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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS ADAM COX,

Defendant and Appellant.

A142894

(Contra Costa County
Super. Ct. No. 51011691)

Defendant Nicholas Cox appeals from his convictions of shooting a firearm at an occupied building (Pen. Code, § 246)¹ and shooting a firearm from a motor vehicle (Pen. Code, § 12034, subd. (c)).² Defendant challenges both convictions. As to his conviction for shooting at an occupied building, defendant contends the trial court erred by not sua sponte instructing the jury on the lesser included offense of shooting a firearm in a grossly negligent manner (§ 246.3, subd. (a)). We conclude the trial court had no obligation to instruct on the lesser offense because there was no substantial evidence showing he was guilty of that offense but not the greater offense. As to both convictions, he contends the trial court erred by refusing to instruct the jury on imperfect self-defense. We conclude the court did not err. We therefore affirm.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² After defendant was charged, section 12034 was repealed and recodified without substantive change as section 26100. (Stats. 2010, ch. 711, § 6, p. 4207, operative Jan. 1, 2012.)

BACKGROUND

On the evening of March 7, 2010, defendant was at Vinnie's Bar and Grill (the "bar") in Concord. At approximately 8:30 p.m., he was standing outside in front of the business and got into an argument with two men from Afghanistan. One of the men displayed a black handgun in his waistband and told defendant he should leave. Beau Baker, who was smoking a cigarette outside the bar, witnessed the argument. After the exchange ended, Baker and defendant had a brief, uneventful conversation, and defendant went inside the bar. Defendant left a short time later.

At approximately 10:30 p.m., defendant drove past the front of the bar and fired several shots with a handgun. Baker, who was again standing in front of the business, was struck in the neck with a bullet.³

Later, a forensic specialist with the police department investigating the shooting found two more bullets in a window frame of the bar that likely came from the gun defendant fired. The officer also found a separate bullet hole in a window, but did not find the bullet.

Witnesses gave differing versions of events. The details of their testimony are largely irrelevant to this appeal, so we describe them only briefly.

Defendant said he drove in front of the bar to pick up his girlfriend. As he approached, he saw one of the Afghan men he had argued with earlier. The man pointed a handgun at him, and in response, he reached under the car seat to grab a handgun. Defendant then heard glass explode inside the car and realized the man was shooting at him. Defendant returned fire and drove away. He did not see Baker in front of the bar and had no intention of shooting Baker.

Baker stated he saw defendant drive to the front of the building and extend his right arm. Baker saw a flash and tried to duck out of the way, but was hit. He did not see an Afghan man shooting at defendant.

³ Although Baker survived the shooting, he was temporarily rendered a paraplegic, and at the time of trial, used a cane when walking.

Other prosecution witnesses also testified they did not see an Afghan man standing in front of the bar at the time of the shooting.

Defendant went to trial on a number of charges related to the shooting at Vinnie's, including attempted murder of Baker (§§ 187, subd. (a), 664, subd. (a)), shooting at an occupied building (§ 246), shooting from a motor vehicle (§ 12034, subd. (c)), and violent felon in possession of a firearm (§ 12021.1). The jury deadlocked on the attempted murder count, but convicted him of the other three enumerated charges. The jury also found true certain enhancements, and the trial court later found true that defendant was convicted of robbery in 2008. After the court declared a mistrial on the attempted murder charge, it dismissed it on the district attorney's request. The court sentenced defendant on the remaining convictions to an aggregate term of 40 years to life.⁴ This included a determinate term of 15 years, plus 25 years to life pursuant to section 12022.53, subdivision (d), which provides that any person who, in committing a felony for discharging a firearm at a building or discharging a firearm from a motor vehicle, "proximately causes great bodily injury . . . to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

DISCUSSION

Lesser Included Offense

Defendant first contends the trial court erred by not instructing the jury on shooting a firearm in a grossly negligent manner (§ 246.3) as a lesser included offense of shooting at an occupied building (§ 246). While defendant concedes he never requested such an instruction, he argues the trial court was required to give it sua sponte.

⁴ Defendant was also charged with additional counts of attempted murder, shooting at an occupied building, and violent felon in possession of a firearm based on a separate shooting that occurred the morning after the bar shooting. The jury found him not guilty of attempted murder and guilty of the firearm possession charge. It deadlocked on shooting at an occupied building, and that count was later dismissed. These three additional counts are not at issue on appeal. Nor do the facts related to them appear to have any relevance to this appeal.

