

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO MOREIRA ARESTA,

Defendant and Appellant.

E062172

(Super.Ct.No. SWF1302144)

OPINION

APPEAL from the Superior Court of Riverside County. Mark Mandio, Judge.

Affirmed.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

At trial, the prosecution presented evidence that defendant and appellant, Fernando Aresta, a 44-year-old father, accompanied his teenage son on a bike ride to hunt down Pedro Rios, a teenager who had burglarized his home a few months prior. Aresta found Pedro, jumped him, and tried to cut his throat with a knife. When Pedro's friend, 16-year-old Bobby Henderson, came to Pedro's aid Aresta stabbed Bobby in the chest, killing him almost instantly.

The jury convicted Aresta of the first degree murder of Bobby (Pen. Code, § 187, subd. (a); count 1) and the assault with a deadly weapon of Pedro (§ 245, subd. (a)(1);¹ count 2). The jury also found true the allegation Aresta personally used a deadly weapon in the commission of the murder. (§ 12022, subd. (b).) The trial court sentenced Aresta to 25 years to life for the murder, consecutive to a determinate term of four years for the assault, plus one year for the deadly weapon enhancement.

On appeal, Aresta argues he was entitled to self-defense and provocation instructions. Finding insufficient evidence in the record to support the instructions, we affirm.

¹ All undesignated statutory references are to the Penal Code.

I

FACTS AND PROCEDURAL BACKGROUND

This case arises from a street fight that occurred around 11:00 p.m. on May 25, 2013 in Lake Elsinore. At trial, the prosecution presented the testimony of several eyewitnesses to the fight. Each of those witnesses, including Aresta's 17-year-old son Anthony, gave consistent accounts of the fight. Aresta's testimony differed from all the other accounts.

A. *Jennifer Gonzales's Testimony*

Fourteen-year-old Jennifer Gonzales is a friend of Pedro Rios and Bobby Henderson. On May 25, 2013, she attended a party with them and a few other teenagers. Around 10:00 p.m., the party broke up and Jennifer left with Pedro and Bobby. Jennifer's house was about a 10-minute walk from the party, so they planned to walk together to her house and continue to hang out. During their walk, they reached an intersection next to a chain-link fence separating the street from a canal. Bobby hopped the fence and Pedro pulled the bottom of the fence up for Jennifer to crawl under. As soon as she reached the other side she heard Pedro scream and say, "I'm Pedro Rios. I'm Pedro Rios. I don't know who you are."

Jennifer turned around to see Pedro lying on his back and two "tall guys" wearing sweatshirts with the hoods pulled over their heads standing over him. Jennifer was five feet away from the fight the entire time. She testified that one of the attackers was a bald man with a big nose and scars on his face, and the other was a teenager with brown hair.

The man straddled Pedro and punched his face several times while the teenager stood next to Pedro and kicked him. Bobby climbed back over the fence and began fighting the teenager. The man pulled out a knife with a blade about five inches long and tried to cut Pedro's neck. Pedro grabbed the man's wrist and tried to push the knife away. Jennifer crawled back under the fence, screamed at the man to stop and that the police were on their way.

Just then Jennifer's friend Thomas De La Rosa skated up to the fight and hit the man across the head with his skateboard. At this point, Jennifer was concentrating on Pedro, trying to talk to him, because he was "really bloody" and "still trying to figure out what had just happened." The next thing she saw was the two attackers riding off on mountain bikes. Bobby was lying on the ground about 20 feet from her and Pedro. Bobby was on his back with his eyes open, struggling to breathe. Jennifer lifted up his shirt and saw he had been stabbed in the chest.

