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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW ESTRADA,

Defendant and Appellant.

F062640

(Super. Ct. No. VCF235428B)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

Robert Derham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Gomes, J. and Detjen, J.

INTRODUCTION

On August 6, 2010, appellant, Andrew Estrada, was charged in an information with murder (Pen. Code, § 187, subd. (a)) and discharge of a firearm causing death (Pen. Code, § 12022.53, subd. (d)). A jury convicted Estrada of second degree murder and found the gun use allegation true. He was sentenced to 15 years to life for second degree murder and 25 years to life for the firearm enhancement, to be served consecutively.

On appeal, Estrada contends he was deprived of effective assistance of counsel because his trial counsel failed to request the jury be instructed on antecedent threats. We disagree and affirm.

FACTS

Estrada and his cousin, Chris Navarro, hosted a party at their house in Farmersville on April 3, 2010, around 10:00 p.m. Estrada and many of the guests drank beer and smoked marijuana.¹ The victim, Aising Saese, lived down the street and came to the party uninvited.

One of the party guests testified Saese and Navarro were talking to one another as she was leaving. A recording of Estrada's police interrogation was admitted into evidence and played for the jury. When the police interrogated Estrada, he stated that Saese told Navarro "he was going to get his homies on us because [they had] marijuana plants," at which point Navarro told Saese to leave the party. Estrada also stated Saese told them he was going to call his "OT's,"² and that he was going to "spray" them because Estrada was wearing red.

¹ Before commencement of the interrogation, Estrada was read and waived his rights, pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. The transcript of Estrada's interrogation by the police was introduced as People's exhibit 61. At trial, a recording of the interrogation was admitted into evidence as People's exhibit 60 and played for the jury. Jurors had a copy of the transcript to read as they heard the interrogation.

² "OT" is an Asian criminal street gang in Farmersville.

Toward the end of the night Alex Aparicio (Alex) and his girlfriend were arguing in the front yard. Saesee approached Alex to ask him for a cigarette and told them they shouldn't be arguing. Later, Alex's girlfriend left the party, but he remained outside. At some point, Alex tried to get back into the house, but the door was locked. He tried knocking on the door and calling his friends in the house, but no one answered. Saesee also tried knocking on the door, and Alex told him that no one was answering.

Meanwhile, Estrada, Navarro, Monique Hernandez, and Alex's brother Sergio Aparicio (Sergio) were all inside the house. Sergio testified they heard somebody knocking, but soon after it sounded like somebody was kicking the door. Estrada looked to see who was knocking. He told the others that he did not know who it was and "maybe [the person knocking is] an OT or something." After Estrada mentioned the person at the door might be an OT, everybody started getting scared. Sergio and Navarro each called the police.

Estrada told police in the interrogation that he texted his friend Daniel Martinez, a Norteño gang member, telling him that an OT was at the party and "getting crazy." Estrada also asked Martinez to bring him a gun. Estrada met Martinez a block away from the house to pick up a revolver. Then Estrada walked up the street in front of the house and yelled at Saesee. Alex testified that at that point Saesee was across the street from the house and no longer knocking on the door. Alex stated Estrada fired the gun once into the air. After the first shot, Alex hid behind a pillar in front of the house.

Estrada told police he yelled at Saesee to get away from the house, at which point Saesee put his hand in his pocket and walked away from the house. Estrada stated he felt scared as Saesee put his hand in his pocket. Estrada fired one shot at Saesee and missed. Saesee turned and ran from Estrada. Estrada told police he got close to Saesee, "shot him" and "emptied the clip on him." Saesee fell to the ground after the second shot, and Estrada continued shooting him in the back as he fell. Saesee died from five gunshot wounds to the back.

Estrada told investigators he shot Saesee because “he put a threat to my family.... He put a threat to all of us and ... on my son.... He scared me really good. Cause I know how OT’s are....”

DISCUSSION

Estrada asserts he was provided with ineffective assistance of counsel when his trial counsel failed to request a jury instruction on antecedent threats. We disagree.

The defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. Tactical errors are generally not deemed reversible. Counsel’s decision making is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or, unless there simply could be no satisfactory explanation. Prejudice must be affirmatively proved. The record must affirmatively demonstrate a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Attorneys are not expected to engage in tactics or to file motions which are futile. (*Id.* at p. 390; also see *People v. Mendoza* (2000) 24 Cal.4th 130, 166.)

Although a court has no duty to give on its own motion a pinpoint instruction on specific evidence developed at trial (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530), it must give a requested instruction “if the instruction correctly states the law and relates to a material question upon which there is evidence substantial enough to merit consideration.” (*People v. Barajas* (2004) 120 Cal.App.4th 787, 791.)

