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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JODIE D. DANIELS,

Defendant and Appellant.

A143869

(San Francisco City and County
Super. Ct. No. 11001419)

Terry Turner robbed Jodie Daniels of a laptop computer. Daniels later returned to the area of the robbery with a pistol, located and pursued Turner, shot him several times and ran away. A jury convicted Daniels of second degree murder and possession of a firearm by a felon, and the court sentenced him to 42 years to life in prison. Daniels argues the court erred in refusing to instruct the jury on complete self-defense. We find no substantial evidence to support such an instruction. We also reject Daniels's argument that his sentence was cruel or unusual. The People concede the court erred in allowing amendment of the information to add sentence enhancement allegations after discharge of the jury and in imposing incorrect restitution and parole revocation fines. We therefore direct the court to modify the judgment accordingly.

I. BACKGROUND

Daniels was charged by information with murder (Pen. Code, § 187, subd. (a))¹ and possession of a firearm by a felon (former § 12021, subd. (a)(1); see § 29800,

¹ Undesignated statutory references are to the Penal Code.

subd. (a)(1)). It was alleged that Daniels personally used and personally and intentionally discharged a firearm in the commission of the murder. (§§ 12022.5, subd. (a), 12022.53, subd. (d).) The following evidence was presented at trial.

On January 13, 2011, Daniels was chatting with acquaintances in the vicinity of Polk and Geary Streets in San Francisco. He carried a laptop in a computer bag that was hanging from his shoulder. As he walked toward a pizza shop, Turner and another man crossed the street, approached Daniels from behind, knocked him to the ground, and took the computer. Daniels ran off but returned about 30 minutes later wearing different clothes: a camouflage coat, a black hat, and black gloves. Acting “pretty upset,” he asked an acquaintance if he had seen the robbers and said “when he catch them he was going to kill his ass.”

Shortly thereafter, Turner ran into a coffee shop near the intersection of Polk and Geary, followed by Daniels. Turner was carrying Daniels’s computer bag, and Daniels was holding a gun. Surveillance video recordings of the incident from inside the coffee shop, which were played for the jury, showed the following events. Turner ran from the front room of the coffee shop into the back room. He looked behind him and then ran to a set of table and chairs. Daniels followed Turner into the back room with his arm extended and gun pointed at Turner. Turner picked up a chair and held it in front of him as he moved toward a vestibule. Daniels kept his gun trained on Turner. Just before Turner reached the vestibule, he threw the chair at Daniels. Daniels retreated slightly then pursued Turner into the vestibule with his arm extended and apparently fired a shot at Turner. Turner staggered out of the vestibule and fell onto the floor of the back room and Daniels shot Turner from where he was standing. Daniels walked up to Turner, who was writhing on the floor, took the computer bag from him, and shot him twice in the head at close range. As he exited the room, Daniels turned and shot Turner again. Daniels left, with Turner lying motionless on the floor.

Five bullets were recovered from Turner’s body. Five cartridge casings, a deformed bullet, and an unfired cartridge were found in the coffee shop’s back room, all

of which had markings from the same .40 caliber Smith and Wesson gun. No weapons were found on or in the vicinity of Turner's body.

A video recording of a police interview with Daniels was played for the jury. Daniels said he had the impression, when Turner first robbed him, that Turner was reaching into his clothes to get a gun. Daniels was armed at that time, but he walked away to avoid a shootout and because he was dazed from Turner's punch. He walked away in the direction of his home, and he returned to the area about a half hour later. Daniels walked toward Van Ness Avenue to get a bus, thinking Turner would no longer be in the area, but he was prepared to get his computer bag back if he saw Turner. When he neared the coffee shop, he saw Turner just in front of him. Turner reached for something or tried to unzip the computer bag, and Daniels feared for his life. Daniels put his hand on his gun and Turner ran into the coffee shop. Daniels ran in after him. When Turner seemed to be reaching for something, Daniels shot at him. He then grabbed his computer bag and ran out. He ran down back streets and abandoned his gun, computer bag, jacket, pants and shoes. When an officer said the video recording showed Turner holding up a chair to defend himself, Daniels said, "I probably bust [(shot)] when I came in the door and I don't know. I let out a few shots." Later he said Turner "probably did hold up a chair. [¶] . . . [¶] Probably threw a chair at me, I don't know. [¶] . . . [¶] I remember him picking up something."