B. *Thomas De La Rosa's Testimony*

Thomas was 18 years old at the time of the incident and was also friends with Pedro and Bobby. He had gone to the same party and had left on his skateboard when the party broke up. On his ride home, he passed two people on bikes going the other way down the street. When he reached his driveway he heard a sound "like somebody getting hurt." He looked down the street in the direction of the sound and saw what appeared to be people fighting. He rode to the fight and saw a man (whom he identified in court as Aresta) straddling another person, trying to cut his throat with a knife. Next to them were

two people wrestling with each other and one of them (who he later realized was Bobby) “body slam[med]” the other (who he later realized was Anthony) to the ground.

At first, Thomas did not know who any of the people involved in the fight were, but he wanted to help the person being attacked with a knife. He picked up his skateboard and hit Aresta across the head with “all [his] force,” causing Aresta to fall over. He saw in his peripheral vision that Aresta had “stumbled back” and was “trying to pick himself up” next to a nearby tree. At that point, he realized the person Aresta had been attacking was Pedro. He pulled Pedro up to the curb and checked his neck to see if he had been cut by the knife. Finding no wounds on Pedro’s neck, Thomas picked up his skateboard and “jabbed” Anthony with it because he was still upset about the attack. Anthony told Thomas that he was sorry.

“[T]hat second,” Thomas saw Bobby make his way over to where Aresta was, near the tree. Thomas tried to warn Bobby that Aresta had a knife, but as soon as Bobby reached the tree, he “stopped like he had hit something,” turned around, stumbled a few steps, and fell forward. Aresta and Anthony immediately rode off on their bikes.

Thomas described the incident as happening very quickly: “[I]t all happened in like 30 seconds, a minute. Real fast. Like no one ever stopped moving. It just all happened in one motion it seemed like.” The police arrived about two minutes later.

On cross-examination, Thomas described the layout of the fight scene. The two altercations (Aresta’s with Pedro and Anthony’s with Bobby) were only about 10 feet

apart. Separating the two groups was a bush and a tree. It was to this tree Aresta stumbled after receiving the blow from Thomas's skateboard.

C. *Pedro Rios's Testimony*

Pedro was 18 years old at the time of the incident. He had committed about eight residential burglaries, one of which was of Aresta's house in January 2013. He and his friend (also named Pedro) had broken into Aresta's house during the evening and stole several jars of marijuana, a shotgun, and "two grand or three."

On the night of May 25, 2013, Pedro was holding the fence up for Jennifer to crawl under when he was struck from behind on the back of his head. He fell to the ground and two people in "hoodies" started beating him. Bobby started fighting with one of the attackers and the other one straddled Pedro and tried to slit his throat with a knife. Suddenly, Pedro's attacker went "flying" and Pedro recognized Thomas De La Rosa hovering over him, checking his neck. Thomas sat Pedro down on the curb, and the next thing Pedro saw was Bobby falling face down onto the street.

That evening, Pedro was treated at the hospital for his injuries. He received several stitches in his mouth, lips, and gums, and had a few dislodged teeth. He estimated he was punched in the face about 25 to 35 times during the attack.

D. *The Neighbor's Testimony*

A nearby resident witnessed some of the fight from his front yard. From his vantage point, he could see one person straddling another, punching him in the face, and two other people standing next to each other. The two groups were very close, about two

to three feet away from each other. The neighbor could not tell if the people standing were arguing or talking. He also saw a girl squatting in between the two groups of people and screaming. He went inside his house to put on shoes and grab his telephone, at which point he heard a loud noise “like when you drop a bowling ball on concrete.” It took him about 15 seconds to run back outside, where he saw a kid lying on the ground and another kid trying to get up on his knees.

E. *Aresta’s Testimony*

Aresta testified that before the incident on May 25, 2013, he knew Pedro Rios as one of the teenagers who had burglarized his home. After the burglary, Pedro would torment his son Anthony by bragging about the crime after school in front of others.

On the night of May 25, 2013, Anthony was at home, bored and watching television. Aresta was running low on cigarettes and asked Anthony if he wanted to go on a bike ride with him, to “cruise to the store.” Anthony told Aresta that if they took a certain route they “might run into Pedro” because Pedro was at a party that some of Anthony’s friends were also attending. According to Aresta, he and his son did not set out on their ride with the purpose of finding Pedro. If Aresta happened to see Pedro on the ride, he “was going to tell him, ‘Don’t be breaking into our house.’ I was going to, you know, just get at him and try to intimidate him with words.”

