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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. EARL KENT WHALEY, Defendant and Appellant.	B275670 (Los Angeles County Super. Ct. No. MA067020)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Reversed and remanded for further proceedings.

Karen Hunter Bird, 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, Steven D. Matthews, J. Michael Lehmann, and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

An argument between Early Kent Whaley and his live-in girlfriend, Robin Smith, turned violent and ended with Whaley biting off a portion of Smith's lower lip. Whaley was convicted of mayhem as a lesser included offense of the charged crime of aggravated mayhem. On appeal Whaley contends the trial court committed prejudicial error by failing to instruct the jury that he was not guilty of mayhem if he had acted in self-defense. We reverse and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

Whaley was charged in an amended information with committing aggravated mayhem (Pen. Code, § 205, count 1);[1] making a criminal threat (§ 422, subd. (a), count 2); inflicting corporal injury on a cohabitant resulting in a traumatic condition (§ 273.5, subd. (a), count 3), with a special allegation the traumatic condition constituted great bodily injury (§ 12022.7, subd. (e)); dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1), count 4); and possessing contraband in jail (§ 4573.6, subd. (a), count 5).

2. *The Trial*

a. *The People's evidence*

Smith testified that during an argument over money Whaley became increasingly agitated and threatened to kill her. Whaley pushed Smith backward onto the bed and bent over her, seemingly about to headbutt her as she struggled to get up. Instead, Whaley bit off a portion of Smith's lower lip, pulled away and spat it onto the floor. Smith was in pain and bleeding profusely. She picked up the torn-off flesh and placed it in ice.

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[1] Statutory references are to this code.

Whaley threatened to kill her if she told the authorities what had happened. A neighbor drove Smith and Whaley to the hospital.

Because she feared Whaley, Smith explained, she agreed to lie about her injury and reported to hospital personnel and sheriff's deputies that she had been the victim of an attempted robbery. Two days after the incident, Smith told Los Angeles County Sheriff's Deputy Gustavo Munoz that Whaley had bitten off her lip during an argument. Ultimately, Smith underwent cosmetic surgeries to repair extensive damage to her lower lip.[2]

Deputy Munoz, the arresting officer, testified Whaley had given differing accounts of the argument, but each time he described Smith as the aggressor and the injury to Smith's lip as an accident.

A former girlfriend of Whaley's testified that, several months before the incident with Smith, Whaley had attempted to bite off her fingers during an argument.

b. *Defense evidence*

Whaley testified that Smith became upset after a woman telephoned him at their apartment. Smith went into the kitchen and grabbed a knife. Wielding the knife, Smith chased Whaley into the bedroom and attempted to stab him. When Whaley grabbed her hands to stop the attack, Smith pushed him. Whaley, who was still restraining Smith's hands, fell backward onto the bed; and Smith fell on top of him. Smith struggled to stab Whaley and threatened to kill him as he pushed her hands away. Fearing for his safety, he bit down on Smith's lower lip. Smith reacted by jerking her head back, and a portion of her lip came off in his mouth. Whaley spat out the lip, placed it in some

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[2] Smith acknowledged she had been convicted in 2007 of a misdemeanor for making a criminal threat.

ice and drove Smith to the hospital.[3] It was Smith's idea to lie about her injury because she wanted to avoid any trouble for both of them.[4]

3. *The Parties' Theories at Trial, Verdict and Sentence*

The People argued Whaley was guilty of committing aggravated mayhem because he had targeted Smith's face and intentionally ripped off her lower lip to permanently disfigure her. The People alternatively asserted, even if Whaley lacked the specific intent to commit aggravated mayhem, he nonetheless committed the lesser included offense of mayhem by unlawfully and maliciously causing Smith serious bodily injury.

The defense theory was that Whaley never intended to bite off Smith's lip and, in fact, he did not do so. Rather, he bit Smith's lip in self-defense to shock her and to ward off her knife attack. Smith caused her own lip to be ripped off when she jerked her head back in reaction to the bite. The defense repeatedly told the jury, because the People had not carried their burden to prove Whaley had not acted in self-defense, he must be acquitted of aggravated mayhem, mayhem and battery of a cohabitant.

The jury found Whaley not guilty of aggravated mayhem; inflicting corporal injury on a cohabitant resulting in a traumatic injury, as well as two lesser included offenses of that charge; making a criminal threat; and dissuading a witness from reporting a crime. It found Whaley guilty of mayhem, a lesser included offense of aggravated mayhem. The jury deadlocked on

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[3] During her testimony, Smith denied she had pushed Whaley or had threatened him with a knife.

[4] Whaley acknowledged he had been convicted in 2008 of making a criminal threat.

the misdemeanor charge of possessing contraband in jail, which the trial court then dismissed under section 1385. Whaley was sentenced to the upper term of eight years in state prison.

