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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DEBRA R. CARR, Defendant and Appellant.	B278946 (Los Angeles County Super. Ct. No. BA440405)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie La Forteza, Judge. Affirmed.

Elizabeth K. Horowitz 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, Shawn McGahey Webb and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Debra Carr of mayhem (Pen. Code, § 203)[1] and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). Carr contends the trial court erred by failing to give an instruction sua sponte on the relationship between a citizen's arrest and self-defense and by giving an instruction on contrived self-defense. We affirm.

FACTUAL AND PROCEDURAL HISTORY

A. *The Attack*

Joseph Lewis and his girlfriend, Delashall Perry, waited at a bus stop after shopping for groceries. When the bus arrived, Lewis got on through the middle door so he could put the crate of groceries on the bus, and Perry entered through the front door of the bus so she could pay the fare. As Lewis got on the bus, he saw several dollar bills on the floor and picked them up. Carr confronted Lewis, said the money was hers, and tried to take the bills from him. Carr pushed and grabbed Lewis, and Lewis told her he would give her the money. From the front of the bus, Perry said to Carr either "you can't treat him like that" or "[you can't] talk to him like that."

Carr "jumped up and ran to the front and attacked" Perry. Carr hit Perry in the face "about three times," and Perry hit Carr back twice to defend herself. The second time Perry hit Carr, Perry's hand went into Carr's mouth. Carr bit down on Perry's finger, Perry screamed, and Carr bit off the top of Perry's finger. Carr spat out Perry's finger and "tried to get away." Perry felt "very horrible" pain and was "in shock."

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1 Statutory references are to the Penal Code.

B. *The Detention*

When Lewis heard Perry scream, he went to the front of the bus and started looking for her finger. He found it "up under the seat where . . . Carr had mauled it, bit it off, and spit it on the floor." Lewis held Perry's finger in his hand and told the bus driver to call 911. When the bus driver told the passengers to get off the bus, Lewis saw Carr starting to leave, and he decided to detain her.

When Carr got off the bus, Lewis "went after her," "grabbed her by her head . . . [and] neck," and "dragged her back to the . . . bus stop," where he waited for the police to arrive. Lewis prevented Carr from getting on another bus. At some point Carr bit Lewis on his arm, "in the wrist area," leaving two puncture wounds.

C. *The Charges, Trial, and Sentencing*

The People charged Carr with mayhem for biting off Perry's finger and assault by means of force likely to produce great bodily injury for biting Lewis's arm. Lewis and Perry testified at trial about what happened, and the People showed a video of the incident taken from surveillance cameras on the bus. At the time of the trial, Perry still had numbness in her severed finger.

Carr testified and gave a different version of the events. She stated Lewis was the one who "kept talking" to her when he got on the bus. Carr said she was ignoring Lewis and asked him to stop talking to her. Carr testified Perry came down the aisle of the bus and told Carr she "was talking to the wrong man" and threatened her by saying, "Don't get your ass kicked." Carr testified she hit Perry, and the two of them "romped a little bit" before Lewis grabbed her, which caused the injury to Perry's finger. Carr did not recall biting Perry. Asked whether she

sustained any injuries in her fight with Perry, Carr said she injured her rib and clavicle.

Carr also testified that, after Lewis pulled her away from Perry, she tried to leave the bus, but Lewis grabbed her by her shoulders and lower back. Carr did not remember biting Lewis. When asked what happened after Lewis grabbed her, Carr testified, "I really don't know." Carr remembered that at one point she was looking up at Lewis and was "out of breath" and that Lewis had his hand and "maybe a knee" on her. Carr testified "the whole thing, being picked up and drug across the ground, being in the fight itself," was "a traumatic experience." Carr did not say that she feared Lewis would harm her or that she bit Lewis to prevent him from harming her.

The jury found Carr guilty of mayhem and assault by means of force likely to produce great bodily injury. The trial court sentenced Carr to a term of two years for the mayhem conviction and a consecutive term of one year for the assault conviction. Carr timely appealed.

DISCUSSION

Carr contends the trial court erred in failing to give an instruction sua sponte "concerning a citizen's right to detain or arrest another citizen, and a detainee's right to self-defense in that context." Carr argues "the jurors were never instructed on this applicable law and never had the chance to properly assess those issues within the confines of that law," which "deprived [her] of her right to properly defend herself against" the charge of assault against Lewis. Carr also contends the trial court erred in giving the contrived self-defense instruction because "[t]here is nothing in the record to support an inference that [Carr]

provoked a fight with the intent to create an excuse to use force . . . ." We find no merit in either argument.

