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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.

SERGIO LOPEZ HERNANDEZ,

Defendant and Appellant.

E053441

(Super.Ct.No. INF028929)

OPINION

APPEAL from the Superior Court of Riverside County. James S. Hawkins, Judge.
Affirmed.

Susan K. Shaler, 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, Senior Assistant Attorney General, and A. Natasha Cortina and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

On New Year's Eve 1997-1998, during a party, Emelio Hernandez attacked defendant Sergio Lopez Hernandez with a knife, cutting his lip severely. Both men then left. Some four or five hours later, after going to a hospital, getting his lip stitched up, and going home briefly, defendant returned to the party. Finding that Emelio, too, had returned, defendant immediately stabbed and killed him. He then fled to Mexico.

As a result, defendant was found guilty of second degree murder (Pen. Code, § 187, subd. (a)), with an enhancement for the personal use of a deadly or dangerous weapon (Pen. Code, § 12022, subd. (b)). He was sentenced to a total of 16 years to life, plus the usual fines and fees.

Defendant now contends:

1. The trial court erred by failing to define "provocation."
2. The trial court erred by failing to instruct on perfect and imperfect self-defense.

We find no error. Hence, we will affirm.

I

FACTUAL BACKGROUND

Defendant and Emelio Hernandez were friends as well as distant relatives. Defendant was living in a trailer with his brother. Emelio was living in another trailer about 100 feet away.

On New Year's Eve 1997-1998, both defendant and Emelio attended a party at a trailer in Thermal. The party-goers were drinking beer.

Defendant and Emelio got into an argument. Suddenly, Emelio attacked defendant with a knife. He tried to stab defendant in the stomach. Then he cut defendant's upper lip. The cut was more than two inches long. A piece of defendant's lip was hanging loose.

Emelio left the party in a truck driven by Antonio Gonzalez Ruiz. Ruiz was going to take Emelio home, but on the way there, Emelio opened the door and got out. He said that he saw the house of someone he knew, and he was going there.

Ruiz went back to the party, picked up defendant, and dropped him off at a hospital in Indio. The drive took some 25 to 40 minutes. Defendant was checked into the hospital at 11:57 p.m. He admitted that he had been drinking, but he was alert and coherent. His lip was stitched up, and he was released at 12:45 a.m.

Around 2:00 a.m., defendant arrived at his brother's trailer. He went to bed, but only for about five minutes; then he got up and went back to the party. Meanwhile, Emelio, too, had gone back to the party.

Only one eyewitness testified to what happened next. Defendant arrived in a white station wagon. He got out, "with [a] knife in his hand," and ran toward Emelio. Emelio threw a table at defendant.¹ Emelio then slipped and fell. Defendant stabbed Emelio repeatedly as he lay on the ground. Defendant then got back into the white station wagon and left.

¹ Physical evidence indicated that this was actually either a barbecue or a sign that had been placed on top of a barrel so it could be used as a table.

Around 4:00 a.m., defendant arrived back at his brother's trailer. He grabbed his backpack and left. His brother did not see him again for over 10 years.

At 4:09 a.m., police were dispatched to the scene. By the time they got there, Emelio was dead. He had a total of eight stab wounds, all in the chest and abdomen. His blood alcohol level at the time of death was 0.21 percent. He had a knife in a sheath tucked into the back of his waistband.

One eyewitness identified the driver of the white station wagon as Pablo Lujan. When the police searched Lujan's white station wagon, they found a knife under the front passenger seat. There were no fingerprints on the knife. However, its size and shape were consistent with Emelio's wounds.

Defendant testified that he had been drinking since the afternoon. In addition, he was given some kind of pills at the hospital.

When defendant left the hospital, a stranger agreed to give him a ride to his brother's trailer. On the way, the stranger gave him some beer. From that point on, defendant did not remember anything until he woke up the next day in Mexicali. He claimed he did not know that Emelio was dead or that he was a suspect until about a month later.