4. *The New Trial Motion*

Whaley moved for a new trial, in part, on the ground the trial court had committed reversible error by not instructing the jury that self-defense applied to the lesser included offense of mayhem, even though it had given a self-defense instruction with respect to all other assault-related offenses. The court denied the motion, insisting, incorrectly, it had properly instructed the jury that self-defense applied "to all counts and lesser included [offenses]– to all specific intent crimes as well as the general intent crimes involving the injury" as the defense had requested.[5]

DISCUSSION

1. *The Jury Instructions*

The trial court instructed the jury on the charged offenses of aggravated mayhem, making a criminal threat, inflicting corporal injury on a cohabitant resulting in a traumatic injury (referred to in the jury instructions as cohabitant battery), dissuading a witness from reporting a crime and possessing contraband in jail. The court also instructed the jury on simple mayhem (§ 203) as a lesser included offense of aggravated mayhem, and battery of a cohabitant (§ 243, subd. (e)(1)) and

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[5] Judge Daviann L. Mitchell presided at trial. However, she was excused during jury deliberations, apparently for personal reasons, and was replaced by Judge Thomas White, who took the verdict. Although the reporter's transcript of the hearing on Whaley's new trial motion and sentencing indicates the bench officer was Judge White, the clerk's transcript states Judge Mitchell presided at that hearing.

simple assault (§ 240) as lesser included offenses of the more serious form of cohabitant battery.

At the request of defense counsel and using CALCRIM No. 3470, the court instructed, "Self-defense is a defense to Aggravated Mayhem and Cohabitant Battery." The court explained Whaley was entitled to the defense of self-defense if he "reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully"; he "reasonably believed that the immediate use of force was necessary to defend against that danger"; and he "used no more force than was reasonably necessary to defend against that danger." The concluding paragraph of the instruction informed the jury, "The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. If the People have not met this burden, you must find the defendant not guilty of Aggravated Mayhem or Cohabitant Battery."

This general self-defense instruction, which explained the requirements of the defense, did not refer to any of the lesser included offenses. However, in instructing on intimate partner battery and simple assault, the court advised the jury that self-defense applied to each crime. Specifically, the jury was told the People must prove, in addition to the elements of these lesser included offenses, "the defendant did not act in self-defense." (CALCRIM Nos. 841 (intimate partner battery) and 915 (simple assault).) For reasons not apparent from the record on appeal, no similar reference to self-defense was included in the instruction on mayhem as a lesser included offense of aggravated mayhem.[6]

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[6] In his motion for a new trial Whaley asserted the trial court had declined his request to include a self-defense

The jury was simply instructed on the elements of the crime with CALCRIM No. 801.[7]

2. *Governing Law and Standard of Review*

A trial court in a criminal case is required, with or without a request, to give correct jury instructions on the general principles of law relevant to issues raised by the evidence. (*People v. Michaels* (2002) 28 Cal.4th 486, 529; *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1183; *People v. Ramirez* (2015) 233 Cal.App.4th 940, 945.) The court has a duty to instruct sua sponte regarding a defense if it appears the defendant is relying on such a defense or if there is substantial evidence supportive of such a defense and it is not inconsistent with the defendant's theory of the case. (*People v. Cottone* (2013) 57 Cal.4th 269, 293; *Michaels*, at p. 529.)

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instruction for mayhem, reasoning CALCRIM No. 3470 implied that self-defense was applicable to the lesser included offenses. However, any discussion of proposed self-defense instructions is not part of the record.

[7] The jury was instructed, "To prove that the defendant is guilty of Mayhem in violation of Penal Code section 203, the People must prove that the defendant unlawfully and maliciously: [¶] 1. Removed a part of someone's body; [¶] OR [¶] 2. Permanently disfigured someone; [¶] OR [¶] 3. Slit someone's lip. [¶] Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else. [¶] A serious bodily injury means a serious impairment of physical condition. Such an injury may include, but is not limited to: a wound requiring extensive suturing and serious disfigurement. [¶] A disfiguring injury may be *permanent* even if it can be repaired by medical procedures."

Claims of instructional error are questions of law, which we review de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218; *People v. Alvarez* (1996) 14 Cal.4th 155, 217; *People v. Jandres* (2014) 226 Cal.App.4th 340, 358.) The Supreme Court has not yet determined the test for prejudice for failing to instruct on an affirmative defense. (*People v. Salas* (2006) 37 Cal.4th 967, 984.) However, most published court of appeal decisions have applied the reasonable probability standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, reversing the judgment only if it is reasonably probable the defendant would have had a more favorable outcome had the instructional error not occurred. (Compare *People v. Givan* (2015) 233 Cal.App.4th 335, 348-349; *People v. Hanna* (2013) 218 Cal.App.4th 455, 462-463; *People v. Sherow* (2011) 196 Cal.App.4th 1296, 1309; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 53, with *People v. Quach* (2004) 116 Cal.App.4th 294, 303 [applying more rigorous *Chapman v. California* standard to erroneous self-defense instruction]; see generally *People v. Watt* (2014) 229 Cal.App.4th 1215, 1220 [instructional error harmless under either *Watson* or *Chapman* standard].)

