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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOEL ADAM WASH, Defendant and Appellant.	B276910 (Los Angeles County Super. Ct. No. NA099675)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed.

Janet Gusdorff, 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, Assistant Attorney General, Paul M. Roadmarel, Jr., and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

On June 5, 2014, Joel Adam Wash (Wash) assaulted his elderly parents in their home. Wash initially struggled with his mother, Dianne, over her purse and she fell to the floor. Wash went into the bedroom but soon returned and began to physically assault Dianne again, this time choking her. Wash's father, John, grabbed a cane and struck Wash in an unsuccessful attempt to stop the attack. Wash choked John after John fell to the floor but turned his attention back to Dianne and began choking her again. John then ran toward Wash and tried to push him off of Dianne. Wash got behind John and, with his arms around John's neck, dragged John toward the living room. Wash had John suspended six to twelve inches off the ground, with his right arm under John's chin and his left arm behind John's neck. John heard four pops, which he thought were his vertebrae, and said: "[Wash] broke my neck." Wash dropped John and turned to Dianne to help her up but she waved him off because she was in pain. Wash then left the house. Wash was convicted of two counts of elder abuse, among other charges. With respect to the elder abuse charge, the trial court provided the jury with self-defense instruction CALCRIM Nos. 3470 and 3474 as requested by Wash. On appeal, Wash argues that the trial court also had a sua sponte duty to provide the jury with CALCRIM No. 3471.

We disagree and affirm the conviction.

BACKGROUND

I. Charges

The Los Angeles County District Attorney filed an information charging Wash with one count of burglary (Pen. Code,[1] § 459; count 1), two counts of elder abuse (§ 368,

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

subd. (b)(1); counts 2 & 3), one count of dissuading a witness by force or threat (§ 136.1, subd. (c)(1); count 4), and two counts of first degree residential robbery (§ 211; counts 5 & 6).

The information further alleged that as to counts 1, 5 and 6, the victims were elderly and the condition was known or reasonably should have been known to Wash. (§ 667.9, subd. (a).) The information also alleged that Wash had suffered a prior serious felony and strike conviction. (§§ 667, subd. (a)(1), 1170.12, subds. (b) & 667, subd. (b)-(j).) Wash pleaded not guilty, denied the special allegation and proceeded to jury trial.

II. Prosecution evidence

In 2014, Wash's mother, Dianne Wash (Dianne), lived in Long Beach with her husband and Wash's father, John Wash III (John).[2] John had a genetic disease that resulted in joint loss. He was also blind and had limited movement, requiring the assistance of a cane and a walker. On February 12, 2014, Wash entered his parents' home and shattered glass objects in their hallway. Dianne obtained a restraining order against Wash and changed all the locks in the house. A month later, Dianne obtained a second restraining order against Wash after he took Dianne's car. Dianne had to beg and plead with Wash to get him to return the vehicle. Despite the restraining orders, Wash continued to show up periodically at his parents' home.

On June 5, 2014, Dianne was at home with John. At 8:00 a.m., she opened the back door to let the dog out. When she went back into the home, Wash had jumped over the front gate and entered the home. Wash went directly to the living room

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[2] We refer to Dianne and John Wash by their first names to avoid confusion with the appellant.

where Dianne kept her purse and tried to take her car keys. Dianne grabbed her purse from Wash and the two struggled. They continued to struggle over the purse until Dianne fell to the ground while Wash continued to grab at her purse. According to Dianne, at some point in time, John came into the room and tried to get Wash off of her. Wash then turned on John and the next thing Dianne saw was John on the floor with Wash on top of him. While John and Wash continued to struggle on the floor, Dianne heard John say, "I think Joel broke my neck. I heard four pops."

Wash eventually got up and left. After Wash left, John called the police. Dianne sustained bruises on her neck and lower back, and a dislocated finger. John sustained bruises on his neck. He was bleeding at the lip and had trouble breathing and swallowing for a period of time after the attack. After Wash left, Dianne saw shattered glass in the kitchen.

Tahnee Stritzel was Wash's next door neighbor when they were growing up. On June 5, 2014, Wash called Stritzel. Wash told Stritzel he was upset because he had hurt his parents. Wash admitted that he pushed his mother into a mirror and choked his father. Wash also asked Stritzel for money, explaining that he needed money because his parents would not let him take their car. Wash continued to call Stritzel every day for a week, asking for money so that he could get his motorcycle fixed to turn himself in.