On the bike ride, Anthony saw Pedro walking down the street with some other kids and pointed him out to Aresta, who then yelled, “Are you the bastard that broke into our house?” Pedro approached Aresta with his skateboard in his hands saying, “You

don't even know me.” Pedro was holding up his skateboard menacingly so Aresta flung his bike at him. Pedro sidestepped the bike and Aresta said, “ ‘Look, let's just talk about this.’ ”

Pedro jumped over the bike, stumbled, and dropped his skateboard. Aresta took that opportunity to punch Pedro in “the body,” whereupon Pedro “football tackle[d]” him toward the fence. He and Pedro wrestled standing up until he was able to pin Pedro to the ground. Aresta “thr[ew] three punches at him striking him on the side of the head.” When he heard a female voice say, “Stop it. Leave him alone,” he stopped punching Pedro.

Aresta stood up and turned to see where the female voice had come from. At that point, someone, who he now believes was Thomas De La Rosa, hit Pedro across the face with a skateboard. Aresta heard Anthony saying, “Ow, ow,” turned and saw “two silhouettes . . . and one is on top of the other.” A second later, Aresta was struck in the back of the head with a skateboard.

Aresta fell to his hands and knees and “somebody” “karate kick[ed]” him in his mouth. Then he was “grabbed from behind and . . . choked.” The person choking him picked him up and “arch[ed]” him backward. Aresta started to suffocate and “see black” then “see red.” He noticed “someone” standing to his right, “They have a knife in their hand, and they had like—I almost thought they were like suspenders, two lines going down here, which offset what they were wearing.” A “young boy” said, “ ‘You want a piece of this, too.’ ” Suddenly, the person choking Aresta released him.

Aresta sat down on the curb. There were people running in his direction, some of whom were “yelling using the ‘f’ word.” Anthony said they should leave and they both rode home on their bikes. Aresta’s jaw was broken from the karate kick, but he did not go to the hospital that evening. Anthony drove him to his girlfriend’s home in Fullerton the following morning and she took him to the hospital, where he stayed for five days.

Aresta lied to the police detective who questioned him about the incident. He claimed he did not know anything about a fight on May 25, 2013, and that he was in Fullerton visiting his girlfriend that evening. He told hospital staff he had hurt his jaw falling off his bike.

F. *Anthony Aresta’s Testimony*

Anthony testified he and Aresta left their house on bikes the evening of May 25, 2013 to find Pedro and “beat him up.” This was an ongoing subject between him and his father. They had talked about tracking down Pedro and beating him up between five and 10 times since the burglary. Anthony knew where Pedro would be that night because his friend was keeping him updated on Pedro’s whereabouts. He was relaying the information to Aresta during their bike ride.

When they found Pedro running down the street with two friends, they followed the group. As Pedro was about to climb a fence, Aresta grabbed him and started beating him up. Aresta punched Pedro in the face several times, then Bobby climbed back over the fence to help Pedro. Anthony said to Bobby, “this doesn’t involve you,” and Bobby responded, “no, that’s my friend.” Anthony stepped in front of Bobby to block him from

Aresta and Pedro. Bobby hit Anthony and threw him to the ground. Anthony recalled being hit in the head and kicked in the ribs while he was on the ground. Then, “it just all stopped” and he “somehow ended up next—over there by Pedro and my dad.” Anthony told Aresta they should leave and they rode off. Anthony did not see where Bobby was.

G. *Additional Testimony*

Riverside County Sheriff’s Deputy Timothy Wisniewski arrived at the fight scene at approximately 11:20 p.m. Thomas was on the ground next to Bobby, cradling Bobby’s head and crying. Bobby’s shirt was covered in blood and he was motionless, trying to breathe. He had a “bubbling” puncture wound near his sternum. Deputy Wisniewski called an ambulance, but Bobby stopped breathing before it arrived.

