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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO MARAUVEL-MORALES,

Defendant and Appellant.

G045269

(Super. Ct. No. 09NF3015)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

David McNeil Morse, 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, Garrett Beaumont and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Sergio Marauvel-Morales (defendant)<sup>1</sup> was convicted of the attempted murder of Francisco Rosas-Rafael (Rosas), and was sentenced to a total of 11 years in state prison. On appeal, he contends that the court erred in failing to modify two jury instructions as requested. We affirm.

## I

### FACTS

On October 16, 2009, defendant and four other men were hanging out in a garage drinking and playing cards. Rosas and defendant got into an argument and Rosas told defendant to go home.

Defendant went home on his bicycle, got a kitchen knife, and returned to the garage—about 20 minutes after he had left. When he got there, Rosas was lying on a couch. Defendant suddenly got on top of Rosas and started stabbing him. Two of the other men grabbed defendant and got him outside of the garage.

Rosas had been stabbed three times and needed emergency surgery. His injuries included three holes in his colon. He was out of work for six months.

Police arrived at the scene of the stabbing at about 8:30 p.m. Defendant was picked up around 2:00 a.m. About an hour or two later, he was interviewed by two police detectives. It did not appear to either one of them that defendant was intoxicated at the time.

In the police interview, defendant initially said that he played soccer until about 3:00 p.m. and drank a 40-ounce bottle of King Cobra malt liquor after he got home. He said that he remained at home until about the time the police picked him up.

Defendant then admitted that he had been drinking with some friends. In addition to the King Cobra, he drank a six-pack of beer. Defendant also stated that after the argument, he went home to get a knife. He said that when he got back, he threw

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<sup>1</sup> The abstract of judgment notes several “akas.” In addition, we observe that, in the police interview, defendant said his name was Sergio Maravel Morales.

down his bicycle, ran towards Rosas and stabbed him. Defendant admitted that no one had tried to hurt him or to pull a gun on him or anything like that. He explained that he had gotten angry because Rosas had threatened to do first what defendant ended up doing to him.

One of the police officers asked defendant what his intentions were when he rode home and returned with a knife. Defendant replied, “[w]hat I did—those were my intentions.” The police officer then asked, “You wanted to kill him, no?” Defendant answered, “Yes.” In addition, defendant conceded that he would have killed Rosas if no one had stopped him, and that when the police located him he was on his way to Tijuana.

At trial, defendant testified that he drank one King Cobra before he went to Rosas’s place. He drank another King Cobra and six 12-ounce beers after he got there. Defendant claimed that after they got into an argument, Rosas said he was going to kill him. However, defendant acknowledged that Rosas did not attack him and did not have a weapon in his hand. Defendant said that he left the garage because he was afraid on account of Rosas’s threat. Defendant further testified that he got a knife from his house in order to defend himself because he thought Rosas was going to kill him. Defendant also said that he went back to the garage because he was afraid of Rosas and he was trying to save his own life. On his way back, defendant was thinking about how he would defend himself. He admitted that he got the knife because he intended to stab Rosas, but claimed that he did not intend to kill him. He did not remember having told the police that he intended to kill Rosas. It did not occur to him to go to the police and report a threat, even though the police station was close to his home.

Baltazar Morales, one of the men in the garage, testified that they began drinking about 6:00 or 7:00 that evening. He thought defendant probably consumed a 40-ounce King Cobra and a six-pack, although he was not certain about it. Morales further testified that no one threatened defendant that evening. However, he remembered that,

about a week beforehand, Rosas had said something bad, something offensive to defendant's mother.

Rosas's cousin, who lived next door to him, testified that she heard the argument and went on over. She saw Rosas, who was bleeding, and defendant, who was standing at the street corner. She thought both men were drunk. She said more particularly that defendant looked like he was "gone"—either drunk or drugged. She said he was "staring up" and "just didn't look like a normal person."

The jury found that defendant committed attempted murder. However, it found not true that he committed the crime "willfully, and with premeditation and deliberation."