Defendant testified that he could not go back to the United States because he "d[id]n't have papers." He admitted, however, that he had crossed the border before.

Defendant denied wanting revenge against Emelio. He also denied owning a knife.

A few months before trial, defendant was interviewed by a prosecution investigator. At that time, he denied going back to the party. He said that, after leaving the hospital, he paid a stranger \$30 to take him to Mexicali. They stopped at his brother's trailer, where defendant picked up his backpack. Then they went directly to Mexicali. He explained that he was afraid of Emelio. He did not say that there was any part of the evening that he did not remember.

II

FAILURE TO DEFINE "PROVOCATION"

Defendant contends that the trial court erred by failing to define "provocation."

A. *Additional Factual and Procedural Background.*

The trial court instructed the jury on first and second degree murder, "heat of passion" voluntary manslaughter, and involuntary manslaughter.

Regarding provocation, it instructed that "provocation can reduce a murder from first degree and may reduce a murder to manslaughter." (CALCRIM No. 522.)

In connection with murder, it instructed, "If you conclude that the defendant committed a murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder." (CALCRIM No. 522.)

In connection with voluntary manslaughter, it instructed, "The defendant killed someone because of a sudden quarrel or [in] a heat of passion if,

" . . . [O]ne, the defendant was provoked;

“ . . . [T]wo, as a result of that provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; and

“Three, the provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

[¶] . . . [¶]

“In order for heat of passion to reduce a murder to a voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I’ve defined it.

“While no specific type of provocation is required, slight or remote provocation is not sufficient, but . . . sufficient provocation can occur over a short or a long period of time. And it’s not enough that the defendant simply was provoked.

“The defendant’s not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether that provocation was sufficient. In deciding whether the provocation was sufficient, just consider whether a person of average disposition, in the same situation, knowing the same facts, would have reacted from passion rather than from judgment.

“If enough time passed between the provocation and the killing . . . for a person of average disposition to . . . ‘cool off’ and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on that basis.” (CALCRIM No. 570.)

During their deliberations, the jurors sent out a note asking for “more clarification on what constitutes 2nd degree murder.”

The trial court responded that the jurors should reread the instructions regarding first and second degree murder, including CALCRIM No. 522.²

B. *Analysis.*

Preliminarily, we note that defense counsel requested both CALCRIM No. 522 and No. 570, without modification. Nevertheless, we will assume, without deciding, that the asserted error does not come under the invited error doctrine.

“When a word or phrase “is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request.”

[Citations.] [Citation.] It is only when a word or phrase has a ‘technical, legal meaning’ that differs from its ‘nonlegal meaning’ that the trial court has a duty to clarify it for the jury. [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 670.)

As used in CALCRIM No. 522, which states that provocation can reduce first degree murder to second degree murder, provocation has its common meaning. (*People v. Cole* (2004) 33 Cal.4th 1158, 1217-1218 [former CALJIC No. 8.73].) Moreover, even

² Defense counsel asked the trial court to tell the jurors to reread, in addition, CALCRIM No. 570, regarding voluntary manslaughter. The trial court declined to do so. Defendant does not argue that this was error.

if the failure to define provocation rendered CALCRIM No. 522 erroneous, that error was harmless under any standard, as defendant was *acquitted* of first degree murder.

In CALCRIM No. 570, provocation is likewise used in accordance with its common meaning. However, the instruction goes on to explain that, to be legally adequate to reduce murder to manslaughter, the provocation must meet various other requirements, all as stated in the instruction. For example, the provocation must be such as “would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.” The provocation also must not be “slight or remote.”

Defendant argues that the instructions did not specify the difference between provocation and heat of passion. However, that is exactly what CALCRIM No. 570 did — it specified that a heat of passion theory would require not only provocation, but also that the provocation was legally sufficient and that, as a result, defendant acted “under the influence of intense emotion that obscured his reasoning or judgment.”

