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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LACHELE YVETTE TAYLOR, Defendant and Appellant.	B282304 (Los Angeles County Super. Ct. No. TA141879)

APPEAL from a judgment of the Superior Court of Los Angeles County, H. Clay Jacke, II, Judge. Affirmed.

Jeffrey J. Douglas, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Lachele Yvette Taylor cut Kevin Richardson with a knife during a dispute over a cup of coffee, inflicting serious injuries which required surgery and left him disabled.

After the jury convicted her of mayhem and assault with a deadly weapon, Taylor appeals, asserting instructional error. We find no error and affirm.

FACTUAL AND PROCEDURAL HISTORY

A. Prosecution Evidence

On the morning of November 21, 2016, Richardson entered the Mealtime Market on South Figueroa Street in Los Angeles. He was bringing coffee and tacos for the store's employees. Richardson was talking to one of the employees when Taylor, who was sitting in a chair behind him, loudly asked him "[w]ho the fuck" he was and told him, "Well this is my store. This is my hood." Richardson told her that he did not know her and was only there to bring the employees coffee. Taylor continued her loud, profanity-laced tirade.

As Richardson gave the employees the tacos, Taylor walked up behind him and told him, "Get the fuck out of my store." Richardson did not respond. He put a cup of coffee on the counter, and Taylor grabbed it. He tried to take it back, causing it to spill. Taylor began slashing at him, cutting him on the shoulder, mouth and wrist.

Richardson went to the hospital, where he received stitches to his shoulder and face. He had scars from all three injuries and required physical therapy for the shoulder and wrist injuries. He was unable to return to work and had to apply for disability benefits

Richardson denied placing his hands on Taylor or grabbing her by the throat. He had no weapons at the time of the attack.

When Taylor was arrested, she had a bloody knife in her possession. She also had blood on her hand and chin.

Surveillance video from the market showed the verbal confrontation, Taylor grabbing Richardson's coffee cup, and Richardson attempting to take it back. It did not show the stabbing, which occurred out of the camera's view.

B. Defense Evidence

Taylor testified that she entered the Mealtime Market to buy a beverage and a lottery ticket. When she realized she did not have enough money for her purchases, she left the market then returned and stood by a counter while she looked in her purse for her ATM card.

Richardson entered the store carrying four cups of coffee in a container. He placed one on the counter in front of her. She said, "Ooh, coffee," and grabbed the cup. Someone said, "That's not yours," so she put the cup back down. She reached for the coffee again, and Richardson charged at her, stopping just steps away. He told her, "Bitch, don't touch my motherfucking coffee." Taylor was afraid and thought Richardson was going to attack her.

Richardson grabbed Taylor by the throat and shoulder and began choking her; he used a great deal of force. She pulled a knife that she carried for protection in her bag and began swinging it to get Richardson to let go of her. After she cut him, he let go. She left the market but could not recall what happened after that.

The jury convicted Taylor of mayhem (Pen. Code, § 203)[1] with the personal use of a deadly and dangerous weapon, a knife (§ 12022, subd. (b)(1)), and assault with a deadly weapon (§ 245, subd. (a)(1)) with the personal infliction of great bodily injury (§ 12022.7). Taylor admitted a prior serious felony conviction (§ 667, subd. (a)(1)) constituting a strike within the meaning of the three strikes law (§§ 667, subds. (b)-(j), 1170.12). The trial court sentenced her to 10 years in state prison: four years for mayhem, one year for the weapon use enhancement, and five years for the prior conviction. The court struck the prior strike allegation in the interest of justice (§ 1385, subd. (a)) and stayed sentence for assault with a deadly weapon (§ 654).

DISCUSSION

On appeal, Taylor challenges the trial court's failure to instruct the jury with optional language contained in CALJIC No. 5.55. She argues that she engaged in provocative behavior, which was met by a life-threatening escalation by Richardson, giving her the right to use a knife in self-defense.

A. Taylor's Self-Defense Theory

At trial, Taylor's theory was that she had not engaged in provocative conduct, but had instead been attacked by Richardson after she reached for the disputed cup of coffee. In both opening statement and closing argument, her lawyer argued that she had stepped back, and that Richardson then charged at her, putting his hand on her throat to choke her; she then defended herself.

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[1] All further statutory references are to the Penal Code.

In light of Taylor's argument that she acted in self-defense, the trial court gave a number of instructions on self-defense. It instructed the jury:

"It is lawful for a person who is being assaulted to defend herself from attack if, as a reasonable person, she has grounds for believing and does believe that bodily injury is about to be inflicted upon her. In doing so, that person may use all force and means which she believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent." (CALJIC No. 5.30.)

"A person threatened with an attack that justifies the exercise of the right of self-defense need not retreat. In the exercise of her right of self-defense a person may stand her ground and defend herself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and a person may pursue her assailant until she has secured herself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene." (CALJIC No. 5.50.)

"Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in her mind, as a reasonable person, an actual belief and fear that she is about to suffer bodily injury, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing herself in like danger, and if that individual so confronted acts in self-defense upon these appearances and from that fear and actual beliefs, the person's right of self-defense

is the same whether the danger is real or merely apparent." (CALJIC No. 5.51.)

"The right of self-defense exists only as long as the real or apparent threatened danger continues to exist. When the danger ceases to appear to exist, the right to use force in self-defense ends." (CALJIC No. 5.52.)

"The right of self-defense ends when there is no longer any apparent danger of further violence on the part of an assailant. Thus where a person is attacked under circumstances which justify the exercise of the right of self-defense, and thereafter the person uses enough force upon her attacker as to render the attacker [apparently] incapable of inflicting further injuries, the right to use force in self-defense ends." (CALJIC No. 5.53.)