A. *The Court Did Not Err in Failing To Instruct on Self-defense to a Citizen's Arrest*

1. *Standard of Review*

"We review de novo a claim that the trial court failed to properly instruct the jury on the applicable principles of the law." (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 850.) We also review de novo whether the trial court has a duty to give a particular jury instruction sua sponte. (*People v. Simon* (2016) 1 Cal.5th 98, 133; *People v. Guiuan* (1998) 18 Cal.4th 558, 569.) """In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]'" [Citation.] "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation."'" (*People v. Mathson* (2012) 210 Cal.App.4th 1297, 1311-1312.)

2. *The Relevant Instructions*

The trial court instructed the jury on assault by means of force likely to produce great bodily injury with CALCRIM No. 875. This instruction stated: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person; and, 1B. The force used was likely to produce great bodily injury; [¶]

2. The defendant did that act willfully; [¶] 3. When the defendant acted, she was aware of facts that would lead a reasonable person to realize that her act by its nature would directly and probably result in the application of force to someone; [¶] 4. When the defendant acted, she had the present ability to apply force likely to produce great bodily injury to that person; and [¶] 5. The defendant did not act in self-defense."

The trial court instructed the jury on the general law governing self-defense with CALCRIM No. 3470: "Self-defense is a defense to mayhem and assault with force likely to commit great bodily injury and the lesser crimes of simple assault and simple battery. The defendant is not guilty of these crimes if she used force against the other person in lawful self-defense. The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that she was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully; [¶] 2. The defendant reasonably believed that . . . the immediate use of force was necessary to defend against that danger; and [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger. . . . [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense." Counsel for Carr did not ask for a clarifying instruction informing the jury that, in the context of a citizen's arrest, a defendant has the right to resist against excessive force.

3. *The Court Did Not Have a Sua Sponte Duty To Instruct on Self-defense During a Citizen's Arrest*

"'"It is settled that 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.'" [Citations.] It is also well settled that this duty to instruct extends to defenses 'if it appears . . . the defendant is relying on such a defense, 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. Brooks* (2017) 3 Cal.5th 1, 73.)

As noted, the trial court instructed the jury on self-defense. Carr does not argue that the court's instructions were erroneous, only that they were incomplete because they did not specifically tell the jury that a defendant has the right of self-defense during a citizen's arrest involving excessive force. Carr even acknowledges the jury instruction he contends the court should have given sua sponte is "an application of the law of self-defense." The trial court, however, did not have a sua sponte duty to give such a clarifying or pinpoint instruction. (See *People v. Lee* (2011) 51 Cal.4th 620, 638 ["a trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel"]; *People v. Young* (2005) 34 Cal.4th 1149, 1202 ["a defendant's failure to request a clarification instruction forfeits that claim on appeal"]; *People v. Barton* (1995) 12 Cal.4th 186, 197 [an instruction that relates "specific facts to the elements of the offense" is a pinpoint instruction "that the trial court need not give . . . unless requested by a party"]; *People v. Saille*, *supra*, 54 Cal.3d at p. 1120 ["a pinpoint instruction does not involve a 'general principle of law' as that term is used in the cases that have imposed a sua sponte duty of instruction on the trial court"]; *People v. Miceli* (1951) 101 Cal.App.2d 643, 648-649 [where the instructions on the law of self-defense were adequate, the defendant should have requested an amplifying instruction to

inform the jury that a "sudden and perilous" counterassault justified his use of deadly force].)[2]

Moreover, a trial court does not err in failing to give an instruction on self-defense where there is no substantial evidence to support it. (*People v. Simon*, *supra*, 1 Cal.5th at p. 134; *People v. Stitely* (2005) 35 Cal.4th 514, 551; *People v. Villanueva* (2008) 169 Cal.App.4th 41 49; see *People v. Ceja* (1993) 4 Cal.4th 1134, 1147 ["[a] trial court must instruct the jury on every theory that is supported by substantial evidence," and, "[c]onversely, it may not instruct on any that is not"].) Here, there was no substantial evidence to support an instruction on self-defense during a citizen's arrest.

