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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

PIERRE PAUL DUQUETTE,

Defendant and Appellant.

E052648

(Super.Ct.No. FVI1001888)

OPINION

APPEAL from the Superior Court of San Bernardino County. Lorenzo R.

Balderrama, Judge. Affirmed.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Pierre Paul Duquette appeals from his three felony convictions and five-year prison sentence that resulted from an argument he had with his

girlfriend in which he hit her in the head with her own handgun. Specifically, defendant argues the trial court erred when it failed to instruct the jury, sua sponte, on self-defense as a defense to all three convictions and mistakenly believed defendant was statutorily ineligible for probation. As discussed below, we reject both of these arguments and affirm the judgment.

### **FACTS AND PROCEDURE**

On the night of July 15-16, 2010, defendant and his live-in girlfriend, Anna Savatgy, got into an argument. Defendant had been drinking. Savatgy testified that she had been drinking also. However, one of the first two sheriff's deputies to respond, Deputy Spagon, testified that he did not notice any signs of alcohol consumption in Savatgy. Savatgy called 9-1-1 and told the dispatcher that she had been struck in the face with a gun during a domestic dispute. The deputies met Savatgy outside the gate of the residence, a property of five or six acres. Savatgy appeared very upset and kept complaining of pain, including to the lower left portion of her jaw. Deputy Spagon examined her face with a flashlight and noticed redness and swelling in that area. Savatgy told the deputy that defendant had struck her in the face with a gun inside the house.

Defendant came out of the house toward the deputies yelling and cursing and slurring his words as if under the influence of alcohol. He refused to open the gate and told them numerous times that they needed to "wake up the judge" and "get a f---ing search warrant." Deputy Spagon told defendant his understanding of the situation and asked defendant for his side of the story. Defendant denied hitting Savatgy. After about

five minutes, during which defendant repeatedly refused to open the gate and continued to yell profanities at the deputies, the deputies cut the lock on the gate and arrested defendant, who resisted arrest.

Deputy Spagon escorted Savatgy back into the house. She retrieved a handgun from a dresser drawer in the bedroom. In the bedroom, a television was lying on the ground, there was a hole in the plaster of a nearby wall, and the room was in disarray, with objects laying all over the room and broken mirror glass on the floor. Savatgy then gave more details regarding the incident. The two had been arguing in the house and defendant at one point told her to go outside and sleep in her car. Savatgy initially left the house but came back because she was not completely dressed. When she came back inside the house to get more clothes, defendant became enraged. Defendant followed Savatgy into the bedroom and began throwing and breaking things, including the television and a wall mirror. Defendant pushed Savatgy into a wall and then began to push her into various items around the room. Defendant then reached into one of Savatgy's drawers and pulled out her .357 magnum handgun, removed it from the holster, and struck her in the lower left of her face with the butt of the handgun. Defendant threatened to shoot Savatgy, but she told Deputy Spagon she did not feel threatened by that statement because she did not have any ammunition in the house. Savatgy complained of pain to her rib cage, thighs and hips. Savatgy did not say anything to the deputy about being intoxicated herself, or about defendant being upset that there was a gun in the house.

At trial, Savatgy testified that on the night in question she and defendant were both drinking. She was drunk but could not say whether defendant was drunk. After defendant told Savatgy to go sleep in her car and she had come back inside to get some clothes, she went into the bedroom and opened her dresser drawer. Defendant saw the handgun and became very upset. Defendant “freaked out” and told her to “[g]et that thing out of here.” Savatgy did not understand why defendant was so upset because she had a permit to keep the gun to defend herself from her violent ex-husband. Defendant did not know she had the handgun, which she had recently brought into the home after cleaning out a storage unit. Savatgy testified that, while defendant was freaking out, she picked up the gun. Defendant grabbed the wrist of her hand that held the gun, and she began to struggle. Defendant let go of the gun and “I came back and I hit myself in the chin with it.” At that point the gun was in the holster. Defendant took the dresser drawer and threw it outside saying, “I don’t want those anywhere on my property.” Defendant told Savatgy to get out of the house and take her weapons with her. Defendant said, “Let’s get out of here” and accidentally knocked the television onto the floor and broke a full-length mirror when he slammed a door. Defendant then threw the rest of Savatgy’s dresser drawers out of the house.

