

**NOT TO BE PUBLISHED**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

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THE PEOPLE,

Plaintiff and Respondent,

v.

TASHIA MONICA SMITH,

Defendant and Appellant.

C070183

(Super. Ct. No. 10F07361)

ORDER MODIFYING OPINION  
AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on November 14, 2012, be modified as follows:

At page 6, third full paragraph, delete the phrase “in passing” in the first sentence of the paragraph so that the sentence reads:

Defendant also asserts that her daughters’ testimony supported a necessity instruction, but makes no sustained argument as to how it did so.

There is no change in judgment. Appellant's petition for rehearing is denied.

BY THE COURT:

BUTZ, Acting P. J.

MURRAY, J.

DUARTE, J.

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A jury convicted defendant Tashia Monica Smith of assault with a deadly weapon (a minivan) and found that she inflicted great bodily injury on the victim, her boyfriend Roberto Clark (Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (e)—count 2);<sup>1</sup> however, the jury acquitted defendant of attempted murder (§§ 664/187, subd. (a)—count 1) and rejected the alleged enhancement on that count that defendant personally used a dangerous and deadly weapon (§ 12022, subd. (b)(1), (2)).

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<sup>1</sup> Undesignated statutory references are to the Penal Code in effect at the time of defendant's May 2009 crime.

Sentenced to an aggregate term of seven years in state prison, defendant contends the trial court erred by refusing her requested instruction on the defense of necessity. We conclude the court ruled properly because no substantial evidence supported giving the instruction. Therefore, we shall affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### ***Prosecution Case***

On the afternoon of May 30, 2009, Comcast employees Lynda Dugger and Westley Lund were sitting in their company truck near the intersection of 10th and E Streets in downtown Sacramento after completing a job in that area. The truck, parked on the right side of 10th Street, was facing north; Dugger was in the driver's seat and Lund was in the passenger seat.

Lund saw an African-American male walking alone on the sidewalk at a "determined pace," coming toward them southbound on the east side of 10th Street about 50 yards away. Lund then saw a white Dodge or Chrysler minivan approaching their position, coming up behind the pedestrian. A few seconds later, Lund saw the minivan cross opposing lanes of traffic, climb the curb, drive across the grass parkway strip, and come up onto the sidewalk behind the pedestrian, possibly striking him. He began to run, with the van in pursuit. He ran across the intersection of E Street, but the van, still on the sidewalk and on the wrong side of the roadway, pinned him against a wrought-iron fence and struck him, sending his body flying into the air before it came down. The van then drove away.<sup>2</sup> Lund tried but failed to get the van's license plate number, then, joined by Dugger, administered first aid to the man, whose leg was torn open from knee to ankle. He kept saying, "I can't believe she did this to me."

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<sup>2</sup> Defendant, who lives on the 900 block of D Street in Sacramento, is the registered owner of the 1996 Plymouth minivan that struck Clark.

Dugger testified to the same effect. Dugger estimated that the van was driving on the sidewalk south of the intersection for at least 30 seconds before it fled the scene.

Defendant's 11-year-old daughter K.S. testified that she lives with four of defendant's other children in a downtown Sacramento apartment. On May 30, 2009, according to K.S., defendant and Clark, the father of defendant's youngest child, got into an argument at the apartment. With all but one of the children present, Clark kicked defendant in the stomach, then went outside. Defendant put some beer outside and closed the front door. Clark started throwing beer bottles at the door.

Defendant rounded up her children and went outside to put them in her van, parked at the curb. Clark threw one more beer bottle, which shattered, causing some beer to go into K.S.'s eye. According to K.S., this was the last bottle he threw. After throwing it, he left the scene and started walking down the street.

Defendant placed her four children in the van and drove off. According to K.S., defendant then tried to run Clark over; as he started to run, she struck him with the van, creating an audible "bang." K.S. did not see Clark throw anything else during this time period. After striking Clark, defendant drove on to the children's grandmother's house.

K.S.'s eight-year-old sister testified similarly. According to K.S.'s sister, defendant hit Clark with the van as he was walking, trying to cross the street. K.S.'s sister did not remember if Clark was carrying anything at the time.

A Sacramento police detective who interviewed Clark in the hospital a day or two later noted that Clark was "severely injured"; the top of his leg appeared to have been "filleted" by the impact of the van. Clark told the detective that defendant needed "anger management" therapy.

