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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DEANDRE ROOKS,

Defendant and Appellant.

C069077

(Super. Ct. No. 09F08737)

A jury found defendant Deandre Rooks guilty of first degree murder (count one; Pen. Code, § 187, subd. (a))¹ and found true the allegation that he personally used a firearm, causing death (§ 12022.53, subd. (d)). The trial court sentenced defendant to an aggregate state prison term of 50 years to life, consisting of 25 years to life on count one and a consecutive 25-years-to-life sentence on the enhancement.

¹ Further undesignated section references are to the Penal Code.

Defendant contends: (1) “The trial court’s instruction to the jury on the effect of provocation, in combination with the instruction on voluntary manslaughter, misinformed the jurors that they should apply an objective standard of reasonableness when determining whether the crime was first or second degree murder”; and (2) “The additional term of 25 years to life added to the murder sentence pursuant to Penal Code section 12022.53, subdivision (d), violates principles of double jeopardy by relying upon the same fact pertaining to both the murder and the enhancement.” We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of November 21, 2009, defendant and five other young people were waiting for a train at the Mather Field light rail station. The victim, Juan Carlos Sanchez, approached the group, carrying a Styrofoam cup and looking unsteady on his feet. Sanchez asked defendant repeatedly for his cigarette. Defendant said no and finally told Sanchez to leave them alone. Defendant and his friends boarded a train; so did Sanchez.

Gralynn Archie, a Regional Transit security guard riding the next train, got a call from the train ahead telling him that several young passengers were arguing and they were going to be asked to leave the train. At the next stop, Sanchez and defendant’s group boarded Archie’s train. Archie smelled alcohol emanating from Sanchez. During “banter” back and forth, Sanchez said to defendant: “Nigga, I’m from the Point” and “[Y]ou know how we roll if you know about the Point.”² Defendant replied that he had been to “the Point” and knew what went on there. Archie also heard someone in defendant’s group saying he or she was from “east Frisco.”

² An expert witness opined that “the Point” meant the Hunter’s Point neighborhood of San Francisco, an area known for criminal street gang activity.

During the argument, Archie heard a girl in defendant's group tell defendant not to let Sanchez talk like that to him. Defendant gave her a look that Archie interpreted as "I got this."

Archie ordered Sanchez to get off at the next stop because of the argument and the alcohol in his cup; Archie did not order the others to leave. Sanchez got off at the Zinfandel station. After a female in defendant's group said something like "oh, hell no," defendant and the others also got off. Defendant's group appeared to be heading in a different direction from Sanchez.

Steven Lemmons, a passenger on the train, saw and heard the argument between defendant's group (whom he described as African Americans aged 17 through 22) and Sanchez (whom he described as Mexican). He heard one of defendant's group claim to come from East Oakland; he might also have heard Sanchez claim to come from 24th and Mission in San Francisco.³ When someone mentioned fighting, the security guard ordered Sanchez off the train. Lemmons got off at the Zinfandel station along with Sanchez and defendant's group.

After they got off the train, Lemmons heard the others continue to talk about fighting. Defendant's group, and one female in particular, seemed to be "egging it on." Sanchez asked defendant to fight him one-on-one; defendant agreed. Defendant suggested an alley behind a shopping center about 200 feet from the light rail station. While there are cameras at the light rail station, there are none in the alley. Sanchez went into the alley, followed by defendant.

³ A homicide detective and defendant's expert witness opined that both areas have significant street gang problems and that the exchanges between the two sides were the sorts of claims typically made by gang members issuing challenges. However, defendant's expert admitted that Sanchez had no gang tattoos and had not been validated as a gang member.

Lemmons heard someone in defendant's group mention a weapon. One of the girls said, "He's going to shoot him." A girl told defendant "not to do it" because "it wasn't worth it." Shortly afterward, Lemmons heard shots that sounded as if they came from a .45-caliber or nine-millimeter semiautomatic weapon.

Dawn Littman, who had been at the station waiting for her train, also saw defendant go toward the alley. She heard around five shots fired from the direction of the alley, followed by a girl's voice saying, "Oh, shit, I can't believe he did that, he really did it." Seeing someone lying on the ground, Littman called 911, then ran toward the alley along with Lemmons. They found Sanchez on the pavement, gravely wounded. He soon died.