Long Beach Police Officer Dennis Price responded to Dianne and John's residence at approximately 8:50 a.m. on June 5, 2014. When he arrived, Officer Price saw blood on the floor, shattered glass from a mirror, and a cane near the front door. Officer Price spoke with John, who was visibly upset and

bleeding from the mouth. John told Officer Price that Wash had attacked him and Dianne.

John was unavailable for trial and the prosecution read his former testimony into the record at trial. John testified that he saw Dianne struggling with Wash over her purse in the kitchen. John called 911 on his cell phone. Wash came toward John, ranting, and John backed down the hallway. Wash went into the bedroom, continuing to rant at John as he rooted through a dresser. Wash closed one of the drawers and ran out of the bedroom. John followed him and tried to call 911 on the house phone but Wash threw that phone against the wall and destroyed the handset. Wash then went into the kitchen and began to physically assault Dianne again, this time choking her. Wash was on top of Dianne with his hands around her neck. Although Wash was saying something, he was not making any sense and "[m]ost of it was blaming us for him being on parole." John then grabbed a cane and struck Wash with it but because it was a folding cane, "it didn't do anything."

After hitting Wash with the cane, John, perhaps having tripped, found himself on the kitchen floor. Wash was now on top of John, with his hands around John's neck. Wash then turned his attention back to Dianne once more and began choking her again. John ran toward Wash and tried to push him off of Dianne. Wash then got behind John and, with his arms around John's neck, dragged John toward the living room. Wash had John suspended six to twelve inches off the ground, with his right arm under John's chin and his left arm behind John's neck. John could not breathe. John heard four pops, which he thought were his vertebrae, and said, "[Wash] broke my neck." Wash then dropped John. Wash turned to Dianne to help her up but she

waved him off because she was in pain. Wash then left the house.

III. Defense evidence

Wash testified on his own behalf. Wash admitted he had prior trouble with the law, including convictions for possession of a controlled substance and assault with a firearm. On June 5, 2014, Wash went to his parents' home to check his mail. Dianne greeted him at the back door and Wash entered the home. Wash told Dianne that he needed her car. Dianne refused because he did not have insurance. Wash saw that Dianne had the car keys in her hand. All of a sudden, while Wash was standing a distance away from her, Dianne tripped and fell. Wash picked her up and helped her to her feet. Sometime later, Wash saw that Dianne was back on the ground. Wash thought she was pretending to be injured. This time, Wash did not help her up. Upset, Dianne got back on her feet and tried to grab the keys that Wash had brought with him to the house.[3] Wash grabbed the keys and held them up in the air so that Dianne could not reach for them. While Dianne tried to reach for the keys, both Wash and Dianne fell on the ground. At this point, John walked in. John also tripped on something and fell on top of Wash. Wash helped John up to his feet. When Wash asked Dianne if she needed help getting up, she told him to leave. Wash walked out and left the house. After Wash left, he called Stritzel to check on his parents. Although he told Stritzel that he "almost killed [his] folks," what he meant was that he fell down with them. Wash

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[3] Wash testified that he had a set of keys in his pocket consisting of his motorcycle keys, a set of keys to his brother's vehicle, the key to the house, the key to his apartment and a key to storage.

admitted that he went to his parents' home 15 to 20 times after the restraining order had been issued.

IV. Verdict and sentencing

The jury convicted Wash of both counts of elder abuse and first degree residential robbery, and found true the allegation that the victims were elderly and that Wash knew this condition. The jury acquitted Wash of the burglary and dissuading a witness charges. The trial court sentenced Wash to a total term of 21 years in state prison.

RELEVANT JURY INSTRUCTIONS

With respect to Wash's theory of self-defense, the trial court instructed the jury with CALCRIM Nos. 3470 and 3474, as requested. On appeal, Walsh argues that the trial court also had a sua sponte duty to instruct the jury using CALCRIM No. 3471. We set out the instructions below for ease of reference.

I. CALCRIM No. 3470

The trial court used CALCRIM No. 3470 in this case, which instructs jurors on the right to self-defense in a nonhomicide case. The trial court specifically instructed the jury that self-defense was a defense to the charges and lesser crime in counts 2 and 3, the elder abuse charges.