## II

### DISCUSSION

#### *A. Jury Instructions Given:*

The court instructed the jury with CALCRIM No. 604 as follows: "An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill a person because he acted in imperfect self-defense. [¶] . . . [¶] The defendant acted in imperfect self-defense if: [¶] 1. The defendant took at least one direct but ineffective step toward killing a person. [¶] 2. The defendant intended to kill when he acted. [¶] 3. The defendant believed that he was in imminent danger of being killed or suffering great bodily injury. [¶] AND [¶] 4. The defendant believed that the immediate use of deadly force was necessary to defend against the danger. [¶] BUT [¶] 5. At least one of the defendant's beliefs was unreasonable. [¶] . . . [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have actually believed there was imminent danger of violence to himself. [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-

defense. If the People have not met this burden, you must find the defendant not guilty of attempted murder.”

The court further instructed the jury with CALCRIM No. 625 as follows: “You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation when he acted. [¶] . . . [¶] You may not consider evidence of voluntary intoxication for any other purpose.”

Defense counsel was concerned that CALCRIM No. 625 undercut the ability of the jury to consider voluntary intoxication in connection with the defense of imperfect self-defense as described in CALCRIM No. 604. Consequently, she asked that each of the two instructions be modified. She requested that the following sentence be added to CALCRIM No. 604: “Voluntary intoxication can be used to establish that the defendant subjectively believed in the need for self-defense, even if the evidence showed such a belief was unreasonable.” Defense counsel also asked that the court give a modified version of CALCRIM No. 625, to delete the sentence reading: “You may not consider evidence of voluntary intoxication for any other purpose.”

The court denied defense counsel’s request. It explained that defendant’s testimony did not support the requested modifications.

*B. Analysis:*

Penal Code section 22, subdivision (b) provides: “Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.” Section 22 has survived both due process and equal protection challenges and “is part of California’s history of limiting the exculpatory effect of voluntary intoxication and other capacity

evidence. [Citations.]” (*People v. Timms* (2007) 151 Cal.App.4th 1292, 1300-1302.) CALCRIM No. 625 “is true to section 22” (*People v. Timms, supra*, 151 Cal.App.4th at p. 1298) and “correctly states the law regarding voluntary intoxication” (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1381, italics omitted).

This being the case, the court did not err in giving CALCRIM No. 625. The question is whether it erred in declining to modify either that instruction or CALCRIM No. 604, as requested by defendant.

As defendant observes, the jury requested clarification by asking: “How should intoxication affect the decision regarding the allegations of premeditation and deliberation?” and “How should intoxication affect the verdict?” In response, the court instructed the jury to read the jury instructions in their totality and specifically CALCRIM No. 601, regarding premeditation and deliberation, and CALCRIM No. 625. Also, additional copies of CALCRIM Nos. 601 and 625 were provided to the jury. The jury reached a verdict 25 minutes later.

Defendant argues that the questions sent to the judge show that the jury was confused by what he characterizes as a conflict between CALCRIM No. 604 and CALCRIM No. 625. He argues that CALCRIM No. 625 given without modification precluded him from putting on his defense of lesser culpability due to imperfect self-defense and also eliminated the prosecution’s burden of proving beyond a reasonable doubt that he did not act in imperfect self-defense.

Defendant cites *Delaney v. Superior Court* (1990) 50 Cal.3d 785, which states that the right to put on evidence of imperfect self-defense is a component of the constitutional right to a fair trial. (*Id.* at p. 809.) He also cites *Crane v. Kentucky* (1986) 476 U.S. 683, which observes that a criminal defendant is guaranteed “a meaningful opportunity to present a complete defense[.]” whether that constitutional right is rooted in the Sixth Amendment, the Fourteenth Amendment or otherwise. (*Id.* at p. 690.) As stated in *People v. Flood* (1998) 18 Cal.4th 470, “Under established law, instructional

error relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions.” (*Id.* at pp. 479-480.) Given the constitutional rights at stake, defendant urges us to apply the standard of review enunciated in *Chapman v. California* (1967) 386 U.S. 18, rather than the standard of review set forth in *People v. Watson* (1956) 46 Cal.2d 818.