“[T]he sua sponte duty to instruct on a lesser included offense arises if there is substantial evidence the defendant is guilty of the lesser offense, but not the charged offense.” (*People v. Breverman* (1998) 19 Cal.4th 142, 177.) “The court must, on its own initiative, instruct the jury on lesser included offenses when there is substantial evidence raising a question as to whether all the elements of a charged offense are present [citations] and when there is substantial evidence that the defendant committed the lesser included offense, which, if accepted by the trier of fact, would exculpate the defendant from guilt of the greater offense.” (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

Section 246 states, in pertinent part: “Any person who shall maliciously and willfully discharge a firearm at an . . . occupied building . . . is guilty of a felony.” Section 246.3, in turn, makes it unlawful to “willfully discharge[] a firearm in a grossly negligent manner which could result in injury or death.” (§ 246.3, subd. (a).)

In *People v. Ramirez* (2009) 45 Cal.4th 980, 990 (*Ramirez*), the Supreme Court held section 246.3 is a lesser included offense of section 246. The court explained: “The high probability of human death or personal injury in section 246 is similar to, although greater than, the formulation of likelihood in section 246.3[, subdivision] (a), which requires that injury or death ‘could result.’ The only other difference between the two, and the basis for the more serious treatment of a section 246 offense, is that the greater offense requires that an inhabited dwelling or other specified object be within the defendant’s firing range.” (*Ramirez*, at p. 990.)

A trial court has no obligation to instruct on a lesser included offense, however, where the evidence, if credited, is such that the defendant necessarily committed the charged, greater offense and cannot have committed only the lesser included offense. (See *People v. Moyer* (2009) 47 Cal.4th 537, 548.) Defendant does not dispute his actions resulted in a high probability of death or personal injury. The evidence also indisputably showed an occupied building was within his firing range, Baker was standing in front of it when he was shot, defendant was trying to shoot at a man standing in front of the building, and the two bullets that likely came from defendant’s gun were found in the window frame. In short, there was no substantial evidence defendant was guilty of the

lesser offense of shooting in a grossly negligent manner in violation of section 246.3, but not of the charged, greater offense of shooting at an occupied building in violation of section 246.

Defendant argues the intent requirements of sections 246 and 246.3 are different because section 246 requires a person to act “maliciously and willfully” while section 246.3 only requires a defendant to act “willfully.” He further contends there was substantial evidence he did not act maliciously because there was testimony he fired the gun in self defense. This argument fails because “[a]lthough the mens rea requirements are somewhat differently described [in sections 246 and 246.3, subd. (a)], both are general intent crimes.” (*Ramirez, supra*, 45 Cal.4th at p. 990; see also *People v. Overman* (2005) 126 Cal.App.4th 1344, 1357, fn. 5 (*Overman*) [“As used in section 246, the terms ‘maliciously’ and ‘willfully’ are expressions of the statute’s general intent requirement.”].)

As general intent crimes, the required mental state for each “consists of an intent to do the act that causes the harm.” (*Overman, supra*, 126 Cal.App.4th at p. 1361.) Here, there is no dispute defendant intended do an act that caused harm—he admitted to intentionally shooting at a person standing in front of the occupied bar.

That the jury deadlocked on the attempted murder charge as to Baker (and the lesser included charges as to that crime) does not advance defendant’s argument that the trial court erred in failing to instruct on the lesser included offense of shooting in a grossly negligent manner. According to defendant, the jury’s indecision on the attempted murder count “suggests that the jury had doubts about whether [defendant] intended to shoot Baker.” But whether defendant intended to shoot Baker was not the salient issue as to whether he shot at an occupied building. Rather, as discussed above, that crime and the lesser crime of shooting in a grossly negligent manner were general intent crimes, and the evidence overwhelmingly establishes that defendant intended to shoot towards the building.

In sum, given the state of the evidence, the trial court was not required to sua sponte instruct the jury on shooting a firearm in a grossly negligent manner.⁵

Imperfect Self-Defense

Defendant also contends the trial court erred by not instructing the jury on imperfect self-defense for the charges of shooting at an occupied building and shooting from a motor vehicle.⁶ The trial court instructed the jury on imperfect self-defense for the attempted murder count, and during deliberations, the jury asked whether imperfect self-defense also applied to the two counts just referenced. The trial court responded the defense did not apply.