The jury was instructed that the defendant acted in lawful self-defense if: (1) "[t]he defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully"; (2) "[t]he defendant reasonably believed that the immediate use of force was necessary to defend against that danger"; and (3) "[t]he defendant used no more force than was reasonably necessary to defend against that danger." The jury was further instructed that "[b]elief in future harm is not sufficient, no matter how great

or how likely the harm is believed to be. The defendant must have believed there was imminent danger of bodily injury to himself or an imminent danger he would be touched unlawfully. [The] [d]efendant's belief must have been reasonable and he must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense."

The jury was also instructed that "[w]hen deciding whether the defendant's beliefs were reasonable, [it must] consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. [¶] The slightest touching can be unlawful if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind." Lastly, the jury was instructed that "[t]he People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. If the People [did] not meet this burden, [the jury had to] find the defendant not guilty of the charges in [c]ounts 2 and 3."

II. CALCRIM No. 3474

The trial court also instructed the jury with CALCRIM No. 3474 as follows: "The right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends."

III. CALCRIM No. 3471

CALCRIM No. 3471 may be provided when a defendant claiming self-defense was the initial aggressor. According to this instruction, a person who starts a fight has a right to self-defense only if: (1) he "actually and in good faith tried to stop fighting"; and (2) he "indicated, by word or by conduct, to [his] opponent, in a way that a reasonable person would understand, that [he] wanted to stop fighting and that he had stopped fighting." According to the instruction, "If the defendant meets these requirements, [he] then had a right to self-defense if the opponent continued to fight."

With respect to a trial court's sua sponte duty to instruct in 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." (*People v. Martinez* (2010) 47 Cal.4th 911, 953.) 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. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824.)

STANDARD OF REVIEW

"We determine whether a jury instruction correctly states the law under the independent or de novo standard of review." (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) On appeal, we review independently the question whether the trial court failed to instruct on defenses. (*People v. Waidla* (2000) 22 Cal.4th 690, 739.) "Review of the adequacy of instructions is based on

whether the trial court 'fully and fairly instructed on the applicable law.' " (*Ramos*, at p. 1088.)

The California Supreme Court has not yet determined the test of prejudice for failure to instruct on an affirmative defense. (*People v. Salas* (2006) 37 Cal.4th 967, 984.) However, no published opinion has embraced the *Chapman* standard for the failure to instruct. Rather, published opinions have concluded that the *Watson* test applies.[4] (*People v. Breverman* (1998) 19 Cal.4th 142, 165 [failure to instruct on a lesser included offense]; *People v. Hanna* (2013) 218 Cal.App.4th 455, 462, 463 [failure to instruct on mistake of fact]; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 52 [failure to instruct on self defense]; *People v. Elize (*1999) 71 Cal.App.4th 605, 616 [same].) Under either the *Chapman* or *Watson* test, reversal is not required, however.

DISCUSSION

By the time the parties discussed jury instructions with the trial court, Wash was representing himself. At this point, Wash told the court: "I'd like to ask for jury instructions on what self-defense is and improper self-defense just to show that, you know, a person has the right to use force of all means until they have secured themselves from danger. Not so much that it's a dangerous situation for me, but I was aggressed on, as she admits, and I reacted. So I do have the right to react to physical aggression." Wash admitted, however: "I'm still in the wrong because they are elderly and fragile, but I didn't try to, like,

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[4] Under *Chapman v. California* (1967) 386 U.S. 18, 24, we must determine whether the trial court's error was harmless beyond a reasonable doubt. Under *People v. Watson* (1956) 46 Cal.2d 818, 836, we ask whether there is a reasonable probability the error was harmless.

attack them, that I was reacting—there's no really—never really appropriate self-defense to someone that's weaker than you, but that someone weaker than me attacked me. So I was asking for maybe jury instructions on self-defense, just a general guideline." After attempting to unravel Wash's arguments, and confirming that Wash's theory, at least with respect to Dianne, was that she made first contact with him, the trial court said "the safest thing" would be to give a self-defense instruction. The prosecutor agreed. However, the trial court warned Wash that, according to an accompanying instruction, Wash only could have used reasonable force.

On appeal, Wash notes that although he offered several explanations for what occurred on June 5, 2014, by both Dianne's and John's accounts, Wash did not touch John until after John struck Wash. This fact supported Wash's self-defense claim and instruction under CALCRIM No. 3470. However, Wash continues, this instruction was insufficient because the jury was not told that an initial aggressor could claim self-defense under specified circumstances. According to Wash, a reasonable juror could have concluded that Wash initiated a struggle with Dianne in the kitchen and in good faith tried to, and did, stop fighting with Dianne once she fell to the ground. At that point, the jury reasonably could have found that Wash could claim self-defense because the evidence supported the conclusion that Wash did not fight with or attack John until John first struck Wash with a cane.

