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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.

ANGELA MAY SHAVER,

Defendant and Appellant.

G049824

(Super. Ct. No. SWF015780)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Kelly L. Hansen, Judge. Affirmed with corrections.

Gregory L. Cannon, 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, A. Natasha Cortina and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Angela May Shaver of first degree murder based on premeditation and deliberation or lying in wait (Pen. Code, § 187, subd. (a); all further statutory references are to this code), with a penalty enhancement for personal use of a knife (§ 12022, subd. (b)(1)). As we explain below, defendant's instructional challenges raised for the first time on appeal are without merit, and we therefore affirm the judgment with a slight correction to the abstract of judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

The victim, Paul Cline, lived in a mobile home in a remote area of Anza, where he allowed defendant and her boyfriend, Christopher Duve, to park their recreational vehicle (RV) on his property in late 2005 and early 2006. On February 13, 2006, Cline closed his bank account and opened a new one because he was concerned about fraudulent activity. Cline reported his suspicion to a sheriff's deputy the next day, and he later told a friend he had pictures of defendant cashing his checks.

On March 8, 2006, Cline's brother Michael attempted to call him to wish him a happy birthday, but no one answered and Cline's answering machine message had been changed to a female voice. Michael continued to call Cline without success for several days, then contacted the Anza Fire Station to request a safety check on his brother. When a fire captain went to Cline's house on March 16, a female exited the home and claimed Cline had moved away weeks earlier. Michael called the sheriff's department to report Cline missing, and officers executed a search warrant at the home on March 21. As they searched the property, defendant and Duve approached in a vehicle, but turned around when they saw law enforcement vehicles. After a short pursuit, deputies stopped the couple and took them into custody. Later that night, Duve divulged the location of Cline's body.

Duve directed the investigators to an isolated dirt road in a mountainous area northeast of Anza, where Cline's body was located approximately 30 feet down a

hill. According to Duve, he and defendant moved into Cline's home and lived with him since "probably January." Before that, they had lived on the streets, in tents, and in an RV. Defendant told Duve that while he had been in prison in 2005, Cline had touched her breast, and Duve warned Cline he would "kick his ass" if it happened again. A couple weeks before Cline was killed, defendant told Duve she wanted Cline dead.

Through a mutual acquaintance, the couple knew a man named Vincent Valdez, whom Duve claimed was in love with defendant. Duve did not like Valdez, but defendant cautioned Duve to be friendly with him or Valdez would hurt Duve. According to Duve, the night before Cline was murdered, Duve overheard defendant and Valdez talking, and Valdez stated, "You know what? I'll do this for you." Valdez concocted a plan to kill Cline, and defendant agreed to it, but Duve maintained defendant did not tell Valdez to kill Cline; rather, Valdez agreed to do so because he loved defendant. Duve did not know how Cline was to be killed, only that it was supposed to happen sometime that week. He did not notice any preparations for the act.

The morning Cline was killed, Duve heard defendant and Cline arguing because Cline accused her of stealing his checks. When Cline left the mobile home, defendant followed him and Valdez then approached Cline from behind and stabbed him in the back with a large knife. According to Duve, he (Duve) then exited the RV and saw Valdez stab Cline six to eight times in the stomach. Duve believed Valdez would have stabbed him if he tried to stop the attack; indeed, Valdez looked at him and told him he was "next." Duve denied stabbing Cline and denied defendant stabbed Cline; according to Duve, defendant remained by the mobile home while Valdez killed Cline.

Defendant also spoke to investigators, and she claimed she argued with Cline the morning he was killed because he made her smoke crack cocaine the night before and "kept grabbing onto [her] breast and stuff." Valdez was present for the argument, "got really upset," and followed Cline outside while defendant retreated to her bedroom. When she looked out the window, she saw Valdez stabbing Cline and

screamed for him to stop, which he ignored. When she and Duve approached the scene, Valdez handed each a knife and instructed them they both also had to stab Cline. Defendant “dropped the knife on” Cline, where it “stuck in” his shoulder, and then she fled inside the trailer. The trio then wrapped Cline’s body in a rug from his home, placed his body in his car, drove away, and then rolled the body down a remote hillside. According to defendant, she went down to the body and covered it with a blanket and dirt. After the murder, she and Duve continued to live in Cline’s home, and Valdez moved in too.

