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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.

ARTURO SUAREZ, JR.,

Defendant and Appellant.

E057525

(Super.Ct.No. RIF153089)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas E. Kelly, Judge.
(Retired judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to art.
VI, § 6 of the Cal. Const.) Affirmed.

Kevin D. Sheehy, 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, Elizabeth M. Carino, and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Arturo Suarez, Jr., appeals from judgment entered following jury convictions for attempted murder (Pen. Code,¹ §§ 187, subd. (a), and 664, subd. (a); count 1), felon in possession of a firearm (§ 29800, subd. (a); count 2); and discharging a firearm at an occupied vehicle (§ 246; count 4).

The jury also found true as to count 1 that defendant personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d), and 1192.7, subd. (c)(8)), and that the attempted murder was not willful, deliberate or premeditated. As to count 4, the jury found true the allegation that defendant personally used a firearm (§ 667 and 1192.7, subd. (c)(8)). Defendant admitted his prior serious felony (§ 667, subd. (a)) and strike prior allegations (§§ 1170.12, subd. (c)(1), and 667, subds. (c) and (e)(1)). The jury found defendant not guilty of street terrorism (§ 186.22, subd. (a); count 3). The trial court sentenced defendant to 24 years four months, plus a consecutive term of 25 years to life in prison.

Defendant contends the trial court violated his constitutional rights by failing to instruct sua sponte on attempted voluntary manslaughter based on sudden quarrel or heat of passion, as a lesser included offense of attempted murder. We reject defendant's contention and affirm the judgment.

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

II

FACTS

On October 21, 2009, around 4:00 p.m., defendant entered Ahumada's Market, which is a liquor store in the Casablanca area of the City of Riverside. Raul Pena and his friends, Jesse Guerrero and Estevan,² were standing outside the market, drinking. Guerrero testified he heard Pena and Estevan say defendant was "mad-dogging" Pena and Estevan, as he entered the market. In other words, defendant angrily squinted at Pena and Estevan and acted tough. Pena gave Guerrero money to buy beer and Guerrero went inside the market. Guerrero saw defendant inside the market taking pickled pigs feet out of a jar. Defendant "mad-dogged" Guerrero. Defendant looked angry. Guerrero got a 40-ounce beer and got in line behind defendant at the counter. Defendant glanced at Guerrero, made his purchase, and left the market. While purchasing his beer, Guerrero heard Pena and defendant arguing outside.

According to the market's videotaped recording of the argument, defendant said he was from Fern Street. Pena said that was his street. Defendant responded it was his street, and added: "I'm a Vagabundo ese. You know my dad homey. I'm a Vagabundo homey. What's up?" Pena said, "What's up?," in response. Defendant told Pena he had disrespected him and made him look bad in front of his wife and child. According to Detective Townsend, in gang culture, it was disrespectful to confront someone when the person was with his wife or children. This could lead to violence. Pena disrespected

² Estevan's last name has not been provided.

defendant by confronting defendant and punching him at the market, in defendant's gang territory, and in front of defendant's wife. Also, Pena disrespected defendant by being much older than defendant and beating him up.

While outside the market, Pena punched defendant in the face. Defendant's wife, Sophia Zaragoza, got out of the car and yelled at defendant to leave, and went back to the car. Defendant and Pena stopped fighting. They then began arguing that they were each from Fern Street. Defendant said, "Let's go to Fern right [now]. [Go] to Fern right [now] ese." Defendant walked to his car and got in the passenger seat. As Sophia was backing up the car and about to leave, defendant jumped out of the car and pointed a semiautomatic gun at Guerrero, Estevan, and Pena.

Pena approached defendant and, according to the audio recording of the incident, told him: "Put your guns away we'll go in my car. Put the guns away. Put the guns away and me and you will go in my car." Guerrero testified this meant Pena was telling defendant that they would go fight on Fern Street. Gang members fought on the Fern Street field to settle disputes over a girlfriend or to prove who was tougher. The fight would resolve the dispute and the men would then walk away.

Defendant put his gun back in his car and rode in Pena's car to Fern Street, with Zaragoza driving separately. Guerrero testified he saw defendant and Pena arguing and yelling at each other in Pena's car. At a field on Fern Street, defendant and Pena wrestled and threw blows.

