

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
JASON RODNEY TURZAI,  
  
Defendant and Appellant.

F063605  
  
(Super. Ct. No. CRF32908)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tuolumne County. Eleanor Provost, Judge.

Barbara Coffman, 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, Michael A. Canzoneri and Charles A. French, Deputy Attorneys General, for Plaintiff and Respondent.

---

\* Before Hill, P. J., Gomes, J. and Kane, J.

-ooOoo-

A jury found appellant, Jason Rodney Turzai, guilty of petty theft with prior convictions for theft-related offenses (Pen. Code,<sup>1</sup> §§ 484/666; count I), transportation of methamphetamine (Health & Saf. Code, § 11379, subd., (a); count II), and misdemeanor battery (§ 242; count III.) Appellant admitted he served four prior prison terms (667.5, subd. (b)). The trial court sentenced appellant to prison for a total term of 10 years. On appeal, appellant contends: (1) the trial court erred when it failed to instruct the jury sua sponte on self-defense with respect to the battery count; and (2) he received ineffective assistance of counsel. We conclude no prejudicial error occurred and affirm the judgment.

### **FACTS**

On July 9, 2010, Rite Aid loss prevention agent, Michael Boyer, observed appellant pick up three items from the first aid aisle and place them in his front shorts pocket. Appellant first removed one of the items from its package, and then placed the empty package back on the shelf. Boyer retrieved the empty package and followed appellant. Appellant left the store without attempting to pay for the three items.

Outside the store, Boyer approached appellant, identified himself as store security, and requested that appellant return the items he had taken. Appellant initially denied taking anything. But after Boyer confronted him with the empty package, appellant produced the item he had removed from the package (Psoriasis Gel) and gave it to Boyer.

Appellant then tried to walk around Boyer, but Boyer stepped in front of him and told him he needed to return the other two items. Appellant replied that he did not have anything else and that he was leaving. Appellant started walking towards his car, which

---

<sup>1</sup> Further statutory references are to the Penal Code unless otherwise specified.

was parked about 15 feet away. Boyer stood between appellant and his car. Appellant pushed Boyer three or four times, backing Boyer towards appellant's car until Boyer's back was almost against the back of the car.

Once they got to appellant's car, Boyer tried to stand in front of the driver's door. Appellant pushed Boyer aside, opened the door, and got into the car. Boyer grabbed the keys out of appellant's hands and told him the police were coming. Appellant kept repeating that he did not do anything and that he wanted to leave. When Boyer saw appellant reach for another set of keys in the backseat of his car, he directed another Rite Aid employee to retrieve the keys.

Shortly thereafter, Boyer heard sirens and repeated that the police were coming. Appellant got out of his car and sat down on the sidewalk. Once the police arrived, Boyer spoke to one of the officers about what had happened. The officer then retrieved two items from appellant (Campho-Phenique and tree oil) and gave them to Boyer.

Tuolumne County Sheriff's Deputy Christopher Hurtado booked appellant into jail. During a routine patdown search, Hurtado recovered a plastic bag from one of appellant's pockets. The bag contained a white powdery substance, which the parties stipulated was a usable amount of methamphetamine. Appellant did not seem surprised when Hurtado found the bag nor did he deny that it was his.

### *The Defense*

Appellant testified in his own behalf. According to appellant's testimony, he left Rite Aid after he did not see anything he wanted to buy. He did not put anything from the store in his pocket. He already had a tube of psoriasis cream in his pocket, which he had purchased in a different town.

After appellant left the Rite Aid, he walked to his car. Somebody got his attention from behind. He turned around and saw Boyer. Boyer said he wanted the things appellant stole out of the store. Appellant responded that he did not know what Boyer

was talking about. Appellant did not know whether or not Boyer identified himself as security. Appellant emptied out his pockets to prove to Boyer that he did not steal anything.

Appellant was either on his way to the car or sitting down in his car, when Boyer “assaulted” him. Appellant testified: “He put me in a—tried to put me in a headlock and tried to move me around, but I really don’t move that easily. I was really panicking at that point, because I thought I was getting robbed.” After struggling with Boyer for a minute or two, appellant realized he was not being robbed when Boyer said, “you are assaulting a police officer.” Appellant testified: “At this point, I wasn’t really resisting. I mean, he was doing ... all the work. I mean, I was just sitting there really. I wasn’t letting him drag me out either. I was trying to start my car and it wouldn’t start. The keys were in the ignition and it was turning over.”