Over defense objection that the evidence did not warrant the instruction, the trial court also gave the instruction at issue on this appeal: "The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense." (CALJIC No. 5.55.) Taylor did not, in making the objection, also request that the court include the bracketed language which forms the basis for her argument on appeal: "[However, a person who contrives to start a fistfight or provoke a nondeadly quarrel does not forfeit the right to self-defense if [his][her] opponent[s] respond[s] in a sudden and deadly counterassault, that is, force that is excessive under the circumstance, the party victimized by the excessive force need not withdraw and may use reasonable necessary force in lawful self-defense.]"[2]

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[2] On appeal, Taylor does not challenge the giving of the instruction, but only the failure to give the bracketed language.

B. The Standard of Review

We review claims of instructional error de novo, and "view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.)

C. The Instructions As A Whole Were A Correct Statement of the Law and Were Consistent With The Defense Theory

"'"[I]n criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case." [Citation.] That duty extends to "'instructions on the defendant's theory of the case, including instructions "as to defenses "'that the defendant is relying on . . . , or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."'"'" [Citation.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 873.)

CALJIC No. 5.55 is a correct statement of the law. (*People v. Enraca* (2012) 53 Cal.4th 735, 761.) The bracketed language at issue in this case was added to CALJIC No. 5.55 in response to *People v. Ramirez* (2015) 233 Cal.App.4th 940 (*Ramirez*).[3]

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[3] Use Note, CALJIC No. 5.55. The bench notes to CALCRIM No. 3472, which is similar to the first paragraph of CALJIC No. 5.55, state that the "instruction may require modification in the rare case in which a defendant intends to provoke only a non-deadly confrontation and the victim responds with deadly force,"

Ramirez involved a gang fight, in which the defendants challenged members of a rival gang; one of the defendants thought he saw one of his rivals draw a gun, so he drew his own gun and shot his rival. He claimed self-defense at trial. (*Ramirez, supra,* 233 Cal.App.4th at pp. 944-945.)

The trial court instructed the jury with both CALCRIM No. 3472, stating that the right to use self-defense may not be contrived, and CALCRIM No. 3471, which provided that "'[i]f the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting, or communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting.'" (*Ramirez, supra*, 233 Cal.App.4th at p. 946, fn. 1.) In closing, the prosecutor argued at length that, reading these instructions together, the defendant had no right to self-defense in those circumstances. (*Id*. pp. 946-947.)

The *Ramirez* court concluded that in the factual scenario before it, and in light of the prosecution argument in the case, CALCRIM No. 3472 "did not accurately state governing law." (*Ramirez, supra*, 233 Cal.App.4th at p. 947.) A person starting a fight does not absolutely forfeit his right to defend himself. Rather, the initial aggressor may use self-defense "if an opponent in a nondeadly confrontation suddenly resorts to deadly force." (*Id*. at p. 948.) The court concluded that "[i]n essence, the instructions and the prosecutor's argument erroneously required

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citing *Ramirez, supra,* 233 Cal.App.4th 940 and *People v. Eulian* (2016) 247 Cal.App.4th 1324.

the jury to conclude that in contriving to use force, even to provoke only a fistfight, defendants entirely forfeited any right to self-defense. The instructions and the prosecutor's argument established as a matter of law that defendants were not entitled to imperfect self-defense if they contrived to use *any* force, even nondeadly force, but that was a question for the jury to decide on its own evaluation of the facts. [Citation.]" (*Id.* at p. 953.)

In *People v. Eulian*, *supra*, 247 Cal.App.4th 1324, the defendant participated in a fight that involved punching and kicking. He claimed the trial court erred in instructing the jury on contrived self-defense pursuant to CALCRIM No. 3472, relying on *Ramirez*. (*Eulian*, at p. 1332.) The court disagreed. It explained that CALCRIM No. 3472 "is a correct statement of law. [Citations.] Although '[t]he instruction misstates the law' according to *Ramirez*, *supra*, 233 Cal.App.4th at p. 950 . . . , we believe the opposite is true. CALCRIM No. 3472 is generally a correct statement of law, which might require modification in the rare case in which a defendant intended to provoke only a non-deadly confrontation and the victim responds with deadly force." (*Eulian*, *supra*, at p. 1334.)

In this case, the prosecution argued that Taylor's claim of self-defense was unreasonable, in light of the facts elicited at trial. Unlike the prosecution in *Ramirez*, there was no assertion or suggestion to the jury that, under CALJIC No. 5.55, Taylor was barred from asserting self-defense. This distinction is critical, in light of the importance placed by the *Ramirez* court on the prosecution's insistence that the right to self-defense did not exist. (*Ramirez, supra*, 233 Cal.App.4th at pp. 948-950.)

Moreover, as in *Eulian*, the second paragraph of CALJIC No. 5.55 was inconsistent with the defense on which Taylor was

relying. Taylor did not claim that she contrived to "provoke only a non-deadly confrontation and [Richardson] respond[ed] with deadly force." (*People v. Eulian*, *supra*, 247 Cal.App.4th at p. 1334.) Instead, her defense at trial was that Richardson initiated a potentially deadly confrontation, and she reacted with deadly force in self-defense. That defense theory was amply addressed by the self-defense instructions, taken as a whole. The fact that she seeks to make an argument on appeal that would have been consistent with the portion of the instruction that she did not request, and on a theory she did not argue, does not demonstrate error.

The trial court did not err in failing to give the challenged portion of the instruction, sua sponte. The instruction, as given, was legally correct, and consistent with the facts in the record and the arguments of counsel.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.