both closed fists more than 15 times. Ly was not fighting back, "[h]e was blocking himself. . . . He was burying himself." Leticia also saw Ly grab a newspaper rack, but he did not swing it at Deily. Leticia testified, "It was pretty traumatizing seeing him not defending himself and her keep on bashing him." Leticia also saw Ly fall near the front tire of a car.

Rachel also saw Ly grab a wooden newspaper rack on the porch. Deily approached Ly and repeatedly hit him on his head with a closed fist. Rachel did not see Ly hit Deily; "[h]is hands were up trying to keep . . . [Deily] from hitting him." Rachel also did not see Ly swing the rack at Deily or use it as a weapon.

#### **E. Suheil Naber's Testimony for the Defense**

Suheil Naber, called by the defense, had lived across the street from Ly's house beginning in 2005. Ly became upset that Naber repaired cars outside his apartment. Naber testified that Ly took pictures of Naber on 50 to 70 occasions, leading Naber to call

the police “at least 38 times.” On April 2, 2007, Naber saw Ly lurking near Naber’s car, which was parked near Naber’s auto body shop. Naber confronted Ly, fearing his vehicle was about to be vandalized. Ly attacked Naber with a metal pipe. Naber slapped Ly, causing Ly to fall down. Naber suffered a cut above his eye, which required three stitches.

#### **F. Prosecution’s Rebuttal Case**

San Bruno Police Officer Colin Page testified that during their interview on June 1, 2012, Deily did not tell him she had destroyed Ly’s digital camera at the beginning of the altercation. Deily did not claim Ly threw a bottle at her, nor did she show Officer Page alleged injuries she received from a bottle.

A videotape of the June 1, 2012, interview was played for the jury. In it Deily did say Ly took pictures of her and the children, and she “just lost it.” She walked to his truck, opened the door, and screamed at him. Ly, she said, reached out and pushed her face into the truck. She then punched him a couple of times. She said she “probably should have left it at that,” but Ly jumped out of the car, and Deily was “so fricken pissed off” that she “went after him.” She said, “I think I went a little too far and hit him too many times.” She claimed Ly tried to hit her with the magazine rack, and estimated that she hit him “about fifteen times.” She said it was “mutual fighting” and claimed to have bruises all over her body. Deily reiterated her claim that Ly had harassed her before the altercation.

The jury also heard an audio recording of some of Deily’s telephone calls to her mother from jail. In one call, Deily said, because of the incident, “they could’ve charged me with DUI they coulda charged me with a hella shit . . . .” She said it was not her intention to seriously injure Ly; she “just wanted to scare him a little bit and make him leave me alone.” She also claimed he hit her first and said, “It is what it is, I beat him up, he fuckin’ deserved it.”

#### **G. The Charges and Judgment**

On August 13, 2012, the district attorney filed an information charging Deily with assault with a deadly weapon (hands) or by means of force likely to produce great bodily

injury<sup>3</sup> (§ 245, subd. (a)(1)) (count 1), battery resulting in serious bodily injury (§ 243, subd. (d)) (count 2), elder abuse (§ 368, subd. (b)(1)) (count 3), dissuading a witness (§ 136.1, subd. (b)(1)) (count 4), and misdemeanor destruction of a wireless communication device with intent to prevent a call for assistance (§ 591.5) (count 5). On counts 1 and 3, the district attorney also alleged that Deily inflicted great bodily injury (§ 12022.7, subds. (a) & (e)).

On September 18, 2013, a jury found Deily guilty of counts 1 and 2, and not guilty of counts 3, 4, and 5. The jury found true that Deily inflicted great bodily injury on count 1. On December 16, 2013, the court sentenced her to the middle term of three years in prison on count 1, stayed the sentence on count 2 under section 654, and stayed the great bodily injury enhancement.

## II. DISCUSSION

The sole issue on appeal concerns the giving of CALCRIM No. 3472, which reads as follows: “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.” Deily claims the instruction was not supported by the evidence and effectively prevented the jury from considering her self-defense claim, thereby depriving her of her Sixth Amendment right to present a defense (*Crane v. Kentucky* (1986) 476 U.S. 683, 690) and her due process right to a fundamentally fair trial (*Lisenba v. California* (1941) 314 U.S. 219, 236; see generally, *People v. Quach* (2004) 116 Cal.App.4th 294, 303 [applying standard of error under *Chapman v. California* (1967) 386 U.S. 18]). Deily does not claim the instruction misstates the law when considered in the abstract. Instead, she claims it was not supported by the evidence. A majority of a panel of the Fourth Appellate District, Division Three recently held the correctness of CALCRIM No. 3472 depends on the particular facts of the case, and especially whether the defendant contrived to use deadly

---

<sup>3</sup> The jury was instructed only on assault by means of force likely to produce great bodily injury and returned its verdict on that theory. (See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1034 [hands do not constitute deadly weapons].)

or nondeadly force.<sup>4</sup> (*People v. Ramirez* (2015) 233 Cal.App.4th 940, 945–950; see *People v. Enraca* (2012) 53 Cal.4th 735, 761 [CALJIC No. 5.55, materially the same as CALCRIM No. 3472, is generally correct]; *People v. Eulian* (2016) 247 Cal.App.4th 1324, 1334 [confirming *Ramirez* has no application where deadly force is not used].) Before we address such a potentially legally complex question—one that divided the *Ramirez* court and is bound up in an inquiry into Deily’s state of mind—we consider the Attorney General’s argument that the claim has been forfeited.

