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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Yuba)

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THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD LEROY SCOTT II,

Defendant and Appellant.

C069761

(Super. Ct. No. CRF11336)

Convicted of attempted first degree murder and sentenced to prison for life, defendant Edward Leroy Scott II argues on appeal that the trial court erred in failing to give sua sponte, or his trial attorney was ineffective in failing to request, an instruction explaining that provocation can reduce attempted first degree murder to attempted second degree murder (which it does by negating premeditation and deliberation). He also contends the trial court erroneously denied him 30 days of conduct credits and the abstract of judgment erroneously shows that he was convicted by plea, rather than by jury.

We find no error in the trial court's failure to give a provocation instruction because Supreme Court precedent establishes that the trial court has no duty to give such an instruction without a request. Further, we find no merit in defendant's assertion that

his attorney was ineffective for failing to make that request because the record shows that defense counsel could have had a reasonable tactical basis for not trying to bring provocation into the case. We do, however, agree with defendant (and the People) that he was wrongly denied 30 days of custody credits and that the abstract of judgment inaccurately shows the means by which his conviction was obtained. Accordingly, we will modify the custody credits in the judgment and direct the preparation of an amended abstract.

#### FACTUAL AND PROCEDURAL BACKGROUND

At the beginning of April 2011, Allan Noell, along with his wife and his mother, moved temporarily into defendant's house, where defendant was also living. Noell and defendant squabbled over various landlord-tenant issues.

On the morning of April 21, Noell told defendant that he had a new place and they were going to move out of defendant's house in two days. That afternoon, while sitting at his desk in the front room, defendant "kind of smiled" at Noell and asked, "How would you like me to shoot you?" Noell did not think defendant was serious.

On the morning of April 23, Noell's wife went to take a shower, but there was no hot water, then the water stopped completely. Shortly after, the electricity went off. Noell went outside to check the electrical box and found it locked with a padlock. Because defendant's vehicle was not in the driveway where it was usually parked, Noell thought defendant had shut off the electricity, locked the box, and left. Noell grabbed the lock and turned it, and it came off in his hand. At that moment, he heard a shot and felt like he had been hit by a bean bag. As he was standing there, "kind of in amazement," he was shot again, this time in the stomach. He saw the muzzle flash from inside the garage, where he saw defendant. Noell ran toward the driveway, keeping his eye on defendant and zigzagging back and forth in an attempt to dodge further shots. As he reached the street, he was shot in the face with pellets. He ran into the house to get his cell phone to call 911.

Noell suffered multiple pellet wounds to the face, chest, and side, as well as to his colon and liver, which required immediate surgery. Police found a disassembled shotgun in the garage.

Defendant was charged with attempted first degree murder with a firearm enhancement, assault with a firearm with a firearm enhancement, discharging a firearm at an inhabited dwelling, and willfully discharging a firearm in a grossly negligent manner.

At trial, defendant testified in his own defense that on the date of the shooting, he decided it was time for Noell to leave because “[i]t was such a hostile environment,” so he disconnected the electricity, gas, and hot water and waited in the garage to talk to Noell. Defendant claimed that instead of Noell coming to talk to him “about the utilities being turned off, [Noell] assaulted the electrical box area and began twisting on the lock” defendant had placed on the box. According to defendant, in an effort to stop Noell from breaking into the electrical box, he fired a blank round from the shotgun, with the wad hitting the box. Because that shot did not deter Noell, defendant put a round full of rock salt into the gun and fired it. When that did not work, defendant yelled at Noell that the next round was “ ‘going to be lead,’ ” and he loaded the gun with a round of bird shot and fired it. When Noell responded by saying, “Well, that’s something” and “I’m staying” and did not move from the electrical box, defendant immediately fired a fourth round, which was also bird shot. Only then did Noell abandon the electrical box, at which time defendant disassembled the gun.

Defendant testified that he specifically loaded the gun in the order he did -- first a blank round, then rock salt, and then bird shot (which he asserted was “less than lethal”) -- so as to use “[p]rogressive force to deal with whatever was coming at [him]” and because “[i]t’s nice to be able to respond lightly before something more serious happens.” When asked on cross-examination if he was angry while he was shooting at Noell, defendant responded, “Oh, I was very calm about it. Doesn’t pay to get emotional when

you're operating a piece of machinery." Defendant also responded that it was "fair to say" he was "cool, calm and collected" and "[c]alculating" at the time.

Consistent with defendant's testimony, defense counsel argued in closing that "there [was] deliberation in this case" -- defendant "deliberately did not intend to kill. . . . The deliberation was so that he specifically would not kill Allen Noell." Thus, defense counsel sought an acquittal on the murder charge on the ground that defendant did not have the intent to kill Noell, rather than simply seeking conviction of the lesser crime of attempted second degree murder.

The jury found defendant not guilty of discharging a firearm at an inhabited dwelling but guilty of the remaining charges; the jury also found the two firearm enhancement allegations true. The trial court sentenced defendant to an aggregate unstayed prison term of 25 years to life plus life.