Bobby’s autopsy revealed he had been stabbed in the chest, through his heart. His puncture wound was four inches deep. He had an abrasion on his face, a superficial cut on his chest, small lacerations on two fingers of his right hand, and a bruise on a finger on his left hand. Bobby was 16 years old, five feet seven inches tall, and 146 pounds; Aresta was six feet two inches tall and 44 years old.

Pedro and Thomas testified they are part of the “Fleez,” which is a group of friends who party and skateboard together. Text messages from Aresta’s cell phone showed he had messaged his girlfriend at 10:23 p.m. on May 25, 2013, saying, “We goin huntin for insects.” The following exchange ensued: the girlfriend responded, “Nice. Call me later when ya done squashin a few of dem varments”; Aresta responded, “Kk will do”; and the girlfriend responded, “Happy hunting squash em good.” Aresta

admitted he and his girlfriend knew Pedro was a member of the Fleez, but he claimed the text messages referred to him killing the grasshoppers and aphids that infested his marijuana plants.

H. *Closing Arguments and Instructions*

During the conference on jury instructions, the court concluded a voluntary manslaughter instruction based on imperfect self-defense was not supported by the evidence. Defense counsel agreed and withdrew his earlier request for the instruction. Aresta did not request any other instructions on self-defense or provocation.

During closing arguments, the prosecution argued Aresta had committed first degree murder. He argued Aresta had set out that night armed with a knife and had initiated the fight with the intent to kill. He told the jury it could infer premeditation and deliberation from the evidence Aresta stabbed Bobby with enough force to penetrate four inches into his chest. Defense counsel argued, “[Aresta] testified that he didn’t stab anybody. . . . And what I’d say is that based on the testimony and the eyewitness accounts of all the other individuals, that the prosecution has not presented evidence to prove beyond a reasonable doubt that [Aresta] stabbed Bobby Henderson to death.”

II

DISCUSSION

Aresta’s opening brief argues the trial court violated its sua sponte duty to provide an imperfect self-defense instruction that would allow the jury to find he committed voluntary manslaughter, a lesser included offense of murder. Aresta filed a supplemental

opening brief, arguing he was also entitled to instructions on perfect self-defense (as a complete defense to murder), heat of passion (as a theory of voluntary manslaughter), and provocation (as a theory of second degree murder). We disagree with Aresta's contentions.

A. *Self-defense*

“The doctrine of self-defense embraces two types: perfect and imperfect. [Citation.] Perfect self-defense requires that a defendant have an honest and reasonable belief in the need to defend himself or herself. [Citation.] ‘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.’ ” (*People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1168.) An instruction on self-defense is required if “supported by substantial evidence,” meaning not merely “any evidence . . . no matter how weak,” but rather evidence from which a jury composed of reasonable persons could conclude the defendant acted in self-defense. (*People v. Cruz* (2008) 44 Cal.4th 636, 664 (*Cruz*.)

The record does not support a self-defense instruction. Significantly, Aresta testified in his own defense and nothing in his testimony supports an inference that he had attempted to withdraw from the fight or was subjectively afraid of Bobby. Aresta's theory of the case was that an unidentified person who looked to be wearing suspenders had murdered Bobby.

The testimony of the other eyewitnesses does not support a theory of self-defense either. First, nothing in the record supports a finding that Aresta feared he was in imminent danger from Bobby, who was unarmed and much younger and smaller than Aresta. According to Thomas's testimony, Aresta stabbed Bobby as he was approaching Aresta. There is no evidence Bobby swung at Aresta or resorted to any physical violence in the moments before his death. (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1359-1360 [simply approaching a defendant is insufficient to create a fear of danger, even in light of evidence of past threats].)