Jameelah Miller, who was in defendant's group, testified that Sanchez was the verbal aggressor on the train: he challenged defendant to fight, but defendant said no. Miller also testified, however, that while they were still on the train a male in the group said he had a gun and defendant "could do something stupid with it," then gave the gun to defendant.

An autopsy showed that Sanchez sustained six gunshot wounds to the torso, entering from both the front and the back; five of them would have been almost immediately fatal. None were contact wounds. Sanchez was probably three to five feet from the gun when it was fired. Sanchez's blood-alcohol content was .18 percent.

Two days after the shooting, police stopped a car driven by defendant's father and arrested defendant, who was in the passenger seat. A duffel bag in the back seat held a fully loaded nine-millimeter handgun and personal items of defendant. The cartridge cases found at the crime scene came from that gun.

Defendant originally told detectives that his "partner" "Robert" killed Sanchez. After a detective openly disbelieved this story, defendant admitted that he shot Sanchez, but in self-defense.

According to defendant, during the argument on the train Sanchez mentioned 24th and Mission, where defendant believed there were a lot of “[B]loods,” including Mexicans who “carry a lotta knives.” One of defendant’s friends handed him a gun, which he kept in his hand from then on. After everyone got off the train, defendant headed toward the alley, not to fight Sanchez but to go to his “partner’s” house nearby. Sanchez followed defendant. When Sanchez reached the corner of the alley, he took off his coat, put his cup down, said “I’m gonna kick your ass,” and charged defendant. Defendant turned and shot six to eight times while backing up; he never shot Sanchez in the back. He did not know whether Sanchez had anything in his hands.

Defendant did not testify. He put on a gang expert who opined, on a hypothetical based on the alleged facts in the case, that a person in defendant’s position, after hearing territorial assertions like those made by Sanchez, would have reason to believe that the other person was about to attempt to inflict great bodily injury on him.

The trial court instructed the jury on first degree murder, second degree murder, voluntary manslaughter, and justifiable self-defense.

Defense counsel argued the killing was either justifiable self-defense or imperfect self-defense.

DISCUSSION

I

Defendant contends the trial court’s instructions misled the jury as to provocation, depriving him of the possibility of a second degree murder conviction. According to defendant, the jury should have been, but was not, instructed on “subjective provocation” -- that is, provocation actually perceived by a defendant and capable of negating premeditation and deliberation, though legally insufficient to arouse the “heat of

passion” required to reduce murder to manslaughter.⁴ This contention is forfeited because defendant does not contend the instructions given were legally erroneous and he did not seek additional clarifying instructions below.

The Instructions Given

The trial court instructed the jury on provocation with CALCRIM Nos. 522 (Provocation: Effect on Degree of Murder) and 570 (Voluntary Manslaughter: Heat of Passion -- Lesser Included Offense) as follows:

“Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide.

“If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter. [¶] . . . [¶]

“A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.

⁴ Defendant asserts that because the instructions given here set out only the “objective” test for heat-of-passion provocation, rather than the “subjective” test for provocation which falls short of that standard (*People v. Padilla* (2002) 103 Cal.App.4th 675, 679 (*Padilla*)), the jury was told in effect that “the only yardstick applicable to evaluate a defendant’s conduct based on provocation is the ordinary reasonable person standard.” Defendant is mistaken. The objective/subjective distinction he cites does not implicate “the ordinary reasonable person standard,” *Padilla* does not so hold, and the jury was not so instructed.

As CALCRIM No. 570 explains, the provocation sufficient to produce heat of passion is that which would cause a person of average disposition to act “rashly and without due deliberation . . . from passion rather than from judgment” -- i.e., *unreasonably*. If conduct is objectively reasonable, it is not criminal.

“The defendant killed someone because of a sudden quarrel or in the heat of passion if:

“1. The defendant was provoked;

“2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment;

“And

“3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

“Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

“In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

“It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. In deciding whether the provocation was sufficient, consider whether a person of average disposition in the same situation and knowing the same facts would have reacted from passion rather than from judgment.