Francis Abueg, Ph.D., a psychologist who was qualified as an expert on psychological disorders including posttraumatic stress disorder (PTSD), evaluated Daniels for PTSD at the defense's request. He testified that Daniels "absolutely did suffer" from moderate PTSD. In Daniels's case, the primary trigger was identifying the burnt corpse of his mother when he was 14 years old and subsequent triggers included being shot at, robbed, and beaten by gang members, as well as losing a one-month-old infant son to sudden infant death syndrome. Abueg testified that PTSD is a "problem of intrusiveness and avoidance . . . that gets in the way of everyday functioning . . ." PTSD patients often suffer from hyperarousal or serious distortions in thinking or mood, and they perceive danger differently from other people. There is "an extreme narrowing of

perception and exaggerating [of] the potential threat. . . . Their whole physiology is ready for flight or fight.” In Abueg’s opinion, the robbery of Daniels’s computer bag activated his PTSD symptoms, including the narrowing of perception and inability to deliberate or premeditate one’s own behavior.

Methamphetamine was found in Turner’s blood and urine, and Turner had “track marks” consistent with intravenous drug use over a period of time. An expert on toxicology testified that methamphetamine can cause hallucinations, aggression, and superhuman strength: “[P]eople who are high on methamphetamine, sometimes it takes five or six police officers to actually restrain them or subdue them because they don’t feel pain . . . and they also have no knowledge of how much strength they have.”

The jury was instructed on first and second degree murder and provocation and imperfect self-defense theories of voluntary manslaughter. The prosecutor argued Daniels committed premeditated and deliberate first degree murder, citing evidence that Daniels left the area after Turner took his computer bag, sat and thought about the situation, made some phone calls, and returned saying he was going to “kill [Turner’s] ass.” “He comes back for revenge,” she argued. The prosecutor ridiculed Daniels’s theory of self-defense: “Now, the defendant in his interview says, oh, he was reaching for something. . . . [¶] Really? . . . [Turner]’s running because he doesn’t have a gun, and he’s unarmed. . . . [¶] . . . [¶] You saw him running into the back, and he was running for his life. . . . And you see the defendant pointing the gun right at him. Right at him. And he picks up a chair in this futile attempt to try to get the aim off of him and throws the chair at the defendant and manages to make it into a vestibule. [¶] And the defendant just keeps firing and firing and firing and firing at him at close range. And [Turner] actually manages to get out of the vestibule. And he runs out of the vestibule, but he falls. He’s been shot several times no doubt. [¶] And what do you see happen next in this video? You see the defendant go right up to him and just pull the trigger right in his face, while he’s down, and pull that bag away from him. And then what does he do? He turns around and shoots him again.”

The defense argued that Daniels's state of mind was inconsistent with deliberation and premeditation or malice aforethought. The methamphetamine found in Turner's system was consistent with Daniels's statement that Turner was acting "violently, threatening, angry, frightening," in defense counsel's words. Moreover, Daniels suffered from PTSD, which distorted the way he perceived and reacted to danger. Inside the coffee shop, Turner "throws a chair, and this happens so fast. . . . [S]omeone with [PTSD] in these circumstances, what would be going on, . . . you do what needs to be done to get away from the danger." Shots were not fired until after the chair was thrown. In his interview with police, Daniels is "a scared young man." The defense argued that Daniels acted in the heat of passion following provocation, or in the alternative in imperfect self-defense: Daniels "actually believed he was in [im]minent danger of being killed or suffering great bodily injury, and that's where [PTSD] comes in. That's where that heightened perception of danger comes in. . . . Daniels actually believed that the immediate use of deadly force was necessary to defend against that danger."

The jury found Daniels not guilty of first degree murder and guilty of second degree murder. It found that in committing the murder Daniels personally and intentionally discharged a firearm, causing great bodily injury, and it convicted him of possession of a firearm by a felon. Following the jury verdict and discharge of the jury, the court allowed the prosecutor to amend the information to allege that Daniels had served three prior prison terms within the meaning of section 667.5, subdivision (b), and found the allegations true. The court sentenced Daniels to 15 years on the murder conviction plus 25 years to life for the firearm use enhancement, a concurrent two-year term for the firearm possession conviction, and two consecutive one-year terms for two of the prior prison terms, having stricken the third. The total sentence was 42 years to life imprisonment. The court also ordered Daniels to pay \$5,227.52 in victim restitution, \$600 in restitution fines, \$600 in suspended parole revocation fines, and other assessments.