Meanwhile, Guerrero rode his bike to the field on Fern Street and, upon arriving, saw Pena and defendant fighting in the street. Guerrero rode past the fight, stopped to

talk to his friend, Marie Aguilar, for a couple minutes, and walked with her back toward the fight. Guerrero heard “[q]uite a few” “continuous” gunshots. He saw Pena’s car move slowly down the street and half-way up onto the sidewalk. Guerrero ran to Pena’s car, put the car in park, and called 911. Pena was bleeding from his chest and stomach. Guerrero did not see any weapons in or near the car, and had not seen Pena with a gun or other weapon that day.

Defendant shot Pena 10 times in the chest, shoulders, arms and finger. After four surgeries, including putting steel plates in his arms, Pena was released from the hospital five days after the shooting. Pena’s rear, passenger-side car window was shattered and the car trunk, passenger-side bumper and inside door panel on the driver’s side were damaged from bullet strikes. Two .40-caliber bullets and eight shell casings were recovered. Three of the casings were found in the car. No weapons were found inside or near Pena’s car.

Francisca Santos testified that, while at her sister’s home on Fern Street, during the afternoon of October 21, 2009, her niece told her there was a fight out in front of the house. Santos looked out the front door and saw two men, defendant and Pena, fighting in the empty dirt lot (field) across the street. After they stopped fighting, they walked off the field and shook hands. They were covered in dirt. Pena got into his car parked by the lot and started his car. Defendant, whom Santos knew as “Turi,” went across the street to his car, reached through the driver’s window for his pistol, walked over to Pena’s car, and fired at the passenger’s side door of Pena’s car more than six times. Defendant was about six feet away.

From about 22 feet away, Santos yelled three or four times, “No, Turi.” Defendant looked angry. She did not see any gun other than defendant’s gun. As the other person drove away, defendant followed the car, continuing to shoot at it. Defendant then left in his car, which was parked in front of Santos’s sister’s home. After the shooting, Santos and her niece collected bullets found in the street and gave them to the police. Santos had known defendant and Pena for many years. Pena was a nearby neighbor whom Santos also knew as “Bully.”

Steven Gonzalez testified that Santos, who is Gonzalez’s wife’s aunt, told him someone was fighting across the street. Gonzalez looked out his living room window and saw two people rolling on the ground, in a dirt field. A couple minutes later, Gonzalez looked out the window and saw the two men shaking hands and walking back to their cars. After Gonzalez resumed eating his dinner, Santos yelled for Gonzalez to help her. Gonzalez stepped outside and heard five or six gunshots, and after a pause, one more shot. Gonzalez also heard Santos yell. Gonzalez saw the shooter standing in the middle of the street, three to five feet from the front passenger side of Pena’s Thunderbird, with his right arm and hand extended forward. The Thunderbird slowly moved forward and stopped against the curb nearby. The shooter’s hair was dirty from rolling in the dirt and his face was bleeding. After the shooter stopped firing at the Thunderbird, he ran to the Toyota Camry parked in front of Gonzalez’s house, got in the car, and sped away. Gonzalez helped Santos collect the shell casings in the street and tossed them in the trash.

Pena’s Testimony and Recorded Statement

Pena testified that, at the time of the charged offenses on October 21, 2009, Raul

Pena, also known as “Bully,” was 50 years old, a former boxer, and founder of Los Lobos. He had grown up in Casablanca and was living there on October 21, 2009. Pena had been convicted of drug-related felony crimes and for being a felon in possession of a firearm. He denied ever carrying a gun or being associated with a gang. Pena was president of Los Lobos for about four years before he quit. According to Pena, Los Lobos was a social club, not a gang, which ceased to exist in 1984.

Pena had known defendant since defendant was a child and had known defendant’s father, Arturo Suarez, Sr. (Arturo), since they were children. Pena had a good relationship with Arturo. Arturo and defendant used to spend a lot of time with Pena at his house, particularly when defendant was a Los Lobos member. Pena did not want to testify because he was of the “old school” view that he should not talk to the police or testify against people. As a consequence, his testimony was essentially limited to stating that on October 21, 2009, he “got into a scuffle with somebody” and then “got shot.” He said he was drunk from drinking beer for about three hours before the shooting and did not remember anything about the incident, including the identity of the shooter.

