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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ABRAN FRANCO,

Defendant and Appellant.

D060354

(Super. Ct. No. SCD220281)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Einhorn, Judge. Affirmed as modified with directions.

Following a jury trial, Abran Franco was convicted of two counts of second degree murder (Pen. Code,¹ § 187, subd. (a)). As to each count the jury found the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and found that a principal discharged a firearm resulting in death (§ 12022.53, subs. (d) & (e)(1)).

Franco was sentenced to an indeterminate term of 80 years to life in prison.

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

Franco appeals challenging only the conviction for murder in count 2. He also contends the abstract of judgment must be corrected to reflect the proper sentences for the murder counts. The People properly concede the abstract of judgment must be amended.

Franco's challenge to his conviction in count 2 is based on his claim the trial judge erred in refusing to instruct the jury on voluntary manslaughter based on imperfect self-defense. We find there is no factual basis in the record to support such instruction and affirm the conviction.

STATEMENT OF FACTS

Since Franco does not challenge his conviction for second degree murder in count 1, we find it unnecessary to discuss the facts underlying such offense. Further, Franco does not challenge either the sufficiency or admissibility of the evidence to support his conviction in count 2. Accordingly, we will set forth a brief summary of the facts in count 2 simply to provide context for the discussion which follows.

At about 5:00 p.m. on April 19, 2008, the victim, Angel Hernandez, and two companions went to a market on Imperial Avenue. Hernandez was a member of the Trust No Souls (TNS) street gang. The market was located in an area where there was an ongoing territorial dispute between TNS and the Southwest Locos street gang.

As Hernandez and the other two walked out of the market, a car driven by Franco, a Southwest Locos member, rapidly drove up next to them. Anthony Zendejas was a passenger in the car. Zendejas fired four rounds from a nine-millimeter pistol at Hernandez and his companions. Hernandez died as a result of the bullet wounds.

In November 2008, police were able to secure the cooperation of Oscar Navarro, a founding member of the Southwest Locos gang. Navarro cooperated in order to secure immunity from prosecution and other benefits. During the next six months, Navarro was able to record several conversations with Franco and Zendejas, which were received in evidence.

Franco discussed the shooting at the J&J Market during his conversation with Navarro on December 12, 2008. Appellant explained that, "We pulled -- we pulled up, straight up, we pulled up and then fuckin We saw the fools, we were like, 'Hey, what's up where you from?' Bones (Zendejas) took off his seat belt 'cause he recognized one of them. He's like, 'TNS!, TNS!' Bones is like, 'Oh yeah.' He opened the door, 'Let's go to the alley.' That fool kicked the door right before he put his foot out. They threw rocks So Bones is like fuck, you know, he just let it rip." A short time later appellant explained, referring to Zendejas' act of shooting, "that was his reaction you know that was a reflex for him. He got -- he got -- he got knocked on the head with a rock and my windshield broke. You know? They threw another rock at the back of"

DISCUSSION

Franco contends the trial court erred in refusing to instruct the jury on voluntary manslaughter based on imperfect self-defense as to the Hernandez killing. Franco contends that the evidence from the recorded interviews was sufficient to raise a question for the jury as to whether Zendejas was in fear of death or great bodily injury when he fired four shots at the rival gang members. When the issue was presented to the trial court at the jury instruction conference the court found no basis in the evidence to support

the instruction. The court said: "I'm not convinced that -- under even a stretch that an imperfect self-defense instruction could be given with the state of the evidence to date. I critically listened to the interviews and remember the testimony of the window fixer guy. I just don't think it's there. Sorry."

"The request to give the imperfect self-defense in this case would of necessity be that the shooter was entitled to the imperfect self-defense. And based upon the statements of [Franco] to law enforcement at the interview, it just doesn't rise to the level of seriously considering an imperfect self-defense. So the request is denied but is noted."

A. Standard of Review

When we review a claim of instructional error, we review the issue de novo. We independently determine whether there is sufficient evidence in the record to support an instruction on voluntary manslaughter as a lesser included offense of murder. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

B. Imperfect Self-Defense

In *People v. Flannel* (1979) 25 Cal.3d 668, 680, the court recognized that an intentional killing, done in a good faith but unreasonable fear of death or great bodily injury, could be voluntary manslaughter. The court held that one who acts under an actual belief that self-defense is necessary may not harbor the mental state of malice as required for the crime of murder. Thus the concept of imperfect self-defense can be presented to a jury when there is sufficient substantial evidence from which the jury could find a reasonable doubt that the intentional killing was done with malice. (*People*

v. Barton (1995) 12 Cal.4th 186, 201.) In order to justify such instruction, there must be evidence before the trial court that would support a finding that the perpetrator had an actual belief of imminent harm. (*In re Christian S.* (1994) 7 Cal.4th 768, 773.) " 'The defendant's fear must be of imminent danger to life or great bodily injury.' " (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.)

