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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ERIC CASTELLANOS, Defendant and Appellant.	D059147 (Super. Ct. No. JCF23159)

APPEAL from a judgment of the Superior Court of San Diego County, Matias R. Contreras, Judge. Affirmed.

Appellant Eric Castellanos was charged with attempted murder (Pen. Code,[1] §§ 664/187, subd. (a); count 1), assault with a deadly weapon by means of force likely to produce great bodily injury (§ 245, subd. (a)(1); count 2) and leaving the scene of an accident (Veh. Code, § 20001, subd. (a); count 3). As to count 2, it was alleged that Castellanos personally inflicted bodily injury (§ 12022.7, subd. (a)).

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1 All statutory references are to the Penal Code unless otherwise noted.

On March 25, 2010, a jury convicted Castellanos as charged in counts 2 and 3, and found true the great bodily injury allegation. However, the jury found Castellanos not guilty of the crime of attempted murder as charged in count 1. Castellanos was sentenced to a total of seven years eight months in state prison.

On appeal, Castellanos claims the trial court erred in failing to give mistake of fact and self-defense instructions *sua sponte*. Castellanos further claims that because his trial counsel did not request instructions on mistake of fact or self-defense he was deprived of the effective assistance of counsel.

As we explain, we conclude the trial court was not required to give *sua sponte* mistake of fact or self-defense instructions. Moreover, as we further explain, counsel's failure to request these instructions will not support a claim of ineffective assistance of counsel. Thus we affirm the judgment of conviction.

FACTUAL AND PROCEDURAL BACKGROUND[2]

1. *Prosecution*

On February 20, 2009, around 11:00 p.m., Brawley Police Officer Christian Romualdo was dispatched to the 400 block of North Third in Brawley. When Romualdo turned onto North Third, he noticed a blue Mercury Cougar going forward, and then backing up. He also noticed several Hispanic males fighting near the vehicle. In

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[2] We view the evidence in the light most favorable to the judgment of conviction. (See P*eople v. Osband* (1996) 13 Cal.4th 622, 690.) Certain portions of the factual and procedural history related to Castellanos's claims of alleged error are discussed *post*, in connect with those issues.

particular, Romualdo observed Castellanos in the driver's seat of the car, two people outside the vehicle on the passenger side and Richard Flores on the ground in front of Castellanos's car.

As Romualdo neared the scene, he noticed when Castellanos moved his car forward and in reverse, Castellanos appeared to be hitting Flores. At one point, Romualdo was able to see Flores's body under the engine compartment of the car. Romualdo testified that as the car was going forward, it would stop abruptly but the brake lights would not light up. When Romualdo activated his overhead lights, Castellanos drove around the body and fled the scene. Romualdo noticed Flores's body on the ground and a female standing next to Flores, yelling: "Stop that vehicle. It just ran over my boyfriend!" Romualdo pursued Castellanos, stopped him a short distance away and took him into custody.

In the meantime another police officer, Richard Davey, approached the scene where Flores was lying in the street. Davey testified Flores had what appeared to be a drag mark on the back of his head where the skin and hair had been removed. Flores was conscious but incoherent. Flores was taken to a hospital by ambulance, where medical personnel discovered several injuries including a fractured pelvis, a fractured right ankle, a fractured rib, a collapsed lung, abrasions and a large hematoma on the back of Flores's head, bleeding from his head and multiple other abrasions and bruises. Flores also suffered the loss of cervical lordosis, the natural curve of his neck. The physician who

treated Flores believed his broken pelvis was caused by a large amount of force, equivalent to the force of a vehicle traveling in excess of 30 miles an hour.

2. *Defense*

Castellanos testified on his own behalf and stated he arrived at the scene of the incident to pick up his friend, Manuel Gallegos. Upon arriving at the scene, Castellanos noticed several men approaching Gallegos in a threatening manner. Castellanos pulled over, got out of his car, and ultimately the four men got into a fight. Castellanos believed Gallegos was in trouble and tried to help him. While Castellanos and Gallegos were attempting to flee, they had trouble getting into the car. Castellanos was able to get into the driver side but Gallegos was forced to the rear of the car and thus not able to get into the passenger side. According to Castellanos, he noticed the difficulty Gallegos was having and attempted to reverse the car so Gallegos would be closer to the passenger door and able to get into the car.