Defendant and Duve estimated Cline had been killed sometime between February 14 and March 5, 2006. They admitted they used Cline’s checks and ATM card to obtain money from Cline’s accounts after he was killed. According to Duve, Valdez cashed checks from Cline’s account after killing him and gave Duve a “cut.”

A friend of Valdez’s, Bryan Allison, told investigators defendant called him when Valdez was arrested on other charges. She asked Allison to meet her at Cline’s property and when he arrived, he found Duve outside burning things in a fire pit. Defendant asked Allison to put a backpack containing clothing on the fire, and he complied. Defendant told Allison that Cline had attacked her and she stabbed him, but Valdez was not involved. Defendant did not describe how or when Cline attacked her. But she told Allison’s girlfriend, Malinda Taylor, on another occasion that Cline had “tried to touch her in the wrong way.” She also told Taylor that her (defendant’s) father sexually abused her by touching her inappropriately when she was a child, that Cline “had done the same thing,” and “she reacted” by stabbing him. According to Taylor, defendant told her Valdez walked in after she killed Cline.

An autopsy showed Cline suffered nine stab wounds in his chest and one on his head. Two of the wounds to Cline’s chest were fatal; one stabbing thrust pierced his left lung and the aorta, and the other pierced Cline’s pericardial sac and entered the right ventricle of his heart. One of the stab thrusts to Cline’s chest actually pierced all the way

through his body. All of the wounds were consistent with having been caused by a knife. A forensic pathologist testified that Cline would have died very quickly, and that some of the wounds could have been inflicted after he was dead.

II

DISCUSSION

A. *Mistake of Fact Instruction*

Defendant contends language the trial court added to its mistake of fact instruction requires reversal. We disagree. The trial court instructed the jury on mistake of fact as follows, in pertinent part: “The defendant is not guilty of murder if she did not have the intent or mental state required to commit the crime because she *reasonably* did not know a fact or *reasonably* and mistakenly believed a fact. [¶] If you find that the defendant stabbed Paul Cline and she believed that Paul Cline was dead at the time she stabbed him and if you find that belief was *reasonable*, she did not have the specific intent or mental state required for murder.” (CALCRIM No. 3406, italics added.)

The bench notes to CALCRIM No. 3406 caution that “[i]f the mental state element at issue is either specific criminal intent or knowledge, do not use the . . . language requiring the belief to be reasonable.” Accordingly, the trial court should have omitted “reasonably” and “reasonable” from the instruction. (Cf. *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425-1426 [defendant’s mistaken belief goods were not stolen need *not* be reasonable to negate the requisite specific intent to receive stolen property].) In effect, the trial court *correctly* but incompletely instructed the jury that if defendant stabbed Cline and she reasonably believed he already was dead at the time she stabbed him, then she did not have the requisite specific intent for murder because it is impossible for a defendant to *intend to* kill someone she believes is already dead. The instruction was incomplete because it is similarly impossible to *intend to* kill someone whom one believes is already dead, even if that belief is unreasonable.

Although the trial court apparently overlooked the bench note, reversal is not required because the mistake of fact instruction merely clarified other instructions concerning the requisite specific intent for murder, and the instruction was correct as far as it went, as noted. “A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial. [Citation.]” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503 (*Hillhouse*)). In any event, we consider the instructions as a whole, not in isolation. “Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury.” (*People v. Holt* (1997) 15 Cal.4th 619, 677.) We see no “reasonable likelihood that the jury misconstrued or misapplied” the court’s instructions when viewed as a whole. (*People v. Clair* (1992) 2 Cal.4th 629, 663; see also *Holt*, at p. 662 [“Jurors are presumed to understand and follow the court’s instructions”].)