Estrada’s trial counsel did not err by failing to request a pinpoint instruction on antecedent threats. Defense counsel’s failure to request the instruction was an objectively reasonable tactical decision. Counsel explained in closing arguments, “Andrew had the [threat] fresh in his mind about Mr. Saesees and his homies coming back to the house, and here you have Mr. Saesees acting like a maniac at the door. It’s reasonable that there was some fear involved.” Counsel characterized the facts that way in an attempt to depict the earlier threats at the party as *present* threats, still “fresh” in Estrada’s mind.

Requesting a pinpoint instruction on antecedent threats may have confused the jury by depicting the conflict as multiple events, inconsistent with counsel’s portrayal of a single ongoing incident. Counsel’s illustration of events at the party served his argument that Estrada acted believing he was facing immediate harm. As so construed, Saesees’s earlier threat that he would come back “with his homies” and “spray” them was not made in the distant past but is part of an immediate and ongoing threat as perceived by Estrada. Accordingly, counsel’s failure to request the pinpoint instruction on antecedent threats was a reasonable tactical decision because counsel was emphasizing that Saesees’s threats were current threats.

Furthermore, Estrada fails to establish trial counsel’s supposed error was prejudicial. While Estrada argues the absence of the antecedent threats instruction³ led the jury to believe that only threats that immediately precede the homicide may be considered (*People v. Pena* (1984) 151 Cal.App.3d 462, 475 (*Pena*)),⁴ he ignores the

³ The optional antecedent threats instruction from the imperfect self-defense instruction states: “If you find that [the victim] threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant’s beliefs. [¶] If you find that the defendant knew that [the victim] had threatened or harmed others in the past, you may consider that information in evaluating the defendant’s beliefs.” (CALCRIM No. 571.)

⁴ The court in *Pena, supra*, 151 Cal.App.3d at page 475 stated, “Absent instruction with respect to the effect of prior threats, jurors could believe they were precluded from considering the effect of prior threats on defendant’s perception of his immediate danger.”

language of other instructions given to the jury. The trial court instructed the jury on imperfect self-defense based on CALCRIM No. 571. The trial court stated, in relevant part:

“The defendant acted in imperfect self-defense or imperfect defense of another if:

“1. The defendant actually believed that he or someone else was in imminent danger of being killed or suffering great bodily injury; AND

“2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; BUT

“3. At least one of those beliefs was unreasonable.

“Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

“In evaluating the defendant’s beliefs, consider all the circumstances as they were known and appeared to the defendant.

“Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

“The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense or imperfect defense of another. If the People have not met this burden, you must find the defendant not guilty of murder.”

The jury was instructed to “consider all the circumstances as they were known and appeared to the defendant.” The jury weighed all the circumstances, including Saesee’s threats against Navarro and Estrada, and still concluded Estrada was not acting in defense of himself or others. Thus, the jury was correctly instructed on the issue of how to weigh evidence of the threats by the victim and how they potentially influenced Estrada’s conduct. The additional antecedent threats instruction adds little to the instructions given to the jury. It is not reasonably probable, therefore, that Estrada would have received a

more favorable result if his trial counsel had requested a pinpoint instruction on antecedent threats.

In sum, “[i]t is unlikely the jury hearing the evidence, the instructions given and the argument of counsel would have failed to give the defendant’s position full consideration.” (*People v. Gonzales* (1992) 8 Cal.App.4th 1658, 1665 (*Gonzales*)). Put another way, given the state of the evidence against defendant, we conclude there is no reasonable probability of a more favorable result had appellant’s trial counsel prepared and requested a pinpoint instruction on antecedent threats. (See *People v. Weaver* (2001) 26 Cal.4th 876, 925; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014-1015.)

Although Estrada relies on *Pena*, we find the rationale of *Pena* is based on facts different from the instant action. In *Pena*, the court found the pinpoint instruction on antecedent threats was warranted because the victim’s threats against the defendant occurred prior to the date of the charged offense. (*Pena, supra*, 151 Cal.App.3d at pp. 476-477.) It was reasonable that the jury there would not account for prior threats against the defendant, absent a pinpoint instruction, because the threats were made days before the incident.

Cases finding that the antecedent threat instruction should have been given have been in situations where the threat occurs some time, usually a day or more, in advance. (*People v. Moore* (1954) 43 Cal.2d 517, 528-529 [decedent attacked and beat defendant on many prior occasions]; *Pena, supra*, 151 Cal.App.3d at pp. 476-477 [threats to defendant by victim occurred prior to date of charged offense of murder]; *Gonzales, supra*, 8 Cal.App.4th at p. 1660 [antecedent threats occurred three days prior to charged offense of attempted murder].) In contrast, Saesee’s threats occurred close in time and space to when and where he was killed. It is highly probable the jury included them in “all the circumstances” when determining whether Estrada acted in self-defense.

Estrada has not cited, and we find no authority, supporting the use of a pinpoint antecedent threats instruction where the threats occurred shortly before the commission

of the alleged crime. The failure to request a pinpoint instruction on antecedent threats did not prejudice Estrada and he was not denied effective assistance of counsel.

DISPOSITION

The judgment is affirmed.