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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.

KENYATTA ANDREW JOHNSON,

Defendant and Appellant.

E053171

(Super.Ct.No. RIF149172)

OPINION

APPEAL from the Superior Court of Riverside County. J. Richard Couzens, Judge. (Retired judge of the Placer Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia, and Barry Carlton, Deputy Attorneys General, for Plaintiff and Respondent.

# I

## INTRODUCTION<sup>1</sup>

Defendant Kenyatta Andrew Johnson, who is not an identified gang member, shot Quincy Brown, a member of the Crip criminal street gang, in the stomach. Defendant was also in possession of cocaine at the time he was detained.

A jury found defendant guilty of attempted murder while using a firearm, of being a felon in possession of a firearm, and transportation of cocaine. (§§ 187; 12022.53, subd. (d); 664; 12021, subd. (a)(1); Health & Saf. Code, § 11352, subd. (a).) Defendant admitted having a prior strike conviction and three prison priors. The court sentenced defendant to a determinate sentence of 19 years and an indeterminate sentence of 25 years to life.

Defendant offers two claims of error. First, defendant urges the trial court abused its discretion by allowing evidence that defendant falsely claimed he used the street moniker, “C.K. Rider,” when defendant was not a gang member and his true nickname was “Bliazay.” Second, defendant contends the court misinstructed the jury about principles of self-defense and imperfect self-defense.

We reject defendant’s arguments and affirm the judgment.

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<sup>1</sup> All statutory references are to the Penal Code unless stated otherwise.

## II

### FACTUAL BACKGROUND

#### *A. Prosecution Evidence About the Shooting*

Defendant and his two friends, Sa Randolph and Semaj Harris, were at a swap meet on March 19, 2009, when they encountered Brown, a member of the Perris Locs Crips, or P-Locs Crips, gang. Brown had a history of harassing defendant.

Brown began bothering Randolph until defendant intervened and punched Brown. Defendant and his two companions continued on their way.

As defendant walked past the Country Hills apartments, two witnesses overheard defendant say, "I just knocked him out" and "I know he's going to go get his shit and I got mine," adding, "He want gunplay, I got gunplay." When testifying in court, the second witness said she was bipolar and a schizophrenic and she did not recall defendant making the latter statement or whether it was true. Both witnesses testified they each heard gunshots.

While Harris and Randolph waited in defendant's car, they also heard gunfire. They said defendant returned to the car without a gun.

After the shooting occurred, an officer detained defendant, Randolph, and Harris for a traffic stop. Randolph told the officer he had heard gunfire. Defendant had rock cocaine in his pocket and socks and a .38-caliber gun and live ammunition near him in the car. Defendant was in possession of a sufficient amount of cocaine for sale. The gun was not tested to link it to the shooting. Another gun, a .45-caliber with five unfired rounds and one unfired .45 bullet, was found near the scene of the shooting.

The gang expert, Robert Nicklo, testified, although there was a previous history of conflict between Brown and defendant, Nicklo did not believe defendant was a gang member. Nicklo explained the importance of “respect” in gang culture, meaning Brown would need to retaliate against defendant if defendant punched him in public.

*B. Brown’s Statements and Testimony*

Brown suffered a non-fatal gunshot wound to the stomach. He testified at trial that he was a gang member and he had a prior conviction for assault with a deadly weapon. He claimed he did not know defendant and he did not know who shot him. Brown had used so much marijuana he could not remember what day he was shot. Brown also admitted he was scared that, if he identified the shooter, he would be killed while in custody. Brown claimed he had been “jumped out” of the Perris Loc Crips gang after the shooting—a point the gang expert disputed.

Brown initially told an investigator he had been shot by a Mexican but, when Brown was informed defendant was in custody and had confessed, Brown tried to assert the Fifth Amendment. After the investigator told Brown that defendant was claiming he acted in self-defense, Brown admitted defendant had come around a corner and shot Brown while he was waiting for a friend outside the apartments. Brown denied he had a gun that day.

*C. Defendant’s Statements*

While in custody, defendant denied his nickname was “Bliazay” and claimed he used the street moniker, “C.K. Rider,” and he was a “Blood.” The gang expert said “C.K.” means “Crip Killer” in gang parlance. Defendant maintained Brown was shot by

“Tiny-Loc” from Compton, who passed the gun on to a person called Bliazay, who planted the gun in defendant’s car. Defendant finally admitted he was Bliazay.

Defendant told the investigator the shooting stemmed from a marijuana transaction. After defendant hit Brown at the swap meet, defendant heard Brown’s brother say he was going to obtain a gun. Harris also said Brown or his brother made reference to a gun. Defendant claimed that after he got in his car, Brown approached him with a .45 and announced, “[T]his is Perris Locs,” before firing at defendant. Defendant returned fire in self-defense and saw Brown hand his gun to his brother. The investigator said it would be a difficult angle to shoot Brown from defendant’s position in the car. Four expended bullets were recovered at the scene of Brown’s shooting. No forensic evidence supported that a .45 had been fired at the car’s location.