“If enough time passed between the provocation and the killing for a person of average disposition to cool off and regain his or her clear reason and judgment, then the killing is not reduced to voluntary manslaughter on this basis.

“The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder.”

Analysis

As defendant points out, it is well settled that there is a form of provocation which can reduce first degree murder to second degree murder, though not to “heat of passion” voluntary manslaughter. “Provocation of a kind, to a degree, and under circumstances insufficient to fully negate or raise a reasonable doubt as to the idea of *both* premeditation *and* malice (thereby reducing the offense to manslaughter) might nevertheless be adequate to negate or raise a reasonable doubt as to the idea of premeditation or deliberation, leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation.” (*People v. Thomas* (1945) 25 Cal.2d 880, 903; see also *People v. Valentine* (1946) 28 Cal.2d 121, 132; *Padilla, supra*, 103 Cal.App.4th at pp. 678-679; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296.) The trial court did not instruct on this form of provocation.

But the trial court had no duty to instruct sua sponte on this issue. An instruction on “subjective” provocation, as defined in the case law cited above, is a pinpoint instruction that the defendant must request. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31-33 [disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752-753, fn. 3].) Here, defendant did not do so.

“A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. [Citation.]” (*People v. Lang* (1989) 49 Cal.3d 991, 1024.) If the defendant did not request such clarification, his claim of inadequate instruction is forfeited. (*People v. Lee* (2011) 51 Cal.4th 620, 638 (*Lee*); *People v. Guerra* (2006) 37 Cal.4th 1067, 1134 (*Guerra*); *People v. Hart* (1999) 20 Cal.4th 546, 622 (*Hart*).)

Defendant does not claim that CALCRIM Nos. 522 and 570 as given here are erroneous. He claims only that, by giving them together without further instruction on

“subjective” provocation, the trial court “misinformed” the jury as to provocation. In other words, he contends the court should have given a pinpoint instruction on this issue sua sponte. Because the court had no duty to do so and defendant did not request such instruction, his claim of error is forfeited. (*Lee, supra*, 51 Cal.4th at p. 638; *Guerra, supra*, 37 Cal.4th at p. 1134; *Hart, supra*, 20 Cal.4th at p. 622.)

Defendant attempts to evade the consequences of his omission by citing section 1259, which provides in part: “The appellate court may . . . review any instruction *given, refused or modified*, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.” (Italics added.) However, section 1259 does not apply where the claim of error does not attack “any instruction given, refused or modified,” but assails only the trial court’s failure to give an unrequested pinpoint instruction. (*Guerra, supra*, 37 Cal.4th at p. 1134 [finding § 1259 applicable to challenge of an allegedly erroneous instruction, but not to challenge of a correct instruction that was allegedly unclear].)

Finally, defendant contends that if trial counsel’s failure to request instruction on “subjective” provocation forfeited the issue, counsel provided ineffective assistance. This contention must fail on direct appeal because the record does not show why counsel did not request the instruction and there could be a reasonable explanation for his conduct. (*People v. Lewis* (1990) 50 Cal.3d 262, 288.)

Defendant’s appellate theory -- that he felt provoked enough to kill (thus negating premeditation and deliberation), even though a person of ordinary disposition would not have felt so provoked under the circumstances -- contradicts both his story to the police (justifiable self-defense without provocation of any kind) and his alternative defense at trial (imperfect self-defense). Counsel could reasonably have decided that throwing a third defense theory at the jurors would have confused them and undermined the alternative theories he wanted to present.

For all of the above reasons, we reject defendant’s claim that the jury was prejudicially misinformed by the instructions given.

II

Defendant contends that his additional term of 25 years to life for the enhancement under section 12022.53, subdivision (d) violates “principles of double jeopardy” because it punishes him for the same fact found true in his murder conviction. Recognizing that this argument is foreclosed by California Supreme Court decisions (*People v. Izaguirre* (2007) 42 Cal.4th 126, 130-134; *People v. Sloan* (2007) 42 Cal.4th 110, 115-124), defendant states that he raises it only to preserve it for federal review. Because we must follow decisions of the California Supreme Court that are on point, we decline to consider defendant’s argument. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

HULL, J.