As appellant was trying to start his car, somebody ran out of Rite Aid, reached in the passenger window, and pulled the keys out of the ignition. Appellant and Boyer reached a “mutual understanding” that they would stop struggling and that appellant would get out of the car and sit on the bench in front of the Rite Aid and wait for the police to arrive. In the meantime, appellant allowed Boyer to search him “completely.” Boyer went into one of his pockets and took out the tube of psoriasis cream.

Appellant testified he never pushed Boyer. However, he added, “if I did, it was to get him out of my car because I was trying to leave. I was trying to start my car to get the hell out of there.”

Appellant further testified that he did not have a packet of methamphetamine in his pocket. He was surprised when the officer found it and told the officer it was not his.

## **DISCUSSION**

### ***I. Failure to Instruct on Self-defense***

Appellant contends the trial court committed reversible error when it failed to instruct the jury sua sponte on the general right of self-defense (CALCRIM No. 3470). We disagree.

#### ***A. Background***

At trial, defense counsel requested an instruction on self-defense. The prosecutor responded that, if defense counsel wanted a self-defense instruction, the prosecution would seek a special instruction regarding a merchant's statutory right to use a reasonable amount of nondeadly force to detain a suspected shoplifter. (§ 490.5, subd. (f)(2).) The trial court impliedly agreed to give both instructions and directed the parties to prepare the instructions. It appears that a self-defense instruction was not included in the instructions counsel later provided to the court and no further request was made for such instruction.

Thereafter, the trial court instructed the jury on the elements of battery, pursuant to CALCRIM No. 960, as follows:

“The defendant is charged in Count III with battery in violation of Penal Code Section 242.

“To prove the defendant is guilty of this crime, the People must prove that:

“1. The defendant willfully and unlawfully touched Michael Boyer in a harmful or offensive manner; and

“2. The defendant did not act in self-defense.

“Someone commits an act willfully when he does it willingly or on purpose. It's not required that he intend to break the law, hurt someone or gain any advantage.

“The slightest touching can be enough to commit a battery if it's done in a rude or angry way. Making contact with another person,

including through his clothing, is enough. The touching does not have to cause pain or injury of any kind.

“The touching can be done indirectly by causing an object or someone else to touch the other person.

“It’s no defense to this crime that the defendant was responding to a provocative ... act that was not a threat or an attempt to inflict physical injury. Words alone, no matter how offensive or exasperating, are not an excuse for this crime.”

The trial court further instructed the jury in the language of section 490.5, subdivision (f), as follows:

“A merchant may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the merchant has probable cause to believe the person to be detained is attempting to unlawfully take, or has unlawfully taken, merchandise from the merchant’s premises.

“In making the detention, a merchant may use a reasonable amount of non-deadly force necessary to protect himself or himself and to prevent the escape of the person detained or the loss of property.”

***B. Applicable Legal Principles***

“A trial court must instruct the jury, even without a request, on all general principles of law that are “closely and openly connected to the facts and that are necessary for the jury’s understanding of the case. [Citation.] In addition, a defendant has a right to an instruction that pinpoints the theory of the defense ....” [Citation.] The court may, however, ‘properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation].’ [Citation.]” (*People v. Burney* (2009) 47 Cal.4th 203, 246.)

To justify an act of self-defense for an assault or a battery, the defendant must have an actual, honest, and reasonable belief that bodily injury is about to be inflicted on him. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064.) The threat of bodily injury must

be imminent, and the right of self-defense is limited to the use of reasonable force. (*Id.* at pp. 1064-1065.)

Section 490.5, subdivision (f), which codifies a merchant's right to detain an individual suspected of shoplifting, provides, in pertinent part that "(2) In making the detention a merchant ... may use a reasonable amount of nondeadly force necessary to protect himself or herself and to prevent escape of the person detained or the loss of tangible or intangible property."

A person making a citizen's arrest also may use reasonable force to effect the arrest, and "the arrestee is obliged not to resist, and has no right of self-defense against such force." (*People v. Adams* (2009) 176 Cal.App.4th 946, 952.) However, a defendant may use self-defense to resist the use of excessive force and to protect himself if he reasonably believes he is "in imminent danger of suffering bodily injury." (*Id.* at p. 953; CALCRIM No. 3470.)