“Imperfect self-defense is the killing of another human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury. [Citation.] Such a killing is deemed to be without malice and thus cannot be murder.” (*People v. Booker* (2011) 51 Cal.4th 141, 182.) Imperfect self-defense is “not a true defense; rather, it is a shorthand description of one form of voluntary manslaughter.” (*People v. Barton* (1995) 12 Cal.4th 186, 200.)

Several courts have held imperfect self-defense is limited to murder charges and does not apply to shooting at an occupied building or shooting from a motor vehicle. (See *People v. Iraheta* (2014) 227 Cal.App.4th 611, 624 (*Iraheta*) [imperfect self-defense does not apply to section 246]; *People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1171 (*Rodarte*) [imperfect self-defense does not apply to shooting from a motor vehicle]; *People v. Vallejo* (2013) 214 Cal.App.4th 1033, 1041 [same].)

⁵ We therefore need not, and do not, address defendant’s assertion his due process and fair trial rights were implicated by the trial court’s failure to instruct on the lesser included offense. In any case, *People v. Breverman*, *supra*, 19 Cal.4th at pp. 177–178, holds failure to instruct on a lesser included offense in a noncapital case does not amount to constitutional error.

⁶ Former section 12034, now section 26100, states that “[a]ny person who willfully and maliciously discharges a firearm from a motor vehicle at another person other than an occupant of a motor vehicle is guilty of a felony.” (§ 26100, subd. (c).)

We agree imperfect self-defense does not apply to these crimes. “The unreasonable self-defense theory for murder is based on the principle that a person who believes in the need for self-defense ‘lacks the crucial characteristic of “malice aforethought” [which is the] awareness that one’s conduct does not conform to the expectations of society.’ ” (*Rodarte, supra*, 223 Cal.App.4th at p. 1171.) However, neither shooting at an occupied building nor shooting from a motor vehicle has a malice aforethought requirement. (§ 246.) It would make no sense to apply a principle intended to negate malice aforethought to crimes not requiring malice aforethought. (*Rodarte, supra*, 223 Cal.App.4th at p. 1171.)

Despite the now fairly well-developed authority on this point, defendant asks us to conclude otherwise based on *People v. McKelvy* (1987) 194 Cal.App.3d 694 (*McKelvy*), in which the lead opinion of a single justice concluded imperfect self-defense applied to mayhem, which is also a general intent crime. (*Id.* at p. 704.) The opinion explained: “Although the ‘malice’ required for the offense of mayhem differs from the ‘malice aforethought’ [required for murder], it is equally true in both cases that the requisite state of mind is inconsistent with a genuine belief in the need for self-defense.” (*Id.* at p. 702.) The lead opinion concluded, however, the trial court had not erred in failing to sua sponte instruct on the defense because the doctrine was undeveloped at the time. (*Id.* at pp. 706–707.) The two other members of the panel concurred “in the judgment only” and saw “no need for the discussion in the lead opinion regarding the sua sponte requirement to instruct with regard to this defense.” (*Id.* at pp. 707–708.)

We decline to follow *McKelvy* and cannot improve on the reasons for declining to do so given in *Iraheta*, from which we quote: “*McKelvy* is not persuasive for several reasons. First, the lead opinion did not command a majority for its conclusion because the two nonauthoring justices concurred only in the result. (See *People v. Vallejo*[, *supra*,] 214 Cal.App.4th 1033, 1040 [the *McKelvy* lead opinion ‘is not binding authority’]; *People v. Quintero* [(2006)] 135 Cal.App.4th [1152,] 1166; *People v. Sekona* [(1994)] 27 Cal.App.4th [443,] 451.) Second, the lead opinion’s conclusion regarding the imperfect self-defense instruction ‘was dictum, because the court affirmed the

defendant's conviction despite the absence of [an imperfect self-defense] instruction.' (*People v. Hayes* (2004) 120 Cal.App.4th 796, 801–802) Third, no other reported decision has followed *McKelvy*, and its reasoning 'has been uniformly rejected.' (*People v. Rodarte, supra*, 223 Cal.App.4th at p. 1169; see *People v. Szadzewicz* (2008) 161 Cal.App.4th 823, 835.) Indeed, appellate courts since *McKelvy* have held imperfect self-defense instructions are inapplicable or need not be given sua sponte when the defendant is charged with mayhem." (*Iraheta, supra*, 227 Cal.App.4th at pp. 621–622.)

We therefore join the current view that imperfect self-defense is not applicable to general intent crimes and conclude the trial court did not err in failing to instruct on the defense as to the crimes of shooting at an occupied building and shooting from a motor vehicle.

DISPOSITION

The judgment is affirmed.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.