Detective Townsend attempted to interview Pena at the hospital on October 23, 2009, two days after the shooting. Pena was coherent and appeared capable of answering questions but was hesitant to speak. People who talked to police or testified were commonly referred to as snitches. Snitches were beaten, shot and stabbed. Townsend surreptitiously recorded his conversation with Pena. Pena told Townsend he was a former gang member. He acknowledged being in a fight at the market but did not identify the person he fought. When the person he fought at the market (defendant) said,

“what’s up,” Pena punched him in the mouth. Defendant pulled a gun. Someone yelled the police were coming. Defendant said he wanted to fight again. Pena told him to put the gun away and come with him in his car to Fern Street, to fight. At Fern Street, Pena beat up defendant. While on the ground, defendant told Pena he was done fighting. Pena helped defendant up, they shook hands, and Pena started walking away to his car. Defendant said, “Look at my face.” One of his eyes was almost closed and he had a big knot on his head. As Pena was driving away, defendant started shooting at Pena.

Pena testified that, after the shooting, defendant’s father talked to Pena, as a friend, and apologized for defendant shooting Pena. As a favor to defendant’s father and because Pena “didn’t want to see his son [defendant] go to prison” or defendant’s “kids grow up without a father,” Pena went to defendant’s attorney’s office and said he had a gun at the time of the shooting, which was untrue. Pena signed a declaration dated June 22, 2010, stating that after he fought someone he did not know outside the market and at Fern Street, Pena got in his car, grabbed his gun, and then heard gunshots.

Defendant’s Testimony

Defendant testified that he grew up in Casablanca and joined Los Lobos gang as a juvenile, beginning in the early 1990’s. In the late 1990’s, he left Los Lobos and joined the Vagabundos gang because he had an uncle in the gang. Los Lobos and Vagabundos were subsidiaries of the Casablanca Fern Street gang. According to Detective Townsend, Los Lobos was not a gang. It was a social club.

Contrary to Townsend’s testimony that defendant was an active member of the Vagabundos gang at the time of the shooting, defendant testified he was no longer an

active gang member after he was released from prison in mid-2007 for being an accessory after the fact in a gang-related double homicide. Abecuc Guevara, who was a Vagabundos gang member, was convicted of the double homicide. Guevara told defendant there was a rumor that defendant was a snitch. Because of this, defendant normally did not visit Casablanca and did not live in Casablanca after his conviction and incarceration in 2002.

Defendant noted that Pena had a reputation in Casablanca for being a bully when he drank. This was why he was called “Bully.” Pena had lived on Fern Street for at least 20 years. As an active gang member, he had assaulted and beat up people. He was known to carry a gun and had used it. Defendant’s father knew Pena. When defendant was a child, defendant’s father often went to Pena’s house and defendant went with him. Defendant had spent a lot of time with Pena.

Defendant testified that on October 21, 2009, he and his wife, Zaragoza, visited his grandmother, who lived in Casablanca, near Fern Street. Zaragoza drove defendant and their infant son to the market to buy pickled pig feet. Zaragoza did not want to stop but defendant told her nothing would happen. As defendant walked from his Camry into the market, he glanced at Pena and the other men standing outside the market drinking. He did not “mad dog” the men. Defendant made his purchase, walked outside, and headed toward the Camry.

Pena called defendant over and asked him what he was looking at. Pena told defendant he was not supposed to be in the area because of what he did to Guevara, inferring defendant was a snitch. These were fighting words. Defendant said he needed

to drop off his wife and argued with Pena. According to defendant, as an older gang member, Pena should have had respect for defendant being with his family and should have left defendant alone. When defendant mentioned Pena knew defendant's father, Pena said, "F___ your dad."

Zaragoza called for defendant to get in the car but, instead, defendant told Pena he was a Vagabundo from Fern Street and challenged Pena to a fight. Pena punched defendant in the chin. Defendant did not fight back. Defendant was upset and tried to run away as Pena chased him.

Defendant got in his Camry but then got out and told Pena he was going to call his chief. Pena told him to go ahead and walked away. Defendant said, "Let's go to Fern right now." Defendant reached for his gun because he was "pissed off" at Pena after he punched defendant. Pena told defendant to put away the gun and go with him to Fern Street. Defendant put the gun in the Camry and got in Pena's car to go settle the dispute on Fern Street, which was the customary place for his gang to settle disputes. Defendant was still mad and upset. Defendant wanted to fight Pena to resolve the dispute. Defendant admitted no one pointed a gun at him at the market.