### ***C. Analysis***

Appellant contends his testimony describing a struggle with Boyer inside his car entitled him to an instruction on self-defense and that the trial court had a sua sponte duty to supply the instruction when the instructions it received did not contain CALCRIM No. 3470.<sup>2</sup> Appellant acknowledges a merchant's right pursuant to section 490.5, subdivision (f), to detain a suspected shoplifter, and the other legal principles set forth above. Thus, in addition to claiming the court erred in failing to give CALCRIM No. 3470, he asserts, within the body of his argument, that the court should have further instructed the jury that "Even in situations involving a merchant's attempt to detain a

---

<sup>2</sup> CALCRIM No 3470 provides, in relevant part: "The defendant acted in lawful [self-defense] if: 1. The defendant reasonably believed that [he] was in imminent danger of suffering bodily injury ....; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger."

suspect, the defendant retains the right to resist the use of excessive force and may defend himself against such force or if he reasonably believed he was in imminent danger of suffering bodily injury.” Assuming these issues have been properly preserved for appellate review, we conclude there is no substantial evidence to support such a theory of self-defense and, therefore, the trial court was not required to give the self-defense instructions appellant claims were erroneously omitted.

Under the forgoing authorities, appellant had the right to use self-defense to resist Boyer’s attempts to detain him *only* if Boyer used excessive force *or* appellant had a reasonable belief that bodily injury was about to be inflicted on him. There was evidence of neither here. The only suggestion of force that could possibly be considered excessive was appellant’s testimony that Boyer tried to put him in a headlock and move him around. However, under the circumstances, where it is clear that appellant was attempting to drive away, and there is no evidence of any injury or threats to appellant, placing appellant in a headlock to prevent his escape is not substantial evidence that Boyer used or threatened to use excessive force.<sup>3</sup> Moreover, there was no evidence appellant actually believed Boyer was about to inflict bodily injury on him. Although appellant claimed he thought he was being robbed, he never testified to a fear or belief that Boyer was going to injure him. Rather, appellant’s testimony indicated that his aim in resisting Boyer was to drive away. As seen above, appellant testified that he never

---

<sup>3</sup> We are aware that, in his cross-examination testimony, appellant embellished his earlier testimony that Boyer tried to place him in a headlock by adding that Boyer “was inside my car with his arm around my neck trying to choke me out.” Thus, appellant implied that Boyer was not simply trying to lock him in place with his arm but trying to restrict his airflow. However, we do not consider appellant’s cross-examination testimony substantial evidence Boyer used excessive force or that appellant reasonably believed he was in imminent danger of bodily injury. As we discuss above, appellant was neither injured nor threatened by Boyer, and appellant never testified to a belief that he was about to be injured and therefore needed to defend himself. Rather, appellant essentially testified that he struggled with Boyer because Boyer was trying to prevent him from leaving and he wanted to get away.

pushed Boyer but *if* he did, it was because he was trying to get Boyer out of his car so he could leave. Because there is insufficient evidence to support appellant's self-defense claim, the trial court did not err by failing to give the instructions appellant claims were erroneously omitted.

However, even if error were found, it would not require reversal because appellant cannot show prejudice. When instructions are erroneous, "[r]eversal is required only if 'the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 571, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Despite appellant's testimony that he did not know whether Boyer identified himself as security, it was abundantly clear from the circumstances that appellant was detained under suspicion of shoplifting from Rite Aid by an individual who was acting under the authority of Rite Aid. It is undisputed that Boyer confronted appellant outside the store and asked him to return items he had stolen. Appellant testified that he emptied his pockets to prove to Boyer that he did not steal anything. In light of these circumstances, appellant's subsequent testimony that he thought he was being robbed strains credulity. No reasonable jury would have believed that appellant was unaware of Boyer's identity to the point where he was simply defending himself against what he reasonably perceived to be an attempted robbery. In any event, as already discussed, appellant never claimed he defended himself because he believed physical injury was imminent. Rather, the thrust of his testimony was that he resisted Boyer's attempts to detain him because he wanted to leave. Thus, even if self-defense instructions were given it is not reasonably probable that the jury would have reached a result more favorable to appellant.