Here, other instructions accurately informed the jury that a murder has not occurred absent *both* a wrongful intent to kill and a concurrent act actually dispatching the victim. In other words, a defendant cannot murder a person who is already dead, even if the defendant may have harbored a murderous intent. Specifically, the trial court instructed the jury on the requisite “union of act and intent” for specific intent crimes. (CALCRIM No. 252.) The instruction specified that murder “requires proof of the union, or joint operation, of act and wrongful intent.” (*Ibid.*) The instruction emphasized the defendant must “intentionally commit the prohibited act” constituting murder *and* “must do so” while he or she harbors “the specific (intent/and mental state)” necessary for murder. (*Ibid.*) CALCRIM No. 520, in turn, told the jury that the requisite act for murder “cause[s] the death of another person,” and the jury in convicting defendant of first degree murder found she acted with express malice because she intended to kill him, either with premeditation and deliberation or by lying in wait, or both.

Because CALCRIM No. 252 informed the jury of the necessary union of act and intent *at the time the defendant commits the prohibited act*, the jury’s verdict

reflects its conclusion defendant intended to kill Cline and acted to do so while he was still alive, as required for murder. In other words, she did *not* believe — whether reasonably or unreasonably — that he already was dead because such a belief would have been incompatible with intending *and at the same time acting* to cause his death. Put another way, it is implicit in the requisite union of murderous intent and an act actually causing the defendant’s death that one cannot *intend* to murder someone whom one believes is already dead. While CALCRIM No. 3406 as given clarified this principle where one reasonably believes the victim is already dead, it was incumbent on defendant to request further clarification if she believed that was necessary. Her failure to do so forfeits her challenge. (*Hillhouse, supra*, 27 Cal.4th at p. 503; *People v. Lee* (2011) 51 Cal.4th 620, 638 (*Lee*)). In any event, the trial court properly instructed the jury on the requisite union of act and intent that would preclude her conviction if she unreasonably believed Cline was already dead. Consequently, there is no basis for reversal.

B. *Updated CALCRIM No. 521*

Defendant contends the trial court erred in failing sua sponte to reinsert a phrase omitted from the end of the pattern instruction on first degree murder (CALCRIM No. 521) when it was updated the year before her trial, namely, “all other murders are of the second degree.” The claim is forfeited. “A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal.” (*Lee, supra*, 51 Cal.4th at p. 638.)

Even overlooking the forfeiture, defendant’s challenge fails on the merits. Defendant contends that absent the omitted language, the trial court’s instructions on murder were fatally incomplete. Specifically, they violated her “right to a jury determination of all material facts” pertinent to the degree of murder, if any, and thereby

unfairly “left the jurors with an all or nothing proposition: They could convict [her] of first degree murder or they could acquit him [*sic*: her] of murder.” In essence, defendant suggests that by eliminating the “all other murders are of the second degree” language, the revised instruction effectively eliminated second degree murder as a verdict option and therefore the jury, faced with the unpalatable choice of acquitting her of murder altogether, instead convicted her of first degree murder. We are not persuaded.

Defendant’s argument is built on a false premise. Streamlining the instructions by paring the “all other murders are of the second degree” language did not eliminate second degree murder as a verdict option. The verdict forms included second degree murder. Nor did the omission have the practical effect of eliminating second degree murder, as defendant claims. Simply put, the language was surplusage.

CALCRIM No. 520 (First or Second Degree Murder) explained to the jury that both first and second degree murder require a killing committed with malice. Specifically, the instruction noted that the elements of both first and second degree murder are the same insofar as each require proof beyond a reasonable doubt that: “1. The defendant committed an act that caused the death of another person; [¶] AND [¶] 2. When the defendant acted, she had a state of mind called malice aforethought.” The instruction defined malice aforethought in clear terms for the jury, and concluded with the following directive: “If you decide that the defendant committed murder, you must then decide whether it is murder of the first or second degree.”