Savatgy testified that she then left the house in her car and drove down the road a little way before realizing that she should go back and get some clothes and her things. When she came back to the gate around the property, she found it locked. She then called 9-1-1 so she could get back into the property to retrieve her things.

On September 30, 2010, the People filed an information charging defendant with: (1) possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1))<sup>1</sup>; (2) assault with a firearm (§ 245, subd. (a)(2)); and (3) corporal injury to a cohabitant (§ 273.5, subd. (a)). The People alleged as to count 3 that defendant personally used a firearm. (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a).) The People also alleged that defendant had a prior “strike” conviction (robbery, § 211, in 1987). (§§ 1170.12, subds (a)-(d), 667, subds. (b)-(i).)

On November 23, 2010, a jury found defendant guilty on all three counts and found true the gun use allegation. Defendant admitted the prior strike conviction.

At sentencing on December 29, 2010, the trial court granted defendant’s *Romero*<sup>2</sup> motion to dismiss the prior strike conviction. The court sentenced defendant to five years in prison as follows: the low term of two years on count 3, plus the low term of three years for the gun use enhancement. The court stayed the sentences for counts 1 and 2 pursuant to section 654. This appeal followed.

## DISCUSSION

### 1. *Self-Defense Instruction*

Defendant contends the trial court was required to have instructed the jury, sua sponte, on self-defense because the evidence showed that he purposely hit his girlfriend with the gun only after he grabbed her arm as she attacked him. As discussed below, we

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<sup>1</sup> All section references are to the Penal Code unless otherwise indicated.

<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

conclude that no self-defense instruction was required because there was no substantial evidence supporting this defense and because it was inconsistent with the defense's theory of the case.

“A trial court is required to instruct sua sponte on any defense, including self-defense, only when there is substantial evidence supporting the defense, and the defendant is either relying on the defense or the defense is not inconsistent with the defendant's theory of the case. [Citation.]” (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49.) “In determining whether substantial evidence supports a defense, the trial court must leave issues of witness credibility to the jury. [Citation.]” (*Ibid.*) On review, we independently determine whether substantial evidence existed to support the defense. (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1055.)

An accident is inconsistent with self-defense. (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1358.)

First, there is not substantial evidence to support an instruction on self-defense. The elements of self-defense are: (1) The defendant reasonably believed that he or someone else was in imminent danger of suffering bodily injury. (2) The defendant reasonably believed that the immediate use of force was necessary to defend against that danger. (3) The defendant used no more force than was reasonably necessary to defend against that danger. (CALCRIM No. 3470.) The only first-person testimony presented at trial as to how Savatgy came to be struck in the face by the gun came from Savatgy herself. She testified that defendant became very upset when he saw the gun in the drawer and said, “What the f--k? What are you doing with this gun?” “Get that thing out

of here.” “And then when I went to reach for the gun [in the dresser drawer] he grabbed my wrist. [¶] . . . He had ahold of my wrist, and we were—I was—he had ahold of my wrist and I was struggling. I’m like, ‘Why are you so mad?’ And he let go and I came back and I hit myself in the chin with it.” Savatgy also testified that she and defendant were struggling over the gun and, “He let go. You know, he let go of my wrist and it came back and it hit me in the face.” There is nothing in this testimony from which a reasonable jury could conclude that defendant purposely hit Savatgy with the gun in self-defense because he thought she might shoot him. This testimony clearly points in only one direction—that defendant was upset because he was a felon who was not supposed to be around guns and that Savatgy was hit in the face by the gun accidentally when defendant let go of her wrist. The only other testimony presented at trial to show how Savatgy was struck in the face by the gun was that of Deputy Spagon. He testified that Savatgy told him defendant had taken the handgun out of her dresser and purposely struck her in the face with it, with no mention that Savatgy ever had possession of the gun or that defendant reasonably believed she was going to shoot him with it. Thus, no substantial evidence supports an instruction on self-defense.

