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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.

SANTINO R. AVILES,

Defendant and Appellant.

A145390

(San Francisco City and County
Super. Ct. Nos. 14014605, 223199)

Defendant Santino R. Aviles appeals from a judgment of conviction of simple assault and battery (Pen. Code, §§ 240, 242) and burglary (§ 459).¹ He maintains the trial court erred in failing to instruct the jury on self-defense as to the assault and battery charges and in failing to stay sentence on one of those two convictions. As we explain, the trial court did not err in the instructions. However, as the People acknowledge, it should have stayed sentence on one of the convictions under section 654.

BACKGROUND

Defendant's version of events was as follows: He thought the earth was going to explode imminently and a spaceship on an apartment building's roof was his ticket to safety. So he snuck into the building and climbed a staircase to the top. Once there, he found nowhere to go, heard someone coming after him, retreated downstairs and climbed through an open hallway window onto a second-floor fire escape. He spotted another open window, which led him into the victim's apartment. Once inside, he sat in a chair, grabbed a moment of quiet, and then fell asleep on the floor. He awoke confused. He

¹ All further statutory references are to the Penal Code.

went through desk drawers in the room looking for things to take with him on the spaceship and packed some other things, including some of his clothes and things that were not his, into a black backpack in the room. At this point, the victim heard him, entered the room, and grabbed him. The victim was choking him, pushing him down, and punching him. So he defended himself. The victim's fiancée was also on the scene and screaming. She came into the room and hit him with a bat. Then the police arrived.

The victim recounted events somewhat differently. He heard a noise in the front room of his apartment and discovered the door to the room had been locked from the inside. After breaking the door open, the victim saw defendant trying to leave through the open window with his fiancée's backpack. That window was always kept closed. Intending to detain defendant, the victim tried to take him to the ground with a wrestling move, and the two struggled. Defendant eventually put the victim in a chokehold. Fearing for his safety, the victim called out to his fiancée. She called the police, came into the room, and, seeing defendant still struggling to get loose, struck defendant with a bat.

A jury acquitted defendant of first degree robbery and attempted robbery charges, as well as aggravated assault and battery charges. It could not reach a verdict on a burglary charge, split 11-1 in favor of conviction, and the superior court declared a mistrial as to that count. The jury convicted defendant of simple assault and battery, and the court sentenced him to concurrent six-month sentences on each. Following trial, defendant entered a guilty plea on the burglary count, and the court imposed a two-year prison sentence on that conviction.

DISCUSSION

Defendant asserts the trial court should have, either on its own initiative or in response to his requests, instructed the jury on self-defense in connection with the assault and battery charges. Defendant is careful to clarify he seeks to invoke "perfect" or "ordinary" self-defense, not "imperfect" self-defense, a doctrine employed in certain homicide cases. He maintains substantial evidence supports the instruction. (See *People*

v. Sisuphan (2010) 181 Cal.App.4th 800, 806; *People v. Salas* (2006) 37 Cal.4th 967, 982 (*Salas*).

Substantial evidence is evidence sufficient for a reasonable jury to find in favor of the defendant. (*Salas, supra*, 37 Cal.4th at p. 982.) We independently review the trial court’s failure to instruct. (*People v. Sisuphan, supra*, 181 Cal.App.4th at p. 806.)

Whether defendant seeks to invoke the “ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered”—or the “imperfect” variant of the doctrine—applicable when the defendant actually but unreasonably holds the belief—the defendant cannot succeed if, “through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony),” defendant “has created circumstances under which his adversary’s attack or pursuit is legally justified.” (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1; see *People v. Rangel* (2016) 62 Cal.4th 1192, 1226 (*Rangel*); *People v. Valencia* (2008) 43 Cal.4th 268, 288 [“if defendant had first assaulted Cruz . . . a claim of imperfect self-defense would be unavailable because a claim of perfect self-defense would have been unavailable”]; *People v. Enraca* (2012) 53 Cal.4th 735, 762; *People v. Szadziwicz* (2008) 161 Cal.App.4th 823, 834 (*Szadziwicz*)). Only if a “victim resorts to *unlawful* force does the defendant-aggressor regain the right of self-defense.” (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 273.)

For example, in *Szadziwicz*, imperfect self-defense was not available because defendant “created the circumstances” in which the victim’s attack was justified. (*Szadziwicz, supra*, 161 Cal.App.4th at p. 834.) The defendant admitted “he committed a burglary by entering Rossmeisl’s hotel room without his consent and with the intent to steal any drugs he found.” (*Ibid.*) He further admitted “he still was in Rossmeisl’s room when Rossmeisl responded to the unlawful invasion by leaping from his bed and pushing Szadziwicz against the wall.” (*Ibid.*; cf. *People v. Loustaunau* (1986) 181 Cal.App.3d 163, 170 [“When a burglar kills in the commission of a burglary, he cannot claim self-defense, for this would be fundamentally inconsistent with the very purpose of the felony-murder rule.”].)

In *Rangel*, the armed defendant broke into the victim's home to shoot his target and then shot an unwitting victim as the intended victim rushed into the living room. Defendant thought the intended victim was running to get a gun. (*Rangel, supra*, 62 Cal.4th at pp. 1201, 1226.) Imperfect self-defense was not available, because the defendant was the initial aggressor and the victim's response was legally justified. (*Id.* at p. 1226, citing § 198.5 ["resident 'presumed to have held a reasonable fear of imminent peril of death or great bodily injury' to himself, his family, or a member of the household when he uses force against a person not a member of the family or household 'who unlawfully and forcibly enters' the residence"].)

In short, self-defense "does not apply if a defendant's conduct creates circumstances where the victim is legally justified in resorting to self-defense against the defendant." (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 274, italics omitted.)

Here, even under defendant's version of events, he snuck into the victim's apartment building, entered the victim's apartment through a window without permission, rifled through belongings of the victim and his fiancé, and took some of those belongings. The victim's action to detain and subdue defendant, a trespasser and thief in his home, was legally justified; defendant's use of force was not, as his wrongful conduct created the scenario resulting in his use of force. (*People v. Johnson* (2009) 180 Cal.App.4th 702, 709–710 ["In general, if an owner/occupant lawfully uses force to defend himself against aggression by a trespasser, then the trespasser has no right of self-defense against the owner/occupant's use of force.", italics omitted]; *People v. Hardin* (2000) 85 Cal.App.4th 625, 634 ["When defendant burst into her house, Ms. Levingston would be presumptively justified in fearing that the unlawful entry entailed a threat to her life and safety. She was thus entitled to use force to evict him."]; *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1360 ["Defense of habitation applies where the defendant uses reasonable force to exclude someone he or she reasonably believes is trespassing in, or about to trespass in, his or her home."]; see §§ 835, 837; *People v. Fosselman* (1983) 33 Cal.3d 572, 579 [citizen may use force to make arrest related to offense committed in their presence].) Thus, that the victim was technically the initial aggressor is irrelevant.

Accordingly, the superior court did not err in refusing to instruct on self-defense, and we affirm defendant's assault and battery convictions.

We agree with defendant, however, that the abstract of judgment should be amended to reflect a stay of execution of one of defendant's two, concurrent, six-month sentences imposed for the assault and battery convictions. (See § 1260.) The assault and battery arose from the same conduct—the struggle between the defendant and the victim—and section 654 precludes double punishment for the same conduct. (§ 654.)

DISPOSITION

The judgment of conviction is affirmed. The superior court is directed to amend the abstract of judgment to reflect a stay of execution of one of defendant's two, concurrent, six-month sentences imposed for the assault and battery convictions.

Banke, J.

We concur:

Humes, P. J.

Dondero, J.