At oral argument, defense counsel argued for the first time that Aresta feared Bobby because Bobby had broken his jaw with a single kick. To the contrary, overwhelming evidence in the record demonstrates Thomas broke Aresta's jaw with his skateboard. The only evidence to support Aresta's theory is his own testimony that "somebody" had karate kicked him in the mouth, which is too vague to constitute the substantial evidence necessary for a self-defense instruction. (*Cruz, supra*, 44 Cal.4th 636, 664 [self-defense instruction requires "substantial evidence" not "any evidence"].) Counsel also made much of Thomas's testimony that, as he was telling Pedro to get up, he saw Bobby approach Aresta "to attack." At most, this testimony demonstrates *Thomas* thought Bobby planned to defend his friends against Aresta. It says nothing about Aresta's state of mind and whether he feared the teenager would kill him or inflict great bodily injury.

Second, there is no evidence Aresta, the aggressor, unequivocally communicated “either by words or by conduct” that he had abandoned the fight. (*People v. Hernandez* (2003) 111 Cal.App.4th 582, 588-589, citing *People v. Button* (1895) 106 Cal. 628 [conduct must be such that “indicate[s] to a reasonable man that [the aggressor] in good faith has withdrawn from the combat”].) Before an aggressor can legally defend himself against the victim, “he must have destroyed the[] appearances [created by his attack] and removed, to the other’s knowledge, his necessity, actual or apparent, for self-preservation.” (*People v. Hecker* (1895) 109 Cal. 451, 463-464.) However, as our high court stated over a century ago, if the events of the fight are so sudden the aggressor cannot notify his opponent of his withdrawal, “it is the first assailant’s fault and he must take the consequences.” (*Id.* at p. 463.)

Here, even if Aresta had desired to end his attack (and there is no evidence he did), there was no time for him to communicate this desire to Bobby. According to the testimony of Jennifer, Pedro, Thomas, Anthony, and the neighbor, the time between when Aresta was hit with the skateboard and “stumbled back” and when he stabbed Bobby was extremely brief. Thomas testified the action lasted about 30 seconds. He stated, “[i]t all happened . . . [r]eal fast. Like no one ever stopped moving. It just all happened in one motion it seemed like.” The neighbor testified that only about 15 seconds passed from when he heard the loud noise (presumably Thomas hitting Aresta with his skateboard) to when he saw the kid (presumably Bobby) lying on the ground.

Even if we assume there was sufficient time to communicate with Bobby, the record contains no evidence Aresta engaged in any conduct that could reasonably be interpreted as withdrawal. Aresta argues he conveyed an intent to withdraw by “running away” from the fight. Seizing on Thomas’s testimony that he was “trying to pick himself up” near the tree, Aresta claims Bobby, a “gang member,”² “aggressive[ly]” pursued him “to a remote location away from the initial fighting.” Aresta argues “all fighting had unquestionably ceased” after Thomas hit him with a skateboard, but Bobby “refused to accept [his] surrender” and “dogged[ly]” pursued him to the tree. This characterization of the record is untenable.

The testimony and the fight-area photographs and diagrams, which we ordered from the trial court and reviewed, establish that the entire altercation took place within a very small radius. As described by multiple witnesses to the incident, there was only about 10 feet between Aresta’s and Anthony’s fights, and the tree where Bobby was stabbed was located between them. This testimony is consistent with our review of the trial exhibits, which show the tree as being only several feet from the area where the altercations took place. Indeed, defense counsel emphasized this point during closing, arguing, “[W]e’re talking about a very confined area, like right here in the corner of this [court]room . . . in a very short window of time.”

² Aresta’s description of Bobby as a gang member has no basis in the record. Bobby was friends with Pedro and Thomas, who were both members of the “Fleez,” but there was no evidence that group was anything more than teenage friends who skateboarded and smoked marijuana together.