II. DISCUSSION

A. *Failure to Instruct on Complete Self-Defense*

Daniels argues the trial court erred by refusing to instruct the jury on complete self-defense. The People argue the requested instruction was not supported by substantial evidence. We conclude there was no error and, in any event, any error was nonprejudicial.

1. *Background*

Explaining its denial of Daniels's request for a jury instruction on complete self-defense, the trial court said: "I looked at it first with regard to the initial incident, and I think that the time lag between [the two], it does not fly. . . . [¶] Also, I looked at it for when Mr. Daniels came upon Mr. Turner the second time on the street. . . . [G]iven the fact that it was clear[] from the evidence that Mr. Turner turned and ran and clearly was seeking shelter into a cafe and was followed by Mr. Daniels with a gun, I don't see it there. And . . . there's no testimony that he was armed. The videotape is clear. Mr. Turner was not carrying a weapon. [¶] Then I even looked at it from the third point which is when they get into the cafe. Mr. Turner picking up the chair, but at that point it's clear he's picking up the chair to protect himself from gunshots, and a chair versus a gun by no stretch is going to equal self-defense."

Defense counsel argued, "Daniels . . . [said] that he believed Terry Turner was armed. He believed he was armed with a gun. This man had threatened to kill him. He pursued him. He didn't start firing until Mr. Turner picked up the chair. [¶] I think it's a factual matter for the jury to decide whether that was defensive or offensive, the picking up the chair. That based on the previous threats, that [Daniels] had a right to try and retrieve his property, obviously not to necessarily use lethal force to get his property back, but he had the right to use force in self-defense and if he believed his life was in danger." The court responded, "[T]here was no testimony about Mr. Turner being armed. What we have was . . . statements by Mr. Daniels in the interview tape, that is not sworn testimony, that he thought he was armed. [¶] However, when pressed, he said, well, I'm not sure it was a gun, because they pressed him. They said did you see a gun several

times, and . . . he said, I'm not sure it was a gun. Under those circumstances, I just can't see a self-defense instruction.”

2. *Analysis*

A trial court must instruct a jury on complete self-defense if the defendant requests the instruction and substantial evidence supports the instruction. (*People v. Elize* (1999) 71 Cal.App.4th 605, 615.) “Whether or not the evidence provides the necessary support for [the instruction] is a question of law” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145), a question we review de novo (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800). “Although a trial court should not measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, the court need not give the requested instruction where the supporting evidence is minimal and insubstantial. Doubts as to the sufficiency of the evidence should be resolved in the accused’s favor.” (*Barnett*, at p. 1145, fn. omitted.)

“ ‘To justify an act of self-defense . . . , the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him. [Citation.]’ [Citation.] The threat of bodily injury must be imminent [citation], and ‘. . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances. [Citation.]’ [Citations.] [¶] [A]lthough the test is objective, reasonableness is determined from the point of view of a reasonable person in the defendant’s position. The jury must consider all the facts and circumstances it might ‘ ‘expect[] to operate on [defendant’s] mind’ ” (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064–1065.) The prosecution has the burden to prove beyond a reasonable doubt that the defendant did not act in self-defense. (*People v. Lee* (2005) 131 Cal.App.4th 1413, 1429.)

By way of comparison, the imperfect self-defense theory of voluntary manslaughter applies when “a defendant killed another person because the defendant *actually*, but unreasonably, believed he was in imminent danger of death or great bodily injury.” (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) Proof that a defendant acted in imperfect self-defense negates the malice element of murder. (*Ibid.*) The prosecution bears the burden of proving beyond a reasonable doubt that the defendant acted with

malice, i.e., that he did not act in imperfect self-defense. (See *People v. Rios* (2000) 23 Cal.4th 450, 458.)