In support of his position, defendant also cites *In re Christian S.* (1994) 7 Cal.4th 768, which describes the doctrine of imperfect self-defense. In that case, the Supreme Court explained: “‘An *honest but unreasonable* belief that it is necessary to defend oneself from imminent peril to life or great bodily injury negates malice aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to manslaughter.’ [Citation.]” (*Id.* at p. 773.) However, the Supreme Court further stated: “We caution, however, that the doctrine is narrow. It requires without exception that the defendant must have had an *actual* belief in the need for self-defense. We also emphasize what should be obvious. Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury. “[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with.*” . . .’ [Citation.] Put simply, the trier of fact must find an *actual* fear of an *imminent* harm. Without this finding, imperfect self-defense is no defense.” (*Id.* at p. 783.)

Here, defendant had the opportunity to put on all his evidence concerning imperfect self-defense. However, there was simply no evidence whatsoever that defendant feared imminent danger, as required by *In re Christian S., supra*, 7 Cal.4th 768.

Defendant admitted that when he and Rosas got into an argument, Rosas neither had a weapon in his hand nor attacked him. Even if defendant nonetheless harbored an unexpressed fear of imminent danger, he removed himself from any such imminent danger when he left the garage.

Defendant rode all the way home and got a kitchen knife because, according to his own version of events, he thought Rosas might kill him sometime. However, he was then out of the presence of Rosas, at his own home, near a police station. There was no fear of imminent harm. Defendant could have taken the opportunity to report the threat to the police if he feared Rosas was coming after him. Instead, he rode his bicycle back to the garage, where he found Rosas lying on a sofa.

Again, there is no evidence to show that Rosas pulled a weapon on defendant, tried to hurt him, or even made a move to rise from the sofa. Rather, by defendant's own admission, when he arrived at the garage, he threw down his bicycle, ran over, and started stabbing Rosas. Beyond a reasonable doubt, the evidence showed that defendant did not have a fear, reasonable or unreasonable, that he was in imminent danger of attack by Rosas.

We disagree completely with the assertion that the refusal to give the sought-after jury instruction modifications precluded defendant from presenting his defense of lesser culpability due to imperfect self-defense. Defendant sought to modify CALCRIM No. 604 to state that “[v]oluntary intoxication can be used to establish that the defendant subjectively believed in the need for self-defense, even if the evidence showed such a belief was unreasonable.” However, in order to for the jury to have found that defendant acted in imperfect self-defense, it would have had to find that defendant subjectively believed he was in fear of imminent danger, even if his belief was unreasonable. It would not have been sufficient, under *In re Christian S., supra*, 7 Cal.4th 768, to find that defendant believed he needed to defend himself from a threat of future harm by Rosas. While the evidence could have supported the latter finding, it

could not have supported the former, even if the jury had been instructed as defendant requested.

We also disagree with the assertion that the jury instructions as given eliminated the prosecution's burden of proving beyond a reasonable doubt that defendant did not act in imperfect self-defense. As the last line of CALCRIM No. 604 provided: "The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of attempted murder." The court clearly instructed the jury on the applicable burden. The fact that it did not modify CALCRIM No. 604 to add language about voluntary intoxication did not change which litigant shouldered the burden. And, as we have already discussed, the court did not err in refusing to modify that instruction.

Even were we to characterize the court's refusal to give the requested modifications as error, and even if we were to agree that the error affected defendant's federal constitutional rights, we nevertheless would not conclude that the error was reversible error. "An instructional error that improperly describes or omits an element of the crime from the jury's consideration is subject to the 'harmless error' standard of review set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. [Citation.] We thus consider whether it appears beyond a reasonable doubt that the instructional error did not contribute to the jury's verdict. [Citation.]" (*People v. Lamas* (2007) 42 Cal.4th 516, 526.)

As we have already indicated, it appears beyond a reasonable doubt that the failure to modify the jury instructions as defendant requested did not contribute to the jury's verdict. Considering the evidence in a light most favorable to defendant, there was no evidence to show that defendant, no matter how intoxicated, had a belief, reasonable or otherwise, that he was at any time in imminent danger of harm.

III  
DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.