## DISCUSSION

### I

#### *Failure To Give Provocation Instruction*

Defendant contends the trial court prejudicially erred in failing to instruct the jury *sua sponte* with an instruction explaining that provocation can reduce attempted premeditated first degree murder to attempted second degree murder. In the alternative, he contends his trial counsel was ineffective in failing to request such an instruction. We disagree on both points.

Much like defendant here, the defendant in *People v. Rogers* (2006) 39 Cal.4th 826 argued that "the trial court erred in failing to instruct on its own motion that provocation . . . may suffice to negate premeditation and deliberation, thus reducing [an

intentional killing] to second degree murder.”<sup>1</sup> (*Id.* at pp. 877-878.) Our Supreme Court concluded that because “provocation is relevant only to the extent it ‘bears on the question’ whether [the] defendant premeditated and deliberated,” an instruction on the issue “relates the evidence of provocation to the specific legal issue of premeditation and deliberation” and therefore “is a ‘pinpoint instruction’ ” that “need not be given on the court’s own motion.” (*Id.* at pp. 878-879.) We are bound by that conclusion. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

That leaves defendant’s assertion that his trial attorney should have requested a provocation instruction. “ ‘ “In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission.” ’ ” (*People v. Majors* (1998) 18 Cal.4th 385, 403.) As we will explain, that is not the case here.

Defendant contends his trial attorney’s failure to request an instruction on provocation “could not have been the result of an informed, reasonable tactical choice rather than of neglect because the record on appeal shows that defense counsel developed substantial evidence of provocation during the trial . . . and that he understood that provocation was an important aspect of the case.” What the record really shows, however, is that a provocation instruction would have been entirely inconsistent with defendant’s own testimony and the defense theory of the case, and therefore defense counsel could have deliberately and reasonably chosen not to request such an instruction.

As we have noted, defendant himself testified that he was “cool, calm and collected” and “[c]alculating” when he shot Noell. Based on this testimony, and defendant’s description of how he deliberately proceeded from using a blank round, to

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<sup>1</sup> The only difference between *Rogers* and this case is that *Rogers* involved a completed murder, while this case involved an attempted murder. For our purposes, however, that difference is immaterial.

rock salt, to bird shot in attempting to get Noell to stop trying to break into the electrical box, defense counsel argued that defendant deliberately tried *not* to kill Noell. In light of defendant's own testimony and the theory of the case that defense counsel argued to the jury based on that testimony, it would have been entirely anomalous for defense counsel to have requested a jury instruction on provocation, as defendant now contends he should have done.

Provocation operates to make an intentional killing second degree murder by negating the premeditation and deliberation necessary for first degree murder. In this context, provocation can be used to show (or raise a reasonable doubt as to whether) the defendant "formed the intent to kill as a direct response to the provocation and . . . acted immediately." (*People v. Wickersham* (1982) 32 Cal.3d 307, 329.) Stated another way, "provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation." (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1334.)

The defense theory here was that defendant did *not* act rashly or impulsively in shooting at Noell; instead, he acted deliberately, but without the intent to kill, by using nonlethal force to stop Noell from trying to break into the electrical box . Injecting provocation into the case by arguing that defendant formed the intent to kill without premeditation and deliberation would have been inconsistent with this theory and would have undermined the attempt to secure an outright acquittal for defendant. Under these circumstances, the failure to request a provocation instruction could well have been a deliberate and reasonable tactical choice. For this reason, defendant has not shown that the failure to request the instruction amounted to ineffective assistance of counsel.

## II

### *Custody Credits*

The trial court awarded defendant 206 days of actual custody credits and "[z]ero days pursuant to Penal Code Section 3046(a)(1)." On appeal, defendant contends the

trial court's reference to Penal Code section 3046, which provides the minimum period of incarceration for a life prisoner, was erroneous, and the trial court erred in failing to award him 30 days of conduct credits (15 percent of 206) pursuant to Penal Code sections 2933.1, subdivisions (a) and (c), and 4019. The People concede the error. We agree defendant is entitled to 30 days of conduct credits. We will modify the judgment accordingly and will direct the trial court to amend the abstract of judgment to reflect these additional credits.

### III

#### *Error In The Abstract Of Judgment*

As defendant points out and the People agree, one of the abstracts of judgment erroneously shows that defendant was convicted by plea rather than by a jury.<sup>2</sup> We will order that this be corrected.

### DISPOSITION

The judgment is modified to award defendant 30 days of conduct credits, thereby increasing defendant's total custody credits from 206 to 236. As modified, the judgment is affirmed. The trial court is directed to amend the abstracts of judgment to reflect the additional custody credits and to reflect that defendant was convicted by jury, not by plea,

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<sup>2</sup> There is one abstract for the determinate terms that were stayed and one abstract for the indeterminate terms. The abstract for the determinate terms accurately reflects that defendant was convicted by a jury. The other abstract contains the error.

and to forward copies of the amended abstracts to the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.