Having reviewed the surveillance video taken inside the coffee shop, we agree with the trial court that there was no substantial evidence of complete self-defense in this case. The video clearly shows Turner's flight *away* from Daniels and Daniels's *pursuit* of Turner through both the front and the back rooms of the coffee shop. If Daniels believed that Turner reached for a weapon *outside* the coffee shop, he could have avoided any imminent risk of harm from that weapon by withdrawing rather than pursuing Turner through the coffee shop. Rather than exhibiting any aggression toward Daniels, Turner engaged in flight and retreat. Turner kept trying to escape from Daniels and never drew a gun. Daniels, on the other hand, kept his outstretched arm and gun trained on Turner as he moved around the back room. Although Turner at one point picked up a chair and threw it at Daniels, he then retreated into a vestibule. After a brief pause, Daniels walked up to Turner in the vestibule and started firing. Turner staggered out of the vestibule and fell to the floor, and Daniels again paused and fired at Turner. He then walked up to and shot Turner twice at close range. Finally, as he was exiting the back room, Daniels turned and fired at Turner once again. Nothing in this scenario supports an inference that Daniels was acting in the actual belief that he faced an imminent threat of death or great bodily injury and that he was required to use lethal force to defend himself. The trial court did not err in refusing to give the instruction.

The cases cited by Daniels are distinguishable. Arguing Turner was the "initial aggressor," Daniels cites *People v. Dawson* (1948) 88 Cal.App.2d 85 as an analogous case. In *Dawson*, however, the defendant had reasonable grounds to believe the victim was burglarizing the building he was responsible for, and the victim made a "leaping advance toward" the defendant just before the defendant shot him. (*Id.* at p. 91.) Here, a period of physical separation and a significant lapse in time occurred between Turner's robbery of Daniels and the shooting. At the time Daniels fired his gun, Turner was primarily retreating from Daniels. Noting that Turner was under the influence of methamphetamine at the time of the shooting, Daniels also cites *People v. Villanueva*

(2008) 169 Cal.App.4th 41 as an analogous case. In *Villanueva*, however, the victim was not only intoxicated, but also had previously threatened the defendant, seemed to reach for a weapon, and stepped on his car's accelerator in an apparent attempt to run the defendant over. (*Id.* at p. 52.) Here, Turner was unarmed, fled from Daniels, and Daniels continuously pursued him.

In any event, any error in refusing the complete self-defense instruction in this case was harmless, even assuming the applicable standard of review is harmless beyond a reasonable doubt. (See *People v. Eid* (2010) 187 Cal.App.4th 859, 883 [prejudice test for failure to provide a requested defense instruction is unsettled].) Because the jury convicted Daniels of murder, it necessarily found beyond a reasonable doubt that Daniels did not act in *imperfect* self-defense. That is, the jury found either that Daniels did not *actually* believe he faced an imminent danger of death or bodily injury, or it found that Daniels's actual fear was not of an *imminent danger of death or bodily injury*. Either of those findings would have also precluded a verdict of complete self-defense.

B. *Cruel or Unusual Punishment*

Daniels argues his sentence of 42 years to life in prison is unconstitutionally cruel or unusual punishment. He relies on dissenting and concurring opinions written by former Supreme Court Justice Stanley Mosk. (See *People v. Hicks* (1993) 6 Cal.4th 784, 797 (dis. opn. of Mosk, J.) [when a sentence “cannot possibly be completed in the defendant’s lifetime, [it] makes a mockery of the law and amounts to cruel or unusual punishment”; commenting on 83-year sentence for burglary and sex offenses on a single occasion]; (*People v. Deloza* (1998) 18 Cal.4th 585, 600 (conc. opn. of Mosk, J.) [111-year sentence “is impossible for a human being to serve, and therefore violates” the state and federal constitutions; commenting on sentence for armed robbery of multiple victims].) Daniels cites no binding authority that supports his position and no authority involving homicide. We reject the argument.

C. *Restitution and Parole Revocation Fines*

Daniels argues the trial court erred by imposing the minimum restitution fine in effect at the time of sentencing rather than the lower minimum in effect at the time of his

offense. The People concede the error but argue the claim is forfeited because Daniels failed to raise a timely objection in the trial court. Because the relevant facts are undisputed, this argument presents a question of law that we review de novo. (*Ghirardo v. Antonioli, supra*, 8 Cal.4th at pp. 799–800.) We conclude defense counsel’s failure to object amounted to ineffective assistance of counsel and order the fine reduced.