According to Castellanos, Gallegos's assailant forced him to retreat around to the driver side of the car and ultimately ended up continuing the fight on top of the hood of the car. Castellanos claimed he was concerned for Gallegos's safety and attempted to force Gallegos's assailant off the top of the hood by driving the car forward and applying the brakes. After numerous attempts, Gallegos's assailant was forced from the hood and Castellanos sped away from the scene with Gallegos still on the hood. According to Castellanos, he later stopped so that Gallegos could get in the car.

Significantly, Castellanos testified he did not know anyone was under his car and was not trying to hurt anyone.

DISCUSSION

A. *Mistake of Fact Instruction*

The jury was instructed with a version of CALCRIM No. 875 which required that in order to find Castellanos guilty of assault with a deadly weapon as alleged in count 2, the prosecution was required to prove Castellanos knew facts that would lead a reasonable person to believe his act by its nature would directly and probably result in the application of force to someone. With respect to count 3, leaving the scene of an accident, the jury was instructed with a version of CALCRIM No. 2140, which in part required the prosecution prove Castellanos "knew that he had been involved in an accident that injured another person or knew from the nature of the accident that it was probable that another person had been injured." Notwithstanding these instructions, which required that Castellanos know the likely and actual consequences of his conduct, Castellanos claims the trial court erred in failing to also instruct *sua sponte* on mistake of fact with CALCRIM No. 3406.[3] This argument has no merit.

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[3] CALCRIM No. 3406 provides: "The defendant is not guilty of <insert crime[s]> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.

"If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit <insert crime[s]>.

In *People v. Anderson* (2011) 51 Cal.4th 989, 996-997, the California Supreme Court held that, in general, a trial court has no *sua sponte* duty to instruct on mistake. A mistake of fact instruction is only required to be given by the trial court upon request. (*Ibid.*) The court in *Anderson* stated: " ' "[W]hen a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, a defendant is not presenting a special defense invoking *sua sponte* instructional duties. While a court may well have a duty to give a 'pinpoint' instruction relating such evidence to the elements of the offense and to the jury's duty to acquit if the evidence produces a reasonable doubt, such 'pinpoint' instructions are not required to be given *sua sponte* and must be given only upon request." ' [Citation.]" (*Id.* at pp. 997-998.) The court held that because the defense of mistake only negates the intentional element of a charged offense, where the jury has been fully instructed on the elements of an offense, including intent or knowledge, a further instruction on mistake is not required *sua sponte*. (*Ibid.*)

As we have seen here, with respect to both the assault count and the leaving an accident count, the jury was fully instructed that the prosecution was required to prove Castellanos knew what he did to Flores. Thus no additional *sua sponte* instruction as to the defense of mistake was required. (*Anderson, supra*, 51 Cal.4th at pp. 997-998.)

"If you find that the defendant believed that <insert alleged mistaken facts> [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for <insert crime[s]>.

"If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for <insert crime[s]>, you must find (him/her) not guilty of (that crime/those crimes)."

B. *Self-Defense Instruction*

Castellanos next claims the trial court erred in failing to instruct on the assault count with the self-defense instruction set forth in CALCRIM No. 3470.[4] The self-

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[4] CALCRIM No. 3470 provides: "Self-defense is a defense to <insert list of pertinent crimes charged>. The defendant is not guilty of (that/those crime[s]) if (he/she) used force against the other person in lawful (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if:

"1. The defendant reasonably believed that (he/she/ [or] someone else/ [or] <insert name of third party>) was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully];

"2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

"AND

"3. The defendant used no more force than was reasonably necessary to defend against that danger.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to (himself/herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ [or] defense of another).

"When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

"[The defendant's belief that (he/she/ [or] someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

"[If you find that <insert name of victim> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

"[If you find that the defendant knew that <insert name of victim> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

defense instruction is different from the mistake instruction, in that it does not directly negate an element of an offense but instead offers a justification for conduct which would otherwise be criminal. However, a trial court's duty to instruct *sua sponte* on such special defenses is nonetheless limited by the facts set forth in the record at trial.