A subsequent instruction defined first degree murder, as alleged here, as murder committed with premeditation and deliberation or by lying in wait. (CALCRIM No. 521 (First Degree Murder).) No further instruction separately defined second degree murder apart from the two requisite elements identified in CALCRIM No. 520, i.e., an act causing the death of another person, committed with malice.

Defendant claims that in the absence of an additional instruction defining second degree murder and the absence in revised CALCRIM No. 521 of the former

language stating “all other murders are of the second degree,” the jury necessarily was at a loss and left uninstructed on second degree murder, resulting in the alleged all-or-nothing predicament of convicting her of first degree murder or acquitting her altogether of murder. As noted, however, CALCRIM No. 520 defined both first *and second degree* murder by the twin elements of a killing committed with malice. We presume jurors “are intelligent persons capable of understanding and correlating jury instructions.” (*People v. Martin* (1983) 150 Cal.App.3d 148, 158.) It follows that *if* the jury concluded the prosecution met its burden on the elements defined in CALCRIM No. 520, but did *not* prove the elements necessary for first degree murder as set out in CALCRIM No. 521, then defendant was guilty only of second degree murder. This conclusion follows as a matter of logic, regardless of whether the language “all other murders are of the second degree” was included or omitted in the instructions. The language is therefore surplusage, and the trial court’s failure to include the language *sua sponte* was neither error, nor requires reversal.

C. *No Heat of Passion or Imperfect Self-Defense Instructions Required*

Defendant contends the trial court erred in failing *sua sponte* to instruct the jury on voluntary manslaughter as a lesser included offense of murder, based on heat of passion or imperfect self-defense. The trial court must instruct on lesser included offenses, even in the absence of a request, when evidence the lesser offense may have been committed is “‘substantial enough to merit consideration’ by the jury. [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).) The evidence meets this threshold when a “reasonable [jury] could conclude the particular facts underlying the instruction existed.” (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.) The trial court has no duty to instruct on lesser included offenses that are not supported by substantial evidence. (*Breverman*, at p. 162.)

Heat of passion or imperfect self-defense each reduce an intentional killing from murder to voluntary manslaughter by negating the element of malice. (§ 192, subd. (a); *Breverman, supra*, 19 Cal.4th at p. 154.) “[T]he factor which distinguishes the “heat of passion” form of voluntary manslaughter from murder is provocation.” (*People v. Moye* (2009) 47 Cal.4th 537, 549-550.) The provocation must be “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.”” (*Breverman*, at p. 163, citations omitted.) The passion aroused need not be anger or rage, but may be any “““[v]iolent, intense, high-wrought or enthusiastic emotion”” . . . other than revenge.” (*Ibid.*) But the provocation must be immediate; if instead “sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter.” (*Ibid.*)

Defendant suggests heat of passion voluntary manslaughter instructions were required because several witnesses noted her claim Cline abused her sexually. Duve told investigators that while he (Duve) was in prison, defendant miscarried their child due to stress and grief caused by Cline’s behavior, including touching her breast. Duve explained that when he was released from prison and confronted Cline about “feeling my lady’s breast,” Cline did not deny the allegation, responding only that he “had problems.” Allison told investigators defendant claimed she stabbed Cline because he had “attacked” her, and Allison’s girlfriend, Malinda Taylor, testified defendant told her she stabbed “pedophile Pete” (Cline) because he had tried to touch her “in the wrong way.” Taylor recounted defendant’s explanation that her (defendant’s) father had molested her as a child, and she “reacted” over Cline’s attempts to touch her.

Defendant also suggests the manner and severity of Cline’s wounds, including a stabbing thrust all the way through his body, constituted evidence of great rage or anger. She acknowledges a jury “could have found [the stabbing] excessive, [but claims] that is why the court should have instructed on voluntary manslaughter based on

imperfect self-defense.” Excessive force may fall under the doctrine of imperfect self-defense, when the defendant “*actually*, but unreasonably, believed he was in imminent danger of death or great bodily injury.” (*In re Christian S.* (1994) 7 Cal.4th 768, 771 (*Christian S.*.)