#### *D. Defendant’s Evidence*

Brown’s aunt, Jackie, testified that, before the shooting, defendant had asked her for help because Brown had repeatedly threatened defendant with a gun when they encountered one another. Jackie knew defendant was a peaceful person who did not use guns. Brown denied he had pulled a gun on defendant. Jackie told an investigator that Brown assured her he would not pull a gun on defendant.

Brown told Jackie he had been shot by some unknown Mexicans. A maintenance worker saw Brown give his brother the gun that was discovered at the scene. Brown’s brother threw the gun in the bushes but retrieved it when he saw the maintenance worker.

### III

#### EVIDENTIARY ERROR

When he was being interviewed, defendant tried to assert that his street moniker was actually “C.K. Rider.” Nicklo, the gang expert, explained “C.K.” means “Crip Killer.” Defendant finally admitted he used the nickname, Bliazay. Although defendant was not identified as a gang member by Nicklo, the defense objected to evidence about “C.K. Rider” because it carried prejudicial gang connotations. The prosecution argued that defendant’s effort to claim the moniker “C.K. Rider” demonstrated that defendant had lied to the police and affected the jury’s view of his credibility. The court agreed with the prosecution that defendant’s credibility was at issue concerning defendant’s claim of self-defense: “And I think his gang involvement reflects on his willingness to be straightforward with the police and be candid in his statements. It directly bears on that.” The court also observed that “this case has been served up to the jury in the gang context.” The prosecutor argued to the jury that defendant had lied about his moniker and claimed he was “C.K.,” “a normal acronym for people that are Bloods, Crip Killer.”

On appeal, defendant persists in arguing the subject evidence was more prejudicial than probative. The People counter that the evidence was relevant on the issue of credibility. The People also propose that the name “C.K. Rider” demonstrates defendant’s consciousness of guilt and constituted an implied admission that defendant tried to kill Brown.

The case law dispositively supports the People’s position on relevance. In *People v. Carter* (2003) 30 Cal.4th 1166, 1194, the California Supreme Court reiterated that,

“[a]lthough evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged—and thus should be carefully scrutinized by trial courts—such evidence is admissible when relevant to prove identity or motive, if its probative value is not substantially outweighed by its prejudicial effect. (*People v. Williams* (1997) 16 Cal.4th 153, 193.)”

In *People v. Lee* (2011) 51 Cal.4th 620, 644, defendant also contended that evidence of his nickname should have been excluded under Evidence Code section 352: “Specifically, he claims evidence of his nickname was unduly prejudicial because it suggested gang origins and prior criminal activity. We are not persuaded that defendant’s nickname alone, without any evidence of gang membership, had a tendency to suggest he belonged to a gang when he shot [the victim]. However, assuming the nickname did imply either gang membership or prior criminal activity, the trial court did not abuse its discretion in admitting the nickname. The trial court carefully scrutinized the proffered evidence and concluded its prejudicial effect did not outweigh its probative value. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [evidence of gang membership is admissible to prove specific intent, means of applying force, or other issues pertinent to guilt of the charged crime].) We conclude the trial court did not abuse its discretion by finding the risk that the jury would improperly infer criminal disposition from defendant’s nickname did not substantially outweigh the fact that evidence of defendant’s nickname was highly probative because it uniquely tended to prove defendant had a specific reason for shooting [the victim] multiple times at very close range.”

Similarly, in the present case which was tinged with gang overtones, defendant's adoption of the moniker "C.K. Rider," even though defendant was not identified as a gang member, tended to show why defendant may have shot Brown, an admitted Crip with whom defendant had engaged in previous conflicts. The evidence was admissible both as to credibility and as to other issues pertinent to defendant's guilt. Because the trial court did not abuse its discretion, we do not need to analyze defendant's additional claims of violation of due process and prejudice.

#### IV

#### INSTRUCTIONAL ERROR

##### A. *Self-Defense*

The court instructed the jury regarding self-defense based on CALCRIM No. 505:

"The defendant acted in lawful self-defense, if, first, the defendant reasonably believed that he was in imminent danger of suffering bodily injury; second, the defendant reasonably believed that the immediate use of force was necessary to defend against that danger; and third, the defendant used *no more force than was reasonably necessary* to defend against that danger." [Italics added.]