A *sua sponte* duty to instruct on a special defense arises only if it appears the defendant is relying on such a defense or if substantial evidence supports such a defense and *the defense is not inconsistent with the defendant's theory of the case*. (*People v. Barton* (1995) 12 Cal.4th 186, 195.) In California, self-defense and accidental injury to a victim are, in general, treated as inconsistent defenses. (See *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357-1358.) The record here fully supports application of this general rule. Castellanos's contention he did not know Flores was under the car, if believed by the jury, would have been a complete defense because it would have disproved the knowledge element of the crime of assault with a deadly weapon. A self-defense theory

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"[Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person.]

"[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with <insert name of victim>, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).]

"[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury/<insert crime>) has passed. This is so even if safety could have achieved by retreating.]

"The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful (self-defense/ [or] defense of another). If the People have not met this burden, you must find the defendant not guilty of <insert crime(s) charged>."

was plainly at odds with Castellanos's testimony, because it suggests Castellanos knew Flores was under the car, but was nonetheless justified in running over him as the only reasonable means of protecting Gallegos. (See CALCRIM No. 3470: "The defendant reasonably believed that the immediate use of force was necessary to defend against that danger.") Plainly, Castellanos made a decision that it would be easier for a jury to believe he did not know Flores was under the car rather than believe he had no other means of protecting Gallegos. Given these circumstances trial court could not undermine Castellanos's accident theory by giving a conflicting self-defense instruction which Castellanos did not request. (See *People v. Barton, supra,* 12 Cal.4th at p. 195.)

C. *Ineffective Assistance of Counsel*

In the alternative Castellanos claims his trial counsel was ineffective for failing to request instructions on mistake of fact and self-defense.

1. *General Principles*

"An appellant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. [Citations.] . . . .

"To establish prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.] In demonstrating

prejudice, the appellant 'must carry his burden of proving prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel.' [Citation.]

"In determining whether counsel's performance was deficient, we exercise deferential scrutiny. [Citations.] The appellant must affirmatively show counsel's deficiency involved a crucial issue and cannot be explained on the basis of any knowledgeable choice of tactics. [Citations.]

"Our Supreme Court recently reiterated the obligations of appellate courts in reviewing claims of ineffective assistance of counsel: ' " 'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of professional assistance." ' [Citation.] '[W]e accord great deference to counsel's tactical decisions' [citation], and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' [citation]. 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' [Citation.]" ' [Citation.]

" 'Competent counsel is not required to make all conceivable motions or to leave an exhaustive paper trail for the sake of the record. Rather, competent counsel should realistically examine the case, the evidence, and the issues, and pursue those avenues of defense that, to their best and reasonable professional judgment, seem appropriate under

the circumstances. [Citation.]' [Citation.]" (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1146–1148.)

2. *Mistake Instruction*

Counsel's failure to request a mistake instruction resulted in no prejudice. As we have noted, the jury was fully instructed that with respect to both the assault count and the leaving the scene of an accident count the prosecution was required to prove Castellanos knew Flores was under the car and injured. Thus the instructions provided to the jury and the jury's verdict demonstrate fairly clearly that a mistake instruction would have been superfluous. However, in addition to the instructions the jury was given on the knowledge required to convict on both counts, the absence of prejudice can also be found in the evidence of Flores's multiple serious injuries and Romualdo's testimony the car repeatedly went forward and stopped without any brake lights coming on. Flores's broken pelvis taken together with the rocking back and forth of the car observed by Romualdo were powerful evidence Castellanos was fully aware of what was happening to Flores. In sum, a mistake instruction, if given would not have altered the jury's verdict.

2. *Self-Defense*

Counsel's failure to request a self-defense instruction will not support a claim of ineffective assistance of counsel claim largely for the same reason a *sua sponte* duty to instruct on self-defense was not required: it would have been inconsistent with the theory Castellanos did not know Flores was under the car. Such an obvious and reasonable tactical choice defeats any contention counsel performed deficiently.

DISPOSITION

The judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.