Defendant complains that the jury may have been misled regarding the effect of the passage of time on provocation. CALCRIM No. 570, however, specifically addressed this point, stating that “If enough time passed between the provocation and the killing . . . for a person of average disposition to . . . ‘cool off’ and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on that basis.” Defendant fails to explain why this was not sufficient guidance.

Finally, defendant argues that the “acquittal first” instruction, CALCRIM No. 640, “compounded the problem” This instruction, as given here, provided:

“You’ll be given verdict forms for guilty and not guilty of first degree murder, the same for second degree murder, the same for voluntary manslaughter, and the same for involuntary manslaughter. You may consider these different kinds of homicides in whatever order you wish. But I can accept a verdict of guilty or not guilty of second degree murder only if all of you have found the defendant not guilty of first degree murder. And I can accept a verdict of guilty or not guilty of voluntary or involuntary manslaughter only if all of you have found the defendant not guilty of both first and second degree murder. [¶] . . . [¶]

It might be that all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of first degree murder. If that’s the case, you complete and sign the verdict form for that decision and not sign any other verdict forms. . . .

[¶] . . . [¶]

“ . . . So it may be that you cannot agree whether the defendant’s guilty of first degree murder. In that case, you just inform me through the deputy that you cannot reach an agreement, and then you don’t sign any verdict forms at all. It might be that you all agree the defendant’s not guilty of first degree murder, but you might find that he is guilty of second degree murder. In that case, you complete and sign the form for not guilty of first degree murder and the form for not guilty of first and guilty of second, and not any others.

“It might be that you all agree he’s not guilty of first, but you can’t agree whether he’s guilty of second, in that case you complete and sign the form for not guilty of first and then let me know through the deputy that you cannot reach any further agreements.

“If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, then you complete and sign those forms for not guilty of each of them.

“ . . . [A]ll of you agree on a verdict of guilty or not guilty for voluntary or involuntary manslaughter, then you complete and sign the appropriate verdict forms for each of those charges.

“You may not find the defendant guilty of either voluntary manslaughter or involuntary manslaughter unless you found he’s not guilty, of course, of the forms of murder.

“Again, if you cannot reach agreement as to voluntary manslaughter or involuntary manslaughter, you just have to tell me through the deputy that you can’t reach an agreement on that, either, and not sign any forms.”

In defendant’s view, the “acquittal first” instruction “necessarily would have required the jurors to consider the . . . instructions in the order given by the court, that is [CALCRIM] No. 520 on murder, No. 521 on degrees of murder, No. 522 on provocation, and only then No. 570 on voluntary manslaughter by reason of heat of passion.” Thus, they may have found him guilty of second degree murder, in that he caused the death of a

human being with malice aforethought, without considering whether he did so under the influence of sufficient provocation to reduce the crime to voluntary manslaughter.

We do not understand defendant to be arguing that CALCRIM No. 640, standing alone, is erroneous. As we have already held, CALCRIM Nos. 522 and 570 were not erroneous; hence, there was no “problem” that CALCRIM No. 640 could “compound.”

In any event, contrary to defendant’s argument, CALCRIM No. 640 does not require the jurors to consider the instructions in any particular order. They would already have heard *all* of the instructions delivered orally by the trial court. They were specifically instructed to consider the instructions “together.” (CALCRIM No. 200.) Moreover, CALCRIM No. 640 itself expressly stated, “You may consider these different kinds of homicides in whatever order you wish.” Thus, neither CALCRIM No. 640 nor any of the other instructions would have prevented the jurors from considering voluntary manslaughter.

III

FAILURE TO INSTRUCT ON SELF-DEFENSE

Defendant contends that the trial court erred by failing to instruct on perfect and imperfect self-defense.

A. *Additional Factual and Procedural Background.*

Defense counsel requested CALCRIM No. 505, regarding perfect self-defense. The prosecutor objected, “There’s no evidence of self-defense” The trial court agreed. It therefore declined to give CALCRIM No. 505.

