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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. SHANNON ROMERO, Defendant and Appellant.	G050358 (Super. Ct. No. 13CF3131) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed.

Alan S. Yockelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

This case arises from an altercation over laundry. Defendant Shannon Romero was found guilty of assault (Pen. Code, § 240)[1] and battery (§ 242). She now appeals, arguing the trial court erroneously instructed the jury on mutual combat and admitted hearsay by the victim. We find no error with respect to the jury instructions, and conclude that while the hearsay should not have been admitted, any error was harmless and did not violate defendant's constitutional rights. We therefore affirm.

I

FACTS

As of September 2013, Romero and her boyfriend, Daniel Reymundo, and their two children, lived with Daniel's brother Robert Reymundo.[2] The house was owned by Daniel and Robert's mother, who rented out part of the property to other tenants. Lisa Nelson lived in the house at one point, presumably as a renter. She and Robert had an occasional sexual relationship. Romero and Nelson did not get along particularly well. Nelson was a petite woman while Romero was full-figured; Nelson, however, was taller. Daniel was also significantly heavier than Nelson.

Around 9:00 a.m. on September 25, Nelson was at the house with Robert, doing laundry, although she no longer lived there. Daniel took Nelson's clothing from the washer and threw the clothes on the driveway. Nelson was angry, and began yelling at Daniel about her clothes.

Robert heard yelling in the hallway. Nelson came into his room and told him what had happened, still upset. Romero went back to her room and put her shoes on "to come back and fight." Nelson also wanted to fight. Romero came into the room and Nelson turned to face her. Robert later testified: "I knew they were going to fight. I told

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[1] Subsequent statutory references are to the Penal Code unless otherwise specified.

[2] For ease of the reader, Robert and Daniel are subsequently referred to by their first names. No disrespect is intended. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475-476, fn. 1.)

them not to fight, just let it go, you know, but they got up – [Romero] came in the room to fight. They both got up at the same time." Robert believed the decision to fight was mutual. The two women pulled each other's hair, and at some point were on the floor in the hallway, in and out of Robert's view. Robert stayed in his room. At one point, it seemed to him that Nelson was trying to "dig [Romero's] eye out or something."

Robert heard Romero call out to Daniel. Daniel approached and kicked or stomped on Nelson's face and head, ending the fight. The altercation had lasted 10 to 20 seconds. Robert gave Nelson the phone to call the police. Robert subsequently saw Romero (and Daniel, he believed) in a car and about to leave, and he informed them that the police were coming. Romero left and Daniel remained behind.

Santa Ana Police Officer Alfredo Castro responded to the scene. An ambulance was present, and Nelson was being treated. Castro observed she was constantly bleeding from her nose and mouth. She was coherent, but crying, and experiencing pain in her head, neck and face.

Nelson was transported to the hospital. She was treated by Dr. Micheline Ghurabi. Nelson had a lower lip abrasion, tenderness in her neck and back, a bite on one finger, and a nasal fracture. She was discharged with an antibiotic and prescription Motrin.

Castro interviewed Robert and Daniel. Robert said the fight was Romero's fault; Daniel said it was Nelson's. Romero was interviewed by Castro at the police station the same day as the incident. Romero had some scratch marks on her face and neck. She told Castro that Nelson had started the fight, but Castro did not believe her.

On March 10, 2014, the Orange County District Attorney charged Romero and Daniel with battery with serious bodily injury (§ 243, subd. (d), count one), and assault with force likely to produce great bodily injury (§ 245, subd. (a)(4), count two). The information further alleged, as to count two, that Romero and Daniel personally inflicted great bodily injury. (§ 12022.7, subd. (a).)

At trial, the enhancement was dismissed as to Romero. The jury eventually found her not guilty of count one, but guilty of the lesser included offenses of assault (§ 240) and battery (§ 242). She was found not guilty on count two, but guilty of the lesser included offense of assault (§ 240). The court suspended imposition of sentence and ordered defendant to serve three years of informal probation on count one and to pay various fines and fees. The court vacated the assault conviction because it was a lesser included offense of battery. The sentence on count two was stayed pursuant to section 654. Defendant now appeals.

II

DISCUSSION

Mutual Combat Instruction

Defendant argues the court should not have instructed on mutual combat because the instruction was not supported by substantial evidence. We disagree, because there was testimony supporting the existence of an agreement to fight.

The trial court instructed on self-defense, with CALCRIM No. 3740, at defendant's request. The court stated it also intended to instruct with CALCRIM No. 3471, which covers self-defense in the context of mutual combat. There was no objection by either party.