3. *The Court Erred in Failing To Instruct on Self-defense as a Defense to Mayhem*

It is undisputed the jury, properly instructed on the elements of self-defense, was told Whaley must be found not guilty of aggravated mayhem, cohabitant battery, intimate partner battery and simple assault if the People failed to prove beyond a reasonable doubt that he had not acted in lawful self-defense when he fought with Smith and bit her lip. Although self-defense was expressly identified as a defense to each of those four assault-related crimes, the court omitted any reference to

self-defense in its instruction on mayhem. Moreover, contrary to the court's recollection at the hearing on Whaley's motion for a new trial, there was no general instruction that self-defense applied to all the crimes involving the injury to Smith's lip.

While the court's instructional error thus seems apparent—there is no question Whaley's testimony required a self-defense instruction with respect to all assault-related offenses—the Attorney General nonetheless argues the jury was properly instructed because it was told mayhem requires an act that is unlawful and malicious. The Attorney General reasons, given the instructions regarding self-defense as to the other assault-related crimes, the jury could not have concluded Whaley was acting in self-defense, using no more force than reasonably necessary to repel Smith's attack, but did so unlawfully and maliciously.[8] Phrasing it somewhat differently elsewhere in his brief, the Attorney General contends, "No jury could have believed that self-defense is a defense to aggravated mayhem, but not mayhem."

As a matter of simple logic, the Attorney General may be correct. But this argument ignores a bedrock principle of appellate review: We assume that jurors generally understand and faithfully follow the court's instructions. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1234; *People v. Delgado* (1993) 5 Cal.4th 312, 331.) Here, the jury was told to consider the evidence concerning self-defense in deciding whether Whaley was guilty of aggravated mayhem, inflicting corporal injury on a cohabitant and assault. It was not told to do so in assessing his guilt on the

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[8] The Attorney General even suggests, without citation to any supporting authority, "the self-defense instruction was arguably superfluous."

lesser included offense of simple mayhem (or on the charges of making a criminal threat or dissuading a witness). We cannot presume the jury ignored the court's instructions and considered the affirmative defense as to a crime not identified by the court, nor can we conjecture that it intuited on its own that an individual acting to defend himself or herself could not be acting unlawfully as required to commit the crime of mayhem. In short, the jury should have been, but was not, instructed on self-defense with respect to simple mayhem.

4. *The Trial Court's Failure To Instruct That Self-defense Applied to Mayhem Constituted Prejudicial Error*

"In applying the *Watson* standard, we may look to the other instructions given, as well as whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability that the error affected the result." (*People v. Watt, supra*, 229 Cal.App.4th at p. 1220.) In addition, as the Attorney General emphasizes, we properly consider the arguments of counsel in assessing the probable impact of erroneous instructions on a jury. (*People v. Young* (2005) 34 Cal.4th 1149, 1202; see *People v. Boyce* (2014) 59 Cal.4th 672, 708.)

The evidence of Whaley's guilt was far from overwhelming. It was undisputed Whaley bit Smith's lower lip during their argument. However, their testimony directly conflicted regarding which of them was the initial aggressor and the sequence of events that resulted in the loss of a portion of Smith's lip. The not guilty verdicts on the charges of making a criminal threat and dissuading a witness indicate the jury did not fully believe Smith's version of the incident, including her testimony that

Whaley had threatened to kill her at the beginning of their argument and then again after her injury if she reported to authorities that he had attacked her. In addition, although the jury could have acquitted Whaley of aggravated mayhem and found him guilty of simple mayhem because it concluded he did not have the requisite specific intent for the more serious felony, as posited by the Attorney General, it is impossible to explain the not guilty verdicts on all other assault-related counts if the jury did not entertain a reasonable doubt as to whether Whaley had acted in self-defense. Based on the evidence and the verdicts, it is at least reasonably probable the jury mistakenly believed it could not consider Whaley's claim of self-defense in deciding his guilt on the lesser included charge of mayhem: A rational jury could not find that Whaley had "unlawfully and maliciously" removed a portion of Smith's lip or permanently disfigured her, as necessary to commit mayhem, but did not "willfully and unlawfully inflict a physical injury" on Smith to be guilty of cohabitant battery unless it considered the affirmative defense of self-defense as to the latter, but not the former.

To be sure, the defense repeatedly stressed during closing argument that the People's failure to prove Whaley had not acted in self-defense meant he was not guilty of mayhem as well as the other assault-related offenses. But as the court instructed the jury, if counsels' comments on the law conflicted with the court's instructions, the jury must follow the court's instructions. Again, we presume the jury followed these instructions. (*People v. Chism* (2014) 58 Cal.4th 1266, 1299.)

In sum, if the jury determined that Whaley was acting in self-defense in assaulting Smith, as the not guilty verdicts indicate, it is reasonably probable the jury may also have

acquitted him of mayhem had the trial court not omitted the instruction on self-defense.

DISPOSITION

The judgment is reversed, and the cause remanded for a new trial on the lesser included offense of mayhem.

PERLUSS, P. J.

We concur:

ZELON, J.

BENSINGER, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.