Upon arriving at Fern Street, Pena and defendant headed to the field but, before they got there, Pena punched defendant. This made defendant mad and upset. When they got to the field, the two men exchanged blows and wrestled. They fell to the ground. Pena pinned defendant down and punched him on the ground. This made defendant "really upset." Defendant said, "That's it. That's it," and the fighting stopped. Pena had beaten up defendant badly. Defendant was bleeding and one of his eyes was swollen

shut. Pena gave defendant a hand, pulled him up, and said, “Yeah, that’s it. That’s it.”

As they walked toward Pena’s car, they continued arguing. Defendant made reference to his facial injuries and Pena said he had “paperwork” on defendant, inferring defendant was a snitch and Pena was going to kill him. Defendant told Pena, “Go ahead and get paperwork.” Defendant testified he saw Pena reach under his car seat and pull something out. Defendant thought Pena was going to kill him. Defendant ran to his car. Glancing back, defendant saw Pena holding a gun and thought Pena was going to shoot him. Defendant grabbed his gun from his car and started firing at Pena’s car because Pena had a gun pointed at him. Defendant feared for his life and that of his wife and one-month-old son. As Pena drove away, defendant continued firing at Pena. Defendant then ran to his car and left the scene. He disposed of his gun and, fearing incarceration, fled to Las Vegas. Three months after the shooting, defendant was located and arrested.

III

JURY INSTRUCTION ON ATTEMPTED VOLUNTARY MANSLAUGHTER

Defendant contends the trial court erred in failing to instruct sua sponte on attempted voluntary manslaughter based on sudden quarrel or heat of passion as a lesser included offense of attempted premeditated murder (heat of passion instruction). We disagree.

Defendant argues there was substantial evidence supporting the instruction. There was evidence Pena engaged in multiple physical and verbal acts of initiating confrontations with defendant, including Pena punching him in the chin at the market in front of defendant’s wife; telling defendant he should not be in the Casablanca area

because he was a snitch; and threatening defendant's life by telling him Pena was going to get "paperwork" on defendant. At the market, defendant acted rashly in response to Pena's acts by drawing and displaying his gun. There was also evidence that, when defendant was riding with Pena in Pena's car, defendant and Pena appeared to be arguing and yelling at each other. Then, as they walked toward the field on Fern Street, Pena punched defendant in the face again. This led to the two men exchanging blows and wrestling on the ground, with Pena beating up defendant. Even after the two stopped fighting, they continued arguing and Pena repeated he was going to get paperwork on defendant, inferring he was going to kill defendant. Defendant argues that evidence of these acts was sufficient to support a finding he acted in the heat of passion when he shot Pena. Defendant testified he was "really upset," "mad," and "pissed off." Santos testified defendant's face was bloody and swollen, and he looked angry. Defendant asserts this evidence supported a finding that defendant acted rashly and out of a strong passion, rather than upon due deliberation or premeditation. (*People v. Breverman* (1998) 19 Cal.4th 142, 163 (*Breverman*).)

Defendant asserts that even though his attorney withdrew a request for the heat of passion instruction, as inconsistent with defendant's defense, the trial court was required to give the instruction sua sponte, given the state of the evidence. During a discussion of the jury instructions, the trial court noted defendant had requested an instruction on attempted voluntary manslaughter based on imperfect self-defense and had withdrawn the heat of passion instruction. The court stated that the court was not required to give sua sponte the heat of passion instruction because, if the jury convicted defendant on

anything, he would be convicted of attempted murder. Furthermore, the heat of passion instruction was inconsistent with defendant's defense and defendant did not want the instruction. The court acknowledged that it nevertheless could be required to give the heat of passion instruction sua sponte even if the defendant objected but, in the instant case there was no sua sponte duty because the state of the evidence did not support the instruction. Defense counsel agreed. The court instructed the jury on the lesser included offense of attempted voluntary manslaughter based on imperfect self-defense and did not give the heat of passion instruction.