Second, defendant relied on a theory of accident at trial. He claimed that he grabbed Savatgy’s wrist as she held the gun and that it only hit her in the jaw when he accidentally let go of her wrist as she struggled.<sup>3</sup> Self-defense involves the intentional, but

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<sup>3</sup> During closing argument, defense counsel gave the defense version of what happened, which mirrored Savatgy’s trial testimony: “[Defendant] freaked out when he  
*[footnote continued on next page]*

justifiable use of force, which is inconsistent with defendant's defense theory. Thus, an instruction on self-defense would be inconsistent with the defendant's claim that he had hit Savatgy with the gun accidentally. In our opinion in *People v. Curtis* (1994) 30 Cal.App.4th 1337, we held that jury instructions on self-defense were inappropriate where the defendant testified that he fired the weapon accidentally, as an accidental shooting is inconsistent with a defense of self defense. (*Id.* at p. 1358.) In *People v. McCoy* (1984) 150 Cal.App.3d 705, the defendant claimed that the charged shootings occurred by accident when one of the victims pulled a gun on him and defendant tried to disarm him. On appeal, he argued that the trial court should have instructed the jury on self-defense. The court rejected this argument: "Defendant's theory was, and is, that the shootings were accidental rather than volitional. His testimony at trial was that he neither fired the gun intentionally nor ever gained possession of it. . . . This theory is inconsistent with self-defense, as self-defense implies an intentional shooting." (*Id.* at pp. 708-709, fn. omitted.) Here, similarly, defendant's theory was that Savatgy was injured accidentally. Although the defense argued that he struggled with her for possession of the handgun, it denied that he intentionally injured her.

No self-defense instruction was required because there was no substantial evidence supporting this defense and because it was inconsistent with the defense's theory of the case.

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*[footnote continued from previous page]*

saw that gun, and yes, she was scared. But she picked up the gun. He grabbed her wrist, and when he let go, she banged herself in the chin."

## 2. Denial of Probation

Defendant also contends this case must be remanded for resentencing because the trial court believed defendant was statutorily ineligible for probation when in fact he was not statutorily ineligible.

At sentencing, the trial court stated, “As far as sentencing considerations I find that the defendant is ineligible for probation per [California Rules of Court, rule 4.413 given the fact that the defendant had been convicted of a felony, which was pled and proven, to wit, the robbery, PC 211.”

The trial court is required to determine whether a defendant is eligible for probation. (Cal. Rules of Court, rule 4.413(a).) All defendants are eligible for probation as long as they do not fall within one of the categories restricting the availability of probation. The most severe restrictions deprive the sentencing court of jurisdiction to grant probation to the defendant; in other words, probation is unconditionally prohibited in certain felony cases. (See, e.g., §§ 1203.06-1203.09.) Less severe restrictions merely limit the sentencing court’s authority to grant probation except in unusual cases in which the interests of justice would best be served by such a grant. (See, e.g., § 1203, subd. (e).)

The trial court was unconditionally prohibited by statute to grant defendant probation pursuant to section 1203.06, subdivision (a)(2). That subdivision provides: “Notwithstanding any other provision of law, probation shall not be granted to . . . any of the following persons: [¶] . . . [¶] (2) Any person previously convicted of a felony specified in paragraph (1) . . . who is convicted of a subsequent felony and who was

personally armed with a firearm at any time during its commission . . . .” One of the felonies specified in paragraph (1) is “(B) Robbery, in violation of Section 211.” Defendant was convicted of robbery in 1987. In this case, defendant was convicted of felony corporal injury to a cohabitant. In addition, although the People alleged and the jury found that he personally *used* a firearm, rather than was personally *armed* with a firearm, while committing this felony as specified in section 1203.06, subdivision (a)(2) above, “[a]n enhancement of being armed with a firearm is necessarily included in a charging allegation of firearm use because the latter cannot be committed without committing the former.” (*People v. Turner* (1983) 145 Cal.App.3d 658, 684, overruled on other grounds in *People v. Newman* (1999) 21 Cal.4th 413 & *People v. Majors* (1998) 18 Cal.4th 385.) Thus, defendant was statutorily and unconditionally ineligible for probation.

**DISPOSITION**

The judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

RICHLI  
J.

MILLER  
J.