## *Defense Case*

Clark was the only defense witness. He testified that he and defendant fought inside her apartment and he kicked her in the stomach, then went outside and started throwing beer bottles at the front door. He claimed he was still throwing bottles and beating on the van's side window when defendant put the children in the van.

According to Clark, he continued to curse, scream, throw bottles, and beat on the van as defendant drove down 10th Street, right up to the moment the van struck him. He was not running away, but was trying to jump in front of the van, blocking its path and preventing defendant from driving it away from him. Finally, as she tried to veer away while going through the E Street intersection, she “los[t] control” and “accidentally” hit him.

Clark admitted that at the preliminary hearing he did not describe his own conduct this way and claimed that he did not see who hit him. He said he had lied because he feared being incriminated for accosting defendant, but was telling the truth now because he did not want to see her “go to jail for something they didn't do on purpose.”

## *The Requested Instruction*

After the parties rested, defense counsel requested that the trial court instruct the jury with CALCRIM No. 3403,<sup>3</sup> the standard instruction on necessity, based on “the

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<sup>3</sup> CALCRIM No. 3403 states: “The defendant is not guilty of [any crime] if [she] acted because of legal necessity. [¶] In order to establish this defense, the defendant must prove that; [¶] 1. [she] acted in an emergency to prevent a significant bodily harm or evil to [herself] [or] someone else; [¶] 2. [she] had no adequate legal alternative; [¶] 3. [t]he defendant's act did not create a greater danger than the one avoided; [¶] 4. [w]hen the defendant acted, [she] 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. [t]he defendant did not substantially contribute to the emergency. [¶] The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance

testimony of Mr. Clark, as well as the children.” (Counsel did not explain how the children’s testimony supported the instruction.) The prosecutor objected that the facts did not warrant this instruction. The trial court denied the instruction, finding that there was no substantial evidence to support a necessity defense.

## **DISCUSSION**

Defendant contends the trial court erred by denying the requested instruction, that the error violated defendant’s federal constitutional rights (U.S. Const., 5th, 6th, & 14th Amends.), and that the error caused her prejudice. We conclude the court correctly denied the instruction as unsupported by substantial evidence.

The trial court must instruct on the general principles of law openly and closely connected with the case and necessary for the jury’s understanding of the case, including any defenses on which the defendant relies or which are supported by substantial evidence and not inconsistent with the defendant’s theory of the case. (*People v. Boyer* (2006) 38 Cal.4th 412, 468-469.) But the court is not obliged to instruct on theories without substantial evidentiary support. (*People v. Miceli* (2002) 104 Cal.App.4th 256, 267 (*Miceli*)). The evidence defendant relies on did not furnish such support for a necessity instruction.

“A defendant raising the defense of necessity has the burden of proving that [s]he violated the law ‘(1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which [s]he did not substantially contribute to the emergency.’ ” (*Miceli, supra*, 104 Cal.App.4th at p. 267.)

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of the evidence, the defendant must prove it is more likely than not that each of the six listed items is true.”

As this test makes clear, the necessity defense depends on the premise that the act said to be necessary was intentional. In other words, to raise this defense the defendant must admit that he or she deliberately did an act which would be criminal if not justified by necessity. By definition, an act done “ ‘to prevent a significant evil’ ” under the “ ‘good faith belief’ ” that there is “ ‘no adequate alternative’ ” (*Miceli, supra*, 104 Cal.App.4th at p. 267) requires conscious choice—it cannot be done unconsciously, accidentally, or negligently.

Clark’s testimony, on which defendant mainly relies to support a necessity defense, actually negated that defense. According to Clark, defendant did not choose to strike him with the van: She lost control while trying to avoid him, and hit him by accident. This evidence supported a defense theory of accident or misfortune (§ 26, subd. Five), and the trial court gave an appropriate instruction on that defense below.

Defendant also asserts in passing that her daughters’ testimony supported a necessity instruction, but makes no sustained argument as to how it did so. We therefore do not consider these undeveloped assertions. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

Because defendant has failed to show that any evidence supported a necessity instruction, we need not discuss the elements of the necessity defense in detail. We note, however, that even if Clark had testified that defendant struck him deliberately, there would still be no evidence that defendant could not have avoided whatever threat he posed to her or her children by driving in a different direction, by calling the police, or by asking a witness (such as the Comcast employees) for help.

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_ BUTZ \_\_\_\_\_, Acting P. J.

We concur:

\_\_\_\_\_ MURRAY \_\_\_\_\_, J.

\_\_\_\_\_ DUARTE \_\_\_\_\_, J.