Not only did Deily’s trial counsel fail to object to the giving of CALCRIM No. 3472, she requested it. Thus, the Attorney General contends any error in giving the instruction was either forfeited (see *People v. Frandsen* (2011) 196 Cal.App.4th 266, 278) or was invited error. Without considering invited error, we find the claim was forfeited.

Ordinarily an error in jury instructions is not forfeited by failure to object if the error affected the defendant’s substantial rights. (§§ 1259, 1469.) In this case the Attorney General claims Deily’s substantial rights were not affected, equating that inquiry with a prejudice analysis for state law error, namely whether it is reasonably probable the defendant would have obtained a more favorable result in the absence of the error. (*People v. Arredondo* (1975) 52 Cal.App.3d 973, 978; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249; see *People v. Konow* (2004) 32 Cal.4th 995, 1024–1025 [citing practice with approval]; see generally, Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.). We agree that is the correct mode of analysis here.

To determine whether Deily’s substantial rights were affected, we must therefore consider whether it is reasonably probable a result more favorable to Deily would have

---

<sup>4</sup> As a threshold matter, the majority in *Ramirez* decided that the defendants did not forfeit their claims of error through failure to object in the trial court, even though defense counsel for one defendant had himself requested CALCRIM No. 3472. (*Ramirez, supra*, 233 Cal.App.4th at p. 952.) The *Ramirez* court overlooked counsel’s failure to object and his request for the inappropriate instruction because the error affected the defendants’ “substantial rights.” (§ 1259; *Ramirez, supra*, at p. 949.) Because the evidence in our case was so one-sided, we reach the opposite conclusion.

been achieved had CALCRIM No. 3472 not been given. On this record, we see no prejudice. The evidence was overwhelming that Deily was not entitled to acquittal on grounds of self-defense. There was direct evidence from Ly that Deily was the sole aggressor from start to finish. But even if jurors believed Deily's version that Ly attacked her first, her self-defense claim was doomed by her own conduct thereafter and by her own words. There can be no doubt that Deily quickly became the aggressor, and she did not let up until Ly was disabled. Ly tried to withdraw, but she chased him across the street, into the neighbor's garage, into Leticia's home, all the while hitting him. By her own extrajudicial admission she "went after him" and "beat him up" because he "deserved it." She admitted she "went a little too far," estimating she hit him "fifteen times."

What's more, all of the neighbors who witnessed the fight uniformly described Deily whaling on Ly while he only tried to protect his face and head and begged her to stop hitting him. He wound up in the hospital for nine days. Even if Ly was the initial aggressor, Deily's response went so far beyond what was necessary to repel his aggression that she unquestionably lost her claim of self-defense. An initial aggressor can become the victim of an assault if he (1) tried in good faith to refuse to continue to fight, (2) made his opponent aware that he wanted to stop fighting, (3) by either words or conduct caused the opponent to be aware that he had stopped fighting, and (4) gave his opponent an opportunity to stop fighting. (CALCRIM No. 3471; CALJIC No. 5.54; *People v. Salazar* (2016) 63 Cal.4th 214.) As a result, the right to self-defense does not exist in a static state; it ebbs and flows depending on who does what when. Here, even jurors who believed Ly attacked Deily first must have also believed he had fully withdrawn from any sort of combat before she delivered the rain of blows upon him on Leticia's front porch. By actually running away from Deily, Ly clearly communicated his withdrawal from the hostilities, whatever their genesis.

### **III. CONCLUSION AND DISPOSITION**

Deily was acquitted on three counts. The charges upon which the jury found her guilty were supported by overwhelming evidence. It is virtually certain the jury would

have convicted Deily of those charges even in the absence of the complained-of instruction. We therefore conclude Deily's substantial rights here were not affected by the jury instruction in question, and thus that her sole claim of error here was forfeited by failure to object in the trial court.<sup>5</sup>

The judgment is affirmed.

---

<sup>5</sup> Deily makes a pro forma argument that trial counsel was ineffective for failing to object. Finding no prejudice from the complained-of instruction, we also find no prejudice for purposes of ineffective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [appropriate to consider prejudice first].)

---

Streeter, J.

We concur:

---

Ruvolo, P.J.

---

Rivera, J.