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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO BAUTISTA GARCIA,

Defendant and Appellant.

2d Crim. No. B235290
(Super. Ct. No. 2009038156)
(Ventura County)

Antonio Bautista Garcia appeals from the judgment entered after his conviction by a jury of carrying a loaded, concealed firearm within his vehicle. (Former Pen. Code, § 12025, subds. (a)(1), (b)(6)(A).)¹ The trial court suspended the imposition of sentence and placed appellant on formal probation for 36 months. One of the conditions of probation was that he serve 180 days in county jail.

Appellant presented the affirmative defense of legal necessity. He contends that, during closing argument, the prosecutor misstated the law concerning this defense. He also contends that the trial court erroneously failed to provide "the jury with a clarifying instruction [that] would have cleared up any confusion" resulting from the misstatement. We affirm.

¹ All statutory references are to the Penal Code. Effective January 1, 2012, section 12025, subdivisions (a)(1) and (b)(6)(A) were repealed and reenacted without substantive change as section 25400, subdivisions (a)(1) and (c)(6)(A). (Stats.2010, ch. 711, §§ 4, 6.)

Facts

Police officers stopped a truck that appellant was driving. Under the front passenger seat, they found a loaded revolver.

Appellant testified as follows: He was at home, and his next-door neighbor was having a party. Persons at the party started throwing empty beer cans at the rear window of his truck. Appellant grabbed his loaded revolver, tucked it into his waistband, and walked outside to talk to his neighbor. Appellant intended to "say please have your guests stop throwing beer cans at my truck." Appellant did not call the police.

On the way to his neighbor's house, appellant was attacked by three persons. One of the persons stabbed him. Appellant ran to his truck, jumped inside, and drove away. He put the revolver underneath the seat. Appellant "was just trying to get away from them people till the cops showed up."

Appellant drove to a friend's house. He wanted the friend to drive him to a hospital. Appellant's friend was not at home, so appellant started to drive himself to the hospital. At this point, he was stopped by the police.

Necessity Defense

Appellant states in his opening brief: "[H]is necessity defense was that he needed to get away from his assailants and, since he had the gun with him at the time, and headed straight for the truck to avoid further assaults, he by necessity had the gun with him in the truck"

"The necessity defense is very limited and depends on the lack of a legal alternative to committing the crime. It excuses criminal conduct if it is justified by a need to avoid an imminent peril and there is no time to resort to the legal authorities or such resort would be futile.' [Citation.] . . . [¶] 'To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that [he] violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which [he] did not

substantially contribute to the emergency.' [Citation.]" (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1164-1165.) " '[T]he defendant has the burden of proving the defense by a preponderance of the evidence.' [Citation.]" (*In re Eichorn* (1998) 69 Cal.App.4th 382, 389.)

Discussion

Appellant contends that the prosecutor misstated the law during closing argument when, over appellant's objection, he "argued to the jury that unless appellant could establish that it was reasonable and necessary to arm himself when he went to confront the neighbors he could not claim necessity as a defense to the crime." Appellant maintains that the court compounded the error by failing to give an instruction clarifying "that the [necessity] defense was limited to the issue of whether appellant reasonably felt it necessary to carry the gun to the truck after being assaulted, rather than carrying it initially when he went to confront the neighbors." Appellant explains: "[He] was charged with the crime of carrying a concealed weapon in a vehicle, not carrying a concealed weapon on his person in public. Thus, the correct issue was whether appellant acted out of necessity when he carried the gun to his truck, not when he initially left the house."

The prosecutor did not misstate the law. "[T]he keystone of the analysis is that the defendant must have no alternative - either before or during the event - to avoid violating the law. [Citations.]" (*United States v. Singleton* (6th Cir. 1990) 902 F.2d 471, 473.) Thus, it was incumbent upon appellant to show that he had no reasonable alternative but to arm himself with a loaded revolver when he went next door to talk to his neighbor.

Furthermore, "the defense of necessity is inappropriate where it would encourage rather than deter violence." (*People v. McKinney* (1986) 187 Cal.App.3d 583, 587.) It would encourage rather than deter violence to permit appellant to invoke the defense of necessity even though he had unreasonably and unnecessarily armed himself with a loaded revolver.

Finally, the defense of necessity is available only if the defendant " 'did not substantially contribute to the emergency[,] ' " i.e., did not substantially contribute to the

events that necessitated the violation of the law. (*People v. Verlinde, supra*, 100 Cal.App.4th at p. 1165.) Appellant substantially contributed to these events if he unreasonably and unnecessarily armed himself with a loaded revolver.

Even if the prosecutor had misstated the law, the misstatement would not have been prejudicial because the trial court correctly instructed the jury on the necessity defense pursuant to CALCRIM No. 3403.² "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.] We so conclude here." (*People v. Osband* (1996) 13 Cal.4th 622, 717.) After the trial court had instructed the jury, the prosecutor began his closing argument by declaring that "the law is what [the court] just read to you."

If appellant believed that the jury instructions were misleading in view of the prosecutor's argument, he should have requested clarification. " "A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." [Citation.]' (*People v. Livingston* (2012) 53 Cal.4th 1145, 1168-1169.)

Moreover, appellant is in effect claiming that the trial court should have given a "pinpoint" instruction "that the [necessity] defense was limited to the issue of whether appellant reasonably felt it necessary to carry the gun to the truck after being assaulted."

² The court instructed: "The defendant is not guilty of carrying a concealed loaded firearm in the vehicle if he acted because of legal necessity. [¶] In order to establish this defense, the defendant must prove that: [¶] 1. He acted in an emergency to prevent a significant bodily harm or evil to himself; [¶] 2. He had no adequate legal alternative; [¶] 3. The defendant's acts did not create a greater danger than the one avoided; [¶] 4. When the defendant acted, he actually believed that the act was necessary to prevent the threatened harm or evil; [¶] 5. A reasonable person would also have believed that the act was necessary under the circumstances; AND [¶] 6. The defendant did not substantially contribute to the emergency. [¶] The defendant has the burden of proving this defense by a preponderance of the evidence. . . . [T]he defendant must prove that it is more likely than not that each of the six listed items is true."

Pinpoint "instructions relate particular facts to a legal issue in the case or "pinpoint" the crux of a defendant's case. . . . They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte.' [Citations.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 878.) Appellant's failure to request a pinpoint instruction "forfeited any claim of error in this regard. [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 675.)

Disposition

The judgment is affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Jeff Bennett, Judge
Superior Court County of Ventura

Linda C. Rush, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, Carl N. Henry, Deputy Attorney General, for Plaintiff and Respondent.