A trial court is required to instruct the jury on a defense only if it is supported by substantial evidence. (*People v. Watson* (2000) 22 Cal.4th 220, 222.) Substantial evidence is that which is reasonable, credible and of solid value. (*People v. Ochoa* (1993) 6

Cal.4th 1199, 1206.) Although all reasonable inferences must be drawn in support of the defense, the trial court "may not 'go beyond inference and into the realm of speculation in order to find support for [the defense]. A finding . . . which is merely the product of conjecture and surmise may not be affirmed.' " (*People v. Memro* (1985) 38 Cal.3d 658, 695, overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.)

We first note that Wash's version of events on appeal has been formed by piecing together Dianne's and John's version of events rather than his actual testimony at trial. At trial, Wash denied struggling with Dianne whatsoever, instead maintaining that Dianne tripped and fell and that Wash picked her up and helped her to her feet. Wash further testified that sometime after that, he saw that Dianne was back on the ground and thought she was pretending to be injured. This time, Wash did not help her up. Dianne got back on her feet and when she tried to grab Wash's keys, both Wash and Dianne somehow fell to the ground. At this point, John walked in. John also tripped on something and fell on top of Wash.[5] Wash helped John up to his feet. When Wash asked Dianne if she needed help getting up, she told him to leave. Wash complied. Thus, according to Wash's account provided at trial, he never engaged in, let alone instigated, a physical altercation with either parent.

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[5] Indeed, Wash was adamant that John never hit him with his cane, telling the jury: "I'd have a problem with my dad if he hit me with a cane if he really felt my mother was in danger because it's just silly, but I didn't get hit with the cane." When subsequently requesting a self-defense instruction, Wash reiterated that John never hit him with the cane.

However, on appeal, Wash cites portions of Dianne's and John's testimony to argue that although Wash was the initial aggressor, he had stopped physically assaulting Dianne by the time John struck him with a cane. The portions of testimony cited by Wash are not so clear cut. Dianne testified that, a year and half after the attack, she did not remember whether Wash had stopped assaulting her when John hit him with the cane.[6] Dianne thought that John had tried to get Wash off of her while she and Wash were still struggling over her purse, although "[s]ome things have kind of melded together." Although Dianne and Wash did stop struggling over the purse at some point, and Wash then went into the bedroom, Dianne said she was unsure when that happened. In short, Dianne advised Wash from the stand, "I would go by what [John] said because that was a fresher statement." According to John, although Wash went into the bedroom after struggling with Dianne over her purse, Wash then returned from the bedroom and began to physically assault Dianne again, this time choking her. It was at this point that John struck Wash with the cane. When taken together, rather than cherry picked, Dianne and John's joint recollection appears the more thorough and reliable version of Wash's multiple assaults.[7]

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[6] Wash was representing himself at this time and conducted the cross-examination of Dianne.

[7] Wash notes that the jury's decision to acquit him of burglary and dissuading a witness means that the jury did not categorically accept all of the prosecution's evidence and reject all the defense evidence. This may be so but on appeal we ask only whether substantial evidence supported the omitted instruction. (*People v. Watson*, *supra*, 22 Cal.4th at p. 222.)

Although John admitted striking Wash in an attempt to stop Wash from continuing to choke Dianne, this did not require that the trial court instruct the jury with CALCRIM No. 3471. According to this instruction, a person who starts a fight has a right to self-defense if, and only if: (1) he "actually and in good faith tried to stop fighting"; and (2) he "indicated, by word or by conduct, to [his] opponent, in a way that a reasonable person would understand, that [he] wanted to stop fighting and that [he] had stopped fighting." Here, Wash's claim that he had stopped fighting Dianne before John hit him with the cane is not supported by substantial evidence. By Dianne's account, although Wash did stop his assault at some point, she was unsure when this happened and testified that John's recollection was the more reliable version of events. By John's account, he struck Wash with the cane as Wash choked Dianne. By Wash's account at trial, he did not assault Dianne at all. Nor did John strike him with a cane. Based on the evidence presented at trial, Wash's account on appeal cannot be deemed reasonable, credible or of solid value. (*People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206.) Indeed, little to no evidence supports Wash's account on appeal. There was no evidentiary basis for giving CALCRIM No. 3471.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.