Defendant argues the italicized language misstates the law as it is stated correctly in CALJIC Nos. 5.10 and 5.30. Defendant elaborates: "In California, the doctrine of self-defense turns entirely on the nature of defendant's belief in the need to use the force he actually used. [Citation.] Defendant must subjectively hold a belief that the force was required and that belief must be objectively reasonable. [Citation.] [¶] If those subjective and objective requirements are met—or, more accurately, if the prosecution

fails to prove that defendant did not harbor the specified belief in the need to use deadly force—then the amount of force defendant *actually* use[d] . . . is irrelevant. [Original italics.]”

Defendant hypothesizes that “if someone points a stick at defendant in a dark alley and defendant responds with deadly force reasonably thinking the stick was a gun, then self-defense would not obtain because the actual force used was, quite plainly, ‘more than was reasonably necessary.’” As the People point out, defendant’s argument is answered by the further jury instruction that “[w]hen deciding whether the defendant’s beliefs are reasonable, consider all of 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.” Therefore, if defendant reasonably believed a stick was a gun, self-defense would apply.

For additional reasons, we do not find defendant’s contentions persuasive. “The principles of self-defense are founded in the doctrine of necessity. This foundation gives rise to two closely related rules. . . . First, only that force which is necessary to repel an attack may be used in self-defense; force which exceeds the necessity is not justified. [Citation.] Second, deadly force or force likely to cause great bodily injury may be used only to repel an attack which is in itself deadly or likely to cause great bodily injury; thus ‘[a] misdemeanor assault must be suffered without the privilege of retaliating with deadly force.’ [Citations.] Under these two principles a person may be found guilty of unlawful homicide even where the evidence establishes the right of self-defense if the jury finds

that the nature of the attack did not justify the resort to deadly force or that the force used exceeded that which was reasonably necessary to repel the attack.” (*People v. Clark* (1982) 130 Cal.App.3d 371, 380), disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 92; *People v. Pinholster* (1992) 1 Cal.4th 865, 966 [any right of self-defense is limited to the use of such force as is reasonable under the circumstances].)

Defendant confuses “reasonably necessary” with actually necessary. As CALCRIM No. 505 explains: “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 killing was not justified.” The defense would therefore apply in defendant's hypothetical if a person reasonably believed the stick was a gun and deadly force was necessary under the circumstances.

Defendant contends “[t]he authors of CALJIC correctly expressed” the concept in both CALJIC Nos. 5.10 and 5.30 “which list[] only the first two elements in CALCRIM No. 505 and thereby focus[] on defendant’s subjective belief and the objective reasonableness of that belief.” Not so. CALJIC No. 5.10 provides, “Homicide is justifiable and not unlawful when committed by any person who is resisting an attempt to commit a forcible and atrocious crime.” CALJIC No. 5.30 provides, “It is lawful for a person who is being assaulted to defend [himself] from attack if, as a reasonable person, [he] has grounds for believing and does believe that bodily injury is about to be inflicted upon [him]. In doing so, that *person may use all force and means which [he] believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary* to prevent the injury which appears to be

imminent.” (Italics added.) The italicized language of CALJIC No. 5.30 is nearly identical to the language used in CALCRIM No. 505. The trial court did not abuse its discretion in giving CALCRIM No. 505.

*B. Imperfect Self-Defense*

Defendant’s final argument is that the court incorrectly instructed the jury, based on CALCRIM No. 604, that defendant acted in imperfect self-defense if defendant believed “he was in imminent danger of being killed or suffering great bodily injury” and he “believed that the immediate use of force was necessary to defend against the danger” but “defendant’s beliefs were unreasonable.” The instruction given to the jury differs from the present version of CALCRIM No. 604 which provides that “[a]t least one of the defendant’s beliefs was unreasonable.” Defendant maintains that only one of defendant’s beliefs—in either imminence or necessity—had to be unreasonable but not both of his beliefs. Defendant may be correct on this point as discussed in *People v. Her* (2009) 181 Cal.App.4th 349, 353. But he cannot establish prejudice.

Following CALCRIM No. 505 and CALCRIM No. 604, the jury would have understood that if defendant reasonably believed he was in imminent danger of being killed or suffering great bodily injury, reasonably believed the immediate use of deadly force was necessary to defend against that danger, and used no more force than was reasonably necessary to defend against that danger, defendant was not guilty of any crime. We find no reasonable likelihood that the instructions, considered in their entirety, could have been misunderstood as defendant suggests. (See *People v. Smithey* (1999) 20 Cal.4th 936, 964.) Even if CALCRIM No. 604 erroneously stated that imperfect self-

defense or defense of another existed only if defendant's "beliefs" were unreasonable, another part of the instruction made clear that "[t]he difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable." The absence of any prejudice also resolves defendant's claim for violation of federal due process.

V

DISPOSITION

In the absence of evidentiary error or prejudicial instructional error, we affirm the judgment.

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CODRINGTON

J.

We concur:

HOLLENHORST

Acting P.J.

RICHLI

J.