"'To justify an act of self-defense for [an assault charge under . . . section 245], the defendant must have an honest and reasonable belief that bodily injury is about to be inflicted on him.'" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064, italics omitted; see *People v. Brady* (2018) 22 Cal.App.5th 1008, 1014 ["the defendant's belief must both subjectively exist and be objectively reasonable"].) There was no evidence, much less substantial evidence, Carr had an actual belief Lewis threatened to inflict imminent bodily injury on her. Carr testified she did not know what happened after Lewis grabbed her as she was

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[2] *People v. Adams* (2009) 176 Cal.App.4th 946, on which Carr relies, does not support her position. The trial court in that case instructed the jury on self-defense pursuant to CALCRIM No. 3470 and on citizen's arrest and a person's right to use reasonable force to defend himself or herself in response to excessive force. (*Adams,* at pp. 950-951.) The court's opinion in *Adams* does not state whether the trial court gave the instruction sua sponte or at the request of the defendant, and the court did not hold that the trial court had a sua sponte duty to give the instruction applying self-defense to a citizen's arrest.

leaving the bus. Carr did not testify she bit Lewis because she feared he would harm her. Carr did not say anything about the circumstances that caused her to bite Lewis or even that she bit Lewis at all. Her only memory after Lewis grabbed her was that she was "out of breath" after the struggle. Although the court gave an instruction on self-defense that may have been applicable to the altercation between Perry and Carr, there was no evidence Carr had an actual and reasonable fear of imminent bodily injury from Lewis that would have supported giving an instruction on self-defense during Lewis's citizen's arrest of Carr.

Nor was there substantial evidence Lewis used excessive or unreasonable force. Carr testified only that Lewis grabbed her by her shoulders and lower back. Lewis did not hit or threaten to strike Carr, and Carr did not sustain any injuries after Lewis grabbed her. While Lewis testified that he grabbed Carr by her head and neck and dragged her back to the bus stop to wait for the police and that Carr bit him "at some point," there was no evidence Carr bit him in response to Lewis's application of force.

Carr argues she "asserted that she was acting in self-defense . . . when she resisted Lewis as he grabbed her." The portions of the reporter's transcript Carr cites, however, do not contain any testimony concerning her fear of bodily injury or her need to resort to self-defense.[3] Carr cites only statements her attorney made during closing argument that Carr acted in self-defense, arguments the trial court instructed the jury were not evidence.

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[3] Similarly, the record citations in Carr's opening brief do not support her assertion that she "testified that Lewis used extensive force in restraining her when he aggressively grabbed her and dragged her on the floor."

4. *Any Error Was Harmless*

We review instructional error in noncapital cases for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (See *People v. Beltran* (2013) 56 Cal.4th 935, 955 [""misdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error are reviewed under the harmless error standard articulated" in *Watson*"]; *People v. Villanueva*, *supra*, 169 Cal.App.4th at p. 52 [applying the *Watson* standard of prejudice in reviewing the trial court's failure to instruct on self-defense]; *People v. Elize* (1999) 71 Cal.App.4th 605, 616 [same].) "[U]nder *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error." (*People v. Mena* (2012) 54 Cal.4th 146, 162.) "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* (2014) 229 Cal.App.4th 1215, 1220.)

Carr has not shown a reasonable probability of a more favorable result on the assault charge had the trial court given an instruction stating Carr had the right to defend herself against excessive or unreasonable force during a citizen's arrest. The failure to give an instruction is harmless where "'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant . . . .'" (*People v. Wright* (2006) 40 Cal.4th 81, 98; see *id*. at pp. 99-100 [no prejudice from the omission of an instruction

on compassionate use of marijuana defense because the jury rejected the factual predicate of the omitted instruction when it found, under other instructions, the defendant possessed the drug with the specific intent to sell it]; *People v. Lujano* (2017) 15 Cal.App.5th 187, 195-196 ["[o]mission of an instruction is harmless beyond a reasonable doubt if "'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions'"']; *People v. Gana* (2015) 236 Cal.App.4th 598, 611 ["[b]y its verdicts and findings the jury clearly 'rejected defendant's [mental state] defense' [citation] in another context and thus the refusal to instruct on unconsciousness was harmless error"].)

Here, the jury, properly instructed on self-defense, found Carr did not act in lawful self-defense, which necessarily included a finding that Carr did not reasonably believe she was in imminent danger of suffering great bodily injury, that immediate use of force was not necessary to defend against that danger, or that Carr did not use reasonable force to defend against that danger. Therefore, had the court instructed the jury on excessive force during a citizen's arrest, and on Carr's right to defend against that force, the result would have been the same. There would have been no effect on the jury's finding, under the general law of self-defense, that Carr did not have an imminent fear of danger from Lewis, did not reasonably believe she needed to use force to defend herself against him, or did not use reasonable force in defense. Moreover, the court instructed the jury that the law of self-defense applied to the assault charge (see CALCRIM No. 3470), which was the charge arising from Carr's biting Lewis when he detained her. Nothing in the instructions suggested to the jury that the right to self-defense did not apply in the context of a citizen's arrest.

B. *The Court Did Not Err in Giving an Instruction on Contrived Self-defense*

Carr argues the trial court erred in giving an instruction on contrived self-defense because "there is no evidence in the record that [she] acted with any intent to provoke Perry or Lewis in order to create an excuse to use force."[4] Carr's argument is meritless because there was such evidence.