C. Analysis

Franco argues that the trial court erred in finding insufficient evidence to support imperfect self-defense. In making his argument, Franco contends that the perpetrator, Zendejas, shot the victim because the victim and his companions kicked the door of Franco's car and threw rocks at them. In particular, Franco notes that a rock struck Zendejas and that the window of Franco's car was damaged. Thus he claims the trial court should have presented the issue to the jury.

It is important to recognize that whether the instruction should have been given depends on Zendejas' state of mind when he fired the four shots. Since neither Franco or Zendejas testified to this issue at trial, like the trial court, we must rely on other evidence, including interviews, to resolve Franco's contention.

Franco relies principally on two cases to support his contention: *People v. Randle* (2005) 35 Cal.4th 987 (*Randle*), overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201, and *People v. Vasquez* (2006) 136 Cal.App.4th 1176 (*Vasquez*). In *Randle* the court found that although the defendant was the initial aggressor where the victim's response became excessive and went beyond preventing the crime that the defendant could rely on imperfect self-defense. In that case the victim and another

observed the defendant and an accomplice attempting to burglarize a car. The victim and the other person chased down the accomplice and began beating him. The court held that the beating of the accomplice could give rise to an unreasonable, but actually held belief, that the accomplice would be killed or badly injured. (*Randle, supra*, at pp. 991-992.)

In *Vasquez*, the court relied on *Randle, supra*, 35 Cal.4th 987, to find the defendant, who was the initial aggressor, could rely on imperfect self-defense. In that case the defendant, who was in a wheel chair, arranged a confrontation with the victim. When the defendant confronted the victim, that person attacked the defendant and began to choke him, at which point the defendant shot the victim. The court held there was sufficient evidence before the trial court to require the imperfect self-defense instruction. (*Vasquez, supra*, 136 Cal.App.4th at pp. 1179-1180.)

We find this case to be distinguishable from either *Vasquez, supra*, 136 Cal.App.4th 1176 or *Randle, supra*, 35 Cal.4th 987. First there is no direct testimony from Zendejas or Franco on the issue. Of course, the absence of direct testimony does not preclude the defense if there is other evidence in the record. (*People v. Falck* (1997) 52 Cal.App.4th 287, 299.) In this case, we think the trial court was correct that the interview recordings and the undercover recordings do not show that Zendejas had an actual belief that he needed to act in self-defense.

Franco and Zendejas had observed rival gang members on their "turf" and intended to beat them up and harm them so they would not return to the Southwest Locos' neighborhood. Franco drove up to the rivals at a rapid speed to scare them. Zendejas, armed with a semiautomatic pistol, confronted the rivals and challenged them to a fight.

Zendejas attempted to get out of the car to attack the men and they repeatedly kicked the door shut. The group threw some rocks at Franco's car, hitting the window and one hit Zendejas causing a minor bump. If that was all that was presented one might stretch to find a possible jury question, but the evidence continued to show that Zendejas did not act out of fear.

As Franco said to the informer, "Those fools kicked the door closed and threw rocks. Then Bones' [Zendejas'] reaction was just . . . fuck it let it rip." For his part, Zendejas told the informant: "I was getting off the car and shit, start throwing rocks and they slammed the door and shit . . . so I just like took it out and fuckin' shot em [¶] . . . [¶] I shot 'em out the window and shit. It was like right there and shit. I was trying to get out, kept on blocking it and shit, just like right there and shit. They were just throwing rocks at it."

There is no evidence in the record that Zendejas acted out of fear. The only evidence of his state of mind comes from his statements to the informant, which were introduced into evidence, and not challenged on this appeal. Zendejas made it clear that he was there to fight with the rivals and scare others from their turf. He never claimed to be in fear. He claimed he could not get out of the car "so I just like took it out and fuckin' shot 'em."

The foundational requirement of imperfect self-defense is that the perpetrator act out of an actually held belief in imminent death or great bodily injury. This record does not support such an inference. Zendejas never claimed to have acted out of fear. To the contrary, the only reasonable inference from his statements is that he acted out of

frustration that he could not get out of the car to assault his rival gang members. Accordingly, we believe the trial court properly denied Franco's requested instruction.

DISPOSITION

The trial court is directed to modify the abstract of judgment to reflect the sentence for second degree murder in each of counts 1 and 2 is 15 years to life. The additional 25 years to life imposed as to each count was pursuant to section 12022.53, subdivision (e). The court is further directed to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

HALLER, J.