## ***II. Ineffective Assistance of Counsel Claim***

Appellant contends his trial counsel rendered ineffective assistance of counsel in connection with the self-defense issue discussed above. We need not determine whether counsel's performance in this regard was deficient because no prejudice appears.

To prevail on a claim of ineffective assistance of counsel, appellant must show "counsel's representation fell below an objective standard of reasonableness," and "the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Further, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Id.* at p. 697.) "Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Sanchez* (1995) 12 Cal.4th 1, 41, overruled on a different ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

First, appellant claims trial counsel was deficient in failing "to request an instruction explaining self-defense and a pinpoint instruction explaining the circumstances under which self-defense is available even in cases where a merchant has detained a person pursuant to ... section 490.5, subdivision (f)." We reject this claim based on our conclusion that it is not reasonably probable a result more favorable to appellant would have been reached had such instructions been given.

For a similar reason, we reject appellant's claim that his trial counsel was deficient for failing to object to the prosecutor's comments in closing argument that "[y]ou don't get self-defense when somebody has the right to detain you" and "Michael Boyer had a right to detain him and to even use force in detaining him to prevent the loss of the

property. So you don't get to then claim self-defense.”<sup>4</sup> Appellant argues the prosecutor's comments misstated the law, presumably because they failed to mention that appellant retained the right to use self-defense to resist the use of excessive force or to protect himself if he reasonably believed he was in imminent danger of suffering bodily injury. However, as we concluded above, even if fully apprised of this particular theory of self-defense, no reasonable jury would have found appellant was entitled to use self-defense against Boyer under the circumstances of this case. Accordingly, appellant cannot show he was prejudiced by counsel's failure to object to the prosecutor's comments.

Finally, appellant contends trial counsel was deficient for failing to request a continuance or to introduce the preliminary hearing testimony of the investigating police officer, Chad Ellis, who was unavailable to testify at the time of trial due to an accident. At the preliminary hearing, Officer Ellis testified that Boyer reported to him that, after appellant returned one of the items to him and proceeded to try to leave the area, Boyer grabbed appellant's arm and told him he was not free to leave, and that he wanted him to return the two remaining items on his person. Appellant then started pushing Boyer backwards in an effort to get away from him.

After reviewing this and the other testimony Officer Ellis gave at the preliminary hearing, we see no grounds for concluding that there is a reasonable likelihood that the introduction of such testimony would have made a difference to the outcome of the trial.

---

<sup>4</sup> The prosecutor's comments appeared in the following argument: “He didn't act in self-defense. He started shoving Mr. Boyer before Mr. Boyer had even touched him. You don't get self-defense when somebody has a right to detain you. As we know, under [section] 430.5 [*sic*], that would be saying you get self-defense when the cop is arresting you if you want to fight the cop. Michael Boyer had a right to detain him and to even use force in detaining him to prevent the loss of the property. So you don't get self-defense. It really doesn't apply anyway, because we know the battery occurred before there was any touching on the part of Mr. Boyer. So where's the self-defense?”

Except for the detail of grabbing appellant's arm, Officer Ellis's testimony was consistent with Boyer's account of events at trial. We disagree with appellant's suggestion that introduction of evidence that Boyer touched appellant first by grabbing his arm would have had a devastating impact on Boyer's credibility.<sup>5</sup> Moreover, Boyer would have been acting well within his rights, under section 490.5, subdivision (f)(2), to grab appellant's arm to try to prevent him from escaping with stolen property. No reasonable jury would have viewed arm-grabbing as an excessive use of force entitling appellant to use self-defense to resist Boyer's rightful attempt to detain him. Appellant's ineffective assistance of counsel claim fails.

**DISPOSITION**

The judgment is affirmed.

---

<sup>5</sup> Notably, the jury in this case *did* hear testimony that Officer Ellis's report stated that Boyer initiated physical contact with appellant by grabbing his arm. As no objection to the testimony was raised, the trial court allowed appellant's counsel to address the report in closing argument and suggest it raised doubts as to Boyer's credibility. Thus, defense counsel argued: "Well, did you grab him, Mr. Boyer? Did you grab his arm? No, I didn't grab his arm. But that's not what you told the officer, and that's not what he wrote in his report. Why would he make it up? Why wouldn't he tell the truth here? Boyer's report: Physically restrained [appellant] both before and after they got into his car. It's there. Investigator Ellis reports that Boyer grabbed [appellant's] arm ...."