A. Applicable Law

“In criminal cases, even absent a request, a trial court must instruct on the general principles of law relevant to the issues the evidence raises. [Citation.] “That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]” [Citation.] “[T]he existence of “any evidence, no matter how weak” will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is “substantial enough to merit consideration” by the jury. [Citations.]’ [Citation.]” (*People v. Taylor* (2010) 48 Cal.4th 574, 623.)

“Voluntary manslaughter is a lesser included offense of murder. [Citation.]” (*People v. Booker* (2011) 51 Cal.4th 141, 181.) Attempted voluntary manslaughter is thus a lesser included offense of attempted murder. (See, e.g., *People v. Lopez* (2011)

199 Cal.App.4th 1297, 1304, fn. 35.)

“Voluntary manslaughter is ‘the unlawful killing of a human being, without malice’ ‘upon a sudden quarrel or heat of passion.’ [Citation.] An unlawful killing is voluntary manslaughter only ‘if the killer’s reason was actually obscured as the result of a strong passion aroused by a “provocation” sufficient to cause an “ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.”’ [Citations.]’ [Citation.] ‘The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment. Adequate provocation . . . must be affirmatively demonstrated.’ [Citation.]” (*People v. Thomas* (2012) 53 Cal.4th 771, 813; see also *People v. Beltran* (2013) 56 Cal.4th 935, 957.)

B. Analysis

Evidence of defendant’s wounded pride and bruised ego from Pena punching defendant in the jaw at the market and beating him up on Fern Street, and from Pena’s verbal threats, was not enough to support a heat of passion instruction, particularly when defendant challenged Pena to fight on Fern Street, rather than leaving with his wife. Defendant and Pena mutually agreed to resolve their differences by going together to the Fern Street field to fight. Then, after fighting, they agreed to end the fight, shook hands, and returned to their cars. No doubt defendant was upset from losing the fight, being called a snitch, and being told Pena was going to get “paperwork” on him. Nevertheless, the fight was over, defendant was free to return to his car, and Pena was in the process of driving away when defendant fired his gun at Pena.

The evidence was insufficient to support a heat of passion instruction, even when taking into consideration the totality of the circumstances, beginning with Pena punching defendant in the chin at the market. After challenging Pena to fight him at the field on Fern Street, defendant had calmed down enough to put his gun back in his car and ride with Pena to the field on Fern Street. In addition, after the two men finished fighting, defendant shook hands with Pena and had time to reflect on his actions as he returned to his car. Defendant was no longer being provoked or threatened. Pena had gone to his car and was about to drive away. We conclude these circumstances were insufficient “to cause an average person to become so inflamed as to lose reason and judgment” (*People v. Manriquez* (2005) 37 Cal.4th 547, 586) or to cause an ordinary person to act rashly or without due deliberation and reflection (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827). Even assuming defendant shot Pena while acting under strong passion aroused by provocation, the evidence does not support a reasonable finding that the provocation was sufficient to cause an ordinary person of average disposition to act as defendant did, and rashly, without due deliberation and reflection, shoot Pena. (*People v. Thomas, supra*, 53 Cal.4th at p. 813.)

Furthermore, “A defendant may not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill an adversary and expect to reduce the crime to manslaughter by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion. The claim of provocation cannot be based on events for which the defendant is culpably responsible. [Citations.]” (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.) Rather than withdrawing at the market and leaving with his

wife after Pena punched him in the chin, defendant challenged Pena to a fight on Fern Street and voluntarily rode with Pena to the Fern Street field. Defendant initiated the fight on Fern Street and therefore cannot rely on the fight and being beaten up as provocation for shooting Pena.

Even if we were to conclude that the trial court erred not giving the heat of passion instruction sua sponte, such error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (See also *Breverman, supra*, 19 Cal.4th at p. 178.) It is not reasonably probable defendant would have obtained a more favorable result had the instruction been given. The jury rejected the theory of attempted voluntary manslaughter based on imperfect self-defense and found defendant guilty of attempted murder. This reflected that the jury found defendant acted with malice, which would have precluded a conviction of attempted voluntary manslaughter based on heat of passion/sudden quarrel.

IV

DISPOSITION

The judgment is affirmed.

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CODRINGTON

J.

We concur:

RAMIREZ

P. J.

KING

J.