The instruction given was as follows: "A person who engages in mutual combat has a right to self-defense only if[,] one, he or she actually in good faith tried to stop fighting; and two, he or she indicated by word or by conduct to his or her opponent in a way that a reasonable person would understand that he or she wanted to stop fighting and that he or she had stopped fi[ght]ing; and three, he or she gave his or her opponent the chance to stop fighting. [¶] If the defendant reaches these requirements, then he or she had a right to self-defense if the opponent continued to fight. [¶] However, if the defendant used only non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from further fight, then the defendant

had the right to defend himself or herself with deadly force and was not required to try to stop fighting or communicate the desire to stop fighting the opponent, or to give the opponent the chance to stop fighting. [¶] A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose." During closing arguments, defendant's counsel argued self-defense to the jury.

We review jury instructions de novo. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn.1.) "The trial court must give instructions on every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case. [Citation.] Evidence is 'substantial' only if a reasonable jury could find it persuasive. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1200.) "In reviewing a challenge to jury instructions, we must consider the instructions as a whole. [Citations.] We assume that the jurors are capable of understanding and correlating all the instructions which are given to them. [Citation.]" (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1294.)

"'[M]utual combat' consists of fighting by mutual intention or consent, as most clearly reflected in an express or implied *agreement* to fight. The agreement need not have all the characteristics of a legally binding contract; indeed, it necessarily lacks at least one such characteristic: a lawful object. But there must be evidence from which the jury could reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose.*" (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1046-1047.)

While defendant claims there is no substantial evidence from which a reasonable juror could have found that both she and Nelson intended to fight, this is inconsistent with the evidence, specifically Robert's testimony. Romero had gone back to her room and put her shoes on "to come back and fight." Nelson also wanted to fight.

Romero came into the room and Nelson turned to face her. "I knew they were going to fight. I told them not to fight, just let it go, you know, but they got up – [Romero] came in the room to fight. They both got up at the same time." He believed the decision to fight was mutual.

Defendant compares this case to *People v. Ross, supra,* 155 Cal.App.4th 1033. In that case, there was a verbal altercation, but no indication of an agreement to fight. The victim slapped the defendant, and the defendant struck back. (*Id.* at pp. 1038-1039.) In *Ross,* there was not substantial evidence the parties intended the altercation to become physical before it did.[3] That is not the case here. Robert's testimony provided substantial evidence, both express and implied, that the women intended to fight prior to the physical altercation. Accordingly, we find no error.

Victim's Statement

Romero next argues that a statement made by Nelson to Ghurabi, the emergency room doctor, was inadmissible hearsay. When testifying, Ghurabi relied on her report and notes from the night of the incident. The prosecutor asked what Ghurabi noticed with the patient, and she answered, "I have written down that the chief complaint was an assault –" at which point defense counsel objected on hearsay grounds. The court overruled the objection. The Attorney General concedes the statement was hearsay, which leaves us with two issues – whether the admission of the statement violated defendant's Sixth Amendment rights under the confrontation clause, and whether admitting the statement was harmless error.

With respect to the confrontation issue, in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) the United States Supreme Court held a testimonial statement from a witness who does not appear at trial is inadmissible against the accused unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-

[3] The same was true in *People v. Rogers* (1958) 164 Cal.App.2d 555, 558.

examine the witness. This rule, however, applies only to testimonial statements introduced to prove the truth of the matter asserted. (*Ibid;* see also *Davis v. Washington* (2006) 547 U.S. 813, 823.) When an out-of-court statement is introduced not for the truth of the matter asserted but for some other nonhearsay purpose, the confrontation clause is not implicated. (*Crawford, supra,* 541 U.S. at p. 59, fn. 9.) We review the admissibility of evidence under the confrontation clause independently. (*Lilly v. Virginia* (1999) 527 U.S. 116, 136.)

As the California Supreme Court has noted, as relevant here: "[T]he confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. . . ." (*People v. Cage* (2007) 40 Cal.4th 965, 984, fns. omitted.)

Nelson's statement to Ghurbai bore none of these characteristics. It occurred under conditions that would ordinarily be private and privileged, not intended for repetition, and lacking all formalities characteristic of testimony. It was given by Nelson to help her receive care, with no knowledge that it would be used later in what was then a purely hypothetical court proceeding. Her statement was not testimonial, and therefore its admission, while erroneous, did not violate defendant's constitutional rights.

With regard to prejudice, the statement was not prejudicial under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 36; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Nelson's brief statement that her injuries were the result of an

"assault" added nothing in particular to the prosecution's case. It was established that Nelson's injuries were the result of a fight that had been testified to by various people, including defendant herself. The statement was redacted from the record admitted into evidence, and the prosecutor did not use the statement during argument. The import of Ghurabi's testimony was to establish Nelson's injuries. Nelson's self-serving, highly biased opinion was simply not prejudicial to defendant beyond any reasonable doubt.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.