At sentencing, the court explained that it would impose “the \$300 minimum restitution fine on each count, for a total of \$600” (§ 1202.4), along with equivalent parole revocation fines (§ 1202.45). At the time Daniels committed the offense, the minimum restitution fine was \$200. (Former § 1202.4, subd. (b)(1), as amended by Stats. 2010, ch. 351, § 9.) The People concede that retroactive imposition of an increase in the minimum restitution fine is an ex post facto violation. (*People v. Saelee* (1995) 35 Cal.App.4th 27, 30.) From this concession, we infer that the People agree the trial court intended to impose the minimum restitution fines authorized by law and would have imposed \$200 rather than \$300 restitution fines (and equivalent parole revocation fines) had it recognized which version of the statute applied in Daniels’s case.

Daniels argues the claim is not subject to forfeiture because the court imposed an unauthorized sentence, but that principle is inapplicable on the facts of this case. Generally, “ ‘claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices’ raised for the first time on appeal are not subject to review. [Citations.] [¶] [The Supreme Court has], however, created a narrow exception to the waiver rule for ‘ “unauthorized sentences” or sentences entered in “excess of jurisdiction.” ’ [Citation.] Because these sentences ‘could not lawfully be imposed under any circumstance in the particular case’ [citation], they are reviewable ‘regardless of whether an objection or argument was raised in the trial and/or reviewing court.’ ” (*People v. Smith* (2001) 24 Cal.4th 849, 852.) Here, a \$300 restitution fine was a sentence that could be lawfully imposed under the circumstances of this case because the law in effect at the time Daniels committed his offenses authorized any fine between \$200 and \$10,000. (Former § 1202.4, subd. (b)(1), as amended by Stats. 2010, ch. 351, § 9.) Therefore, the unauthorized sentence exception is inapplicable. (Cf. *People v.*

Saelee, supra, 35 Cal.App.4th at pp. 30–31 [imposition of minimum restitution fine that was higher under law at time of sentencing was an unauthorized sentence because no proof was proffered of defendant’s ability to pay a higher fine, as required by law at the time of offense].)

Daniels also argues his trial counsel’s failure to object to the fine amounts constituted ineffective assistance of counsel. “On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation.” (See *People v. Mai* (2013) 57 Cal.4th 986, 1009.) As noted *ante*, the People effectively concede the trial court intended to impose the minimum restitution fine authorized by law. Thus, we agree defense counsel’s failure to alert the court to the lower minimum in effect at the time of Daniels’s offense was prejudicial deficient performance—there was no conceivable tactical reason not to raise the objection, and the trial court would have reduced the fine if the objection had been raised. Accordingly, we shall order the restitution fines and parallel parole revocation fines reduced to \$200 each.

D. *Prior Conviction Enhancements*

Daniels argues the trial court erred by allowing the prosecutor to amend the information to add prior conviction allegations after the jury had already been discharged. The People concede error. “[I]n the absence of a defendant’s forfeiture or waiver, section 1025, subdivision (b) requires that the same jury that decided the issue of a defendant’s guilt ‘shall’ also determine the truth of alleged prior convictions. Because a jury cannot determine the truth of the prior conviction allegations once it has been discharged [citation], it follows that the information may not be amended to add prior conviction allegations after the jury has been discharged.” (*People v. Tindall* (2000) 24 Cal.4th 767, 782.) Although Daniels did not raise an objection or make an express waiver of this right in the trial court, the People concede that defense counsel’s failure to object amounted to ineffective assistance. We accept the People’s concession and direct

the trial court to strike the two one-year sentence enhancements imposed pursuant to section 667.5, subdivision (b).

III. DISPOSITION

The judgment is modified to reduce the restitution and parole revocation fines to \$200 each and to strike the two one-year enhancements imposed pursuant to section 667.5, subdivision (b). In all other respects, the judgment is affirmed. The superior court clerk shall correct the abstract of judgment and forward the corrected abstract to the Department of Corrections and Rehabilitation.

BRUINIERS, J.

WE CONCUR:

SIMONS, Acting P. J.

NEEDHAM, J.