But imperfect self-defense requires an immediate threat, just as heat of passion arises as an immediate response to provocation. Specifically, imperfect self-defense “requires without exception that the defendant must have had an *actual* belief in the need for self-defense 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.*”” (*Christian S., supra*, 7 Cal.4th at p. 783.) By definition, a threat of harm in the past is not imminent because it has passed.

Here there was no substantial evidence Cline’s alleged sexual advances immediately preceded the killing. Thus, absent evidence of an immediate provocation or threat, there was no basis for an instruction on heat of passion or imperfect self-defense. Additionally, “‘deadly force or force likely to cause great bodily injury may be used only to repel an attack which is in itself deadly or likely to cause great bodily injury. . . . [Citations.]’” (*People v. Hardin* (2000) 85 Cal.App.4th 625, 629.) Here, there was no suggestion Cline’s past sexual advances in allegedly touching defendant’s breast posed a deadly threat or threat of great bodily injury. Nor did defendant’s vague suggestion to Allison that Cline “attacked” her at some point indicate Cline posed a lethal danger, necessitating lethal counterforce. To the contrary, as Allison explained, “Nobody really said exactly what happened.” The requirement to instruct the jury on lesser included offenses stems from the existence of evidence to support the instruction, not speculation. (*Breverman, supra*, 19 Cal.4th at p. 162.) No substantial evidence supported a heat of passion or imperfect self-defense instruction, and therefore the trial court did not err in failing to provide them.

D. *Sentencing Order, Abstract of Judgment, and Cumulative Error*

Defendant argues the trial court's sentencing order should be corrected to *recommend* her participation "in any substance abuse programs offered" by the Department of Corrections, rather than ordering it. Section 1203.096 provides that if the sentencing court finds the defendant committed the offenses while under the influence of a controlled substance or that the offenses were drug related, the court should "recommend in writing that the defendant participate in a counseling or education program having a substance abuse component while imprisoned." (*Id.*, subd. (a).) Prison authorities are not required to heed the recommendation. (*People v. Peel* (1993) 17 Cal.App.4th 594, 599.) Here, the relevant sentence in the court's minute order did not include the word "recommend" and instead stated simply: "Defendant to participate in a counseling or educational program having a substance abuse component through the Div of Adult Institutions (PC 1203.096)." By providing the statutory cite, the court's language must be understood as a recommendation and not an order. Accordingly, there is no need to correct the minute order.

Defendant also argues the sentencing order and the abstract of judgment should be corrected to reflect the trial court only noted at sentencing that "she is not to own or possess any type of firearm" for life and not — as stated in the minute order and abstract of judgment — that she is barred from possessing "any firearm, deadly weapon, ammunition or related paraphernalia for life." The minute order and abstract of judgment included the governing code provisions, as follows: "(PC12021/18USC922(g)(1))."¹ These provisions bar a convicted felon from possessing a firearm or ammunition, but do not ban possession of all "deadly weapon[s]" or "related paraphernalia." (*Ibid.*; see also former § 12316, subd. (b)(1) [extending convicted felon's firearm possession ban to ammunition], now codified at § 30305, subd. (a)(1).) Consequently, the minute order and

¹ The firearm ban in former section 12021 has been repealed, and is now codified without substantive change in section 29800.

abstract of judgment must be corrected to delete the words “deadly weapon” and “related paraphernalia.”

Finally, defendant’s due process argument based on multiple, cumulative error (*People v. Staten* (2000) 24 Cal.4th 434, 464) fails because there were no trial errors, and therefore nothing to cumulate.

III

DISPOSITION

The trial court’s sentencing order and abstract of judgment must be corrected to delete the words “deadly weapon” and “related paraphernalia” from the statutory lifetime bans on possession of firearms and ammunition. In all other respects, the judgment is affirmed. The trial court shall forward a corrected copy of the abstract of judgment to the Department of Corrections and Rehabilitation.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.