Moreover, nothing about the phrase “picking himself up” indicates Aresta wanted to stop fighting. (*People v. Hernandez, supra*, 111 Cal.App.4th at p. 590 [testimony the defendant “moved back” during a fight he instigated was insufficient evidence of withdrawal].) Contrary to Aresta’s characterization, Thomas’s testimony was not that Aresta “ran away” to a “remote” location, instead, he testified Aresta “stumbled back” after he hit him with the skateboard. Thomas’s testimony supports the inference that Aresta was trying to buy a few moments to regain his bearings after being hit so hard his jaw broke, not that he was running away. At no point before stabbing Bobby did Aresta attempt to leave the fight. Aresta remained in the fray for the entirety of the fight. It is only after stabbing Bobby that he could be said to have withdrawn, by fleeing the scene on his bike.

Finally, Aresta argues the severity of his jaw injury made it clear the fight had ended, meaning Bobby’s approach initiated a new altercation against which he felt compelled to defend himself. First, Aresta exaggerates the impact of his injury. All accounts of Thomas’s blow to his face were that he continued moving and fighting after the injury. Aresta himself testified that, despite his injury, he managed to break out of a chokehold, bike home, wash and dress his wound, and visit his girlfriend in Fullerton before seeking medical care. Second, even assuming Aresta’s injury would have appeared severe to an onlooker, given the rapid succession of events leading up to the stabbing, Bobby had no time to notice the injury. At most, Bobby would have seen

Aresta was bleeding and stumbling, both of which are common to knife fights and do not, on their own, convey the aggressor has abandoned the fight.

Far from showing self-defense, the evidence shows Aresta, an adult man armed with a knife, attacked a group of teenagers, attempted to kill Pedro, and succeeded in killing the boy who came to Pedro's defense. Aresta deployed the fatal blow the instant Bobby approached him. We borrow for our conclusion the words of *People v. Smith* (1981) 122 Cal.App.3d 581, 590: "[The] evidence doesn't provide even a glimmer of self-defense."

B. *Provocation*

"Heat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter." (*People v. Beltran* (2013) 56 Cal.4th 935, 942.) "Heat of passion . . . is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation." (*Ibid.*) Provocation that is insufficient to preclude the formation of malice "might nevertheless be adequate to negative or raise a reasonable doubt as to the idea of premeditation or deliberation, leaving the homicide as murder of the second degree." (*People v. Thomas* (1945) 25 Cal.2d 880, 903.)

Aresta contends he was entitled to instructions on both types of provocation on the theory he was “in a highly emotional state” after sustaining “traumatic injuries.”³ This contention is without merit. Having initiated the attack, Aresta cannot claim he was provoked by his victims’ efforts to defend themselves against his aggression. A claim of provocation “cannot be based on events for which the defendant is culpably responsible.” (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.) “ ‘If the defendant causes the victim to commit an act which defendant could claim provoked him, he cannot kill the victim and claim that he was provoked. In such case, he is deemed to have acted with malice and would be guilty of murder.’ ” (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1312 [reversing trial court’s reduction of the defendant’s conviction from second degree murder to manslaughter because the defendant was the initial aggressor/provocateur].) Additionally, the provocation must have been caused or initiated by *the victim* (*People v. Avila* (2009) 46 Cal.4th 680, 705), and there was no interaction, let alone altercation, between Aresta and Bobby. Aresta stabbed Bobby in the chest the instant Bobby approached him. The two had spoken no words to each other and Bobby was unarmed.

³ To the extent Aresta’s provocation theory is based on being angry about Pedro’s burglary of his house, we reject the burglary as a mitigating factor. The crime occurred months before the murder, giving Aresta ample time to “cool off.” (See *People v. Moyer* (2009) 47 Cal.4th 537, 552 [the defendant had ample time to cool off where provoking incident occurred the night before the killing].)

Because we conclude there is insufficient evidence to support the instructions Aresta argues for on appeal, we need not address his claims of trial court error (for failure to provide) and ineffective assistance of counsel (for failure to request) the instructions.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.