Defense counsel did not request an instruction on imperfect self-defense (e.g., CALCRIM No. 571).

B. *Perfect Self-Defense.*

“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.)

Perfect self-defense is a complete defense to both murder and manslaughter. (Pen. Code, § 197, cl. 1; *People v. Randle* (2005) 35 Cal.4th 987, 994, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) “For perfect self-defense, one must actually *and* reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury. [Citation.]” (*Randle*, at p. 994.)

Here, uncontradicted evidence showed that, when defendant returned to the party, he got out of the car with a knife already in his hand, went toward the victim, and stabbed him. Thus, defendant clearly was the initial aggressor. As such, he was not entitled to claim self-defense. “. . . ‘If the defendant in any way challenged the fight, and went to it armed, he cannot afterward maintain that in taking his assailant’s life he acted in self-defense.’” (*People v. Holt* (1944) 25 Cal.2d 59, 66.)

Defendant argues that earlier, the victim had attacked and, indeed, severely injured him. Since then, however, four or five hours had passed; defendant had left the party and obtained treatment at a hospital. He no longer needed to defend himself.

Defendant also notes that the victim threw a table at him. However, defendant had already begun advancing on the victim with a deadly weapon; the victim was entitled to defend *himself*. Moreover, after throwing the table, the victim fell down. Thus, defendant was not in *imminent* danger when he stabbed the victim.

Finally, defendant argues that he had no way of knowing that the victim had gone back to the party. At most, this would mean that defendant did not go back to the party with the intention of attacking the victim. The fact that he got out of the car with a knife in his hand, however, shows that, once he got back to the party and saw the victim, he formed this intent.

Accordingly, the trial court did not err by refusing to instruct on self-defense.

C. *Imperfect Self-Defense.*

“Imperfect self-defense is the killing of another human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury. [Citation.]” (*People v. Booker* (2011) 51 Cal.4th 141, 182.) Imperfect self-defense reduces what would otherwise be murder to manslaughter. (*People v. Blacksher* (2011) 52 Cal.4th 769, 832.)

“The concepts of perfect and imperfect self-defense are not entirely separate, but are intertwined. . . . “[T]he ordinary self-defense doctrine — applicable when a

defendant *reasonably* believes that his safety is endangered — may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission of a felony), has created circumstances under which his adversary’s attack or pursuit is legally justified. [Citations.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances.” [Citation.] . . .’ [Citations.]” (*People v. Enraca* (2012) 53 Cal.4th 735, 761.)

Once again, because defendant was the initial aggressor, he could not claim imperfect self-defense. (*People v. Booker, supra*, 51 Cal.4th at p. 182.) There simply was no evidence that *before* he became the aggressor — by drawing his knife, getting out of the car, and approaching the victim — he actually believed that he was in any danger.

Defendant relies on *People v. Barton* (1995) 12 Cal.4th 186. There, according to the defendant, the victim swung at him; he believed that he saw a blade in the victim’s hand. The defendant therefore drew his gun and yelled at the victim to drop the knife. (*Id.* at pp. 192-193.) When the victim “made a sudden movement” toward the defendant, the defendant fired. (*Id.* at p. 193.) Although the victim was not, in fact, armed, the Supreme Court held that there was substantial evidence that the defendant “unreasonably believed that [the victim] was armed and trying to attack him, and that defendant deliberately fired his gun in response to this perceived threat.” (*Id.* at p. 202.)

Here, by contrast, defendant did not give the victim any orders or make any conditional threats; he simply approached the victim with his knife drawn. Moreover, although the victim did throw a table at defendant, the victim then fell down. Thus,

unlike in *Barton*, there was no evidence that defendant believed, reasonably or unreasonably, that he needed to defend himself.

The trial court therefore also did not err by failing to instruct on imperfect self-defense.

IV

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.