1. *The Instruction*

The trial court instructed the jury pursuant to CALCRIM No. 3472 that a "person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an

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[4] The prosecutor did not argue the contrived self-defense instruction applied to the assault charge involving Lewis. The prosecutor argued the jury should apply the contrived self-defense instruction when she discussed the evidence Carr provoked a fight with Perry for the mayhem charge. We presume the jury followed the trial court's instruction to disregard this instruction if the jury found the instruction did not apply to the assault charge. (See *People v. Frandsen* (2011) 196 Cal.App.4th 266, 278.) Carr also asserts the prosecutor misstated the law when the prosecutor "indicated" Carr did not have the right to self-defense for the assault charge if the jury found Carr provoked the altercation with Lewis. The record does not support this assertion. In any event, the trial court instructed the jurors that they should "follow the law as [the court] explain[ed] it" and that, if the jury believed that the attorneys' comments on the law conflicted with the court's instructions, it "must follow [the court's] instructions." We presume the jury followed the trial court's instructions. (See *People v. Edwards* (2013) 57 Cal.4th 658, 723.)

excuse to use force." Counsel for Carr did not object to this instruction. We review independently the trial court's decision to give a particular instruction. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1206; *People v. Quiroz* (2013) 215 Cal.App.4th 65, 76.)

2. *Substantial Evidence Supported the Instruction*

"'It is error to give an instruction [that], while correctly stating a principle of law, has no application to the facts of the case.'" (*People v. Debose* (2014) 59 Cal.4th 177, 205; see *People v. Cross* (2008) 45 Cal.4th 58, 67 ["[g]iving an instruction that is correct as to the law but irrelevant or inapplicable is error"]; *People v. Marshall* (1997) 15 Cal.4th 1, 39-40 ["'unsupported theories should not be presented to the jury'"].)[5] The court should not give an instruction that is not supported by substantial evidence. (*Marshall* at p. 39; *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 759.) "Substantial evidence is evidence that would allow a reasonable jury to find the existence of facts underlying the instruction, and to find the defendant guilty beyond a reasonable doubt based on the theory of guilt set forth in the instruction. [Citations.] In making this determination, we view the evidence most favorably to the judgment presuming the existence of every fact that reasonably may be deduced from the record in support of the judgment." (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1290.)

CALCRIM No. 3472, which the trial court gave in this case, "is . . . generally a correct statement of law." (*People v. Eulian* (2016) 247 Cal.App.4th 1324, 1333.) "'[T]he ordinary self-defense

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[5] Carr does not argue the contrived self-defense instruction incorrectly stated the law.

doctrine—applicable when a defendant reasonably believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified.'" (*People v. Enraca* (2012) 53 Cal.4th 735, 761; see, e.g., *id*. at p. 762 [record supported giving an instruction similar to CALCRIM No. 3472 because the defendant attacked the victim first]; *People v. Eulian*, *supra*, 247 Cal.App.4th at p. 1334 [the "defendant's conduct . . . provide[d] a factual predicate" for the trial court to instruct with a modified version of CALCRIM No. 3472 because the defendant "walked 40 feet to confront" the victim, screamed at the victim, and jabbed his finger in her face until she kicked the defendant and his mother].)

Here, there was substantial evidence Carr provoked the fight with Perry. Even though Perry spoke first and initiated the conversation with Carr, Carr walked from the middle of the bus to the front of the bus to hit Perry in the face, as the defendant did in *People v. Eulian*, *supra*, 247 Cal.App.4th at p. 1334. The evidence also showed Carr pushed and grabbed Lewis as she tried to take the money from his hands, which prompted Perry to say she could not treat Lewis in that manner.

Although Carr testified Perry threatened her when she got on the bus by saying, "Don't get your ass kicked," Lewis and Perry could not recall any such threat. (See *People v. Ceja*, *supra*, 4 Cal.4th at p. 1143 [reviewing court "must view the record favorably to the judgment below to determine whether there is evidence to *support* the instruction, not scour the record in search of evidence suggesting a contrary view"]; *People v. Jantz*, *supra*, 137 Cal.App.4th at p. 1290 [in determining whether substantial

evidence supports an instruction, "we view the evidence most favorably to the judgment"].) A rational jury could have concluded from these facts that Carr initiated a physical attack that created the circumstances justifying Perry's hitting her back. (See *People v. Enraca*, *supra*, 53 Cal.4th at p. 761). There was substantial evidence to support giving an instruction on contrived self-defense.

3. *Any Error Was Harmless*

Finally, any error in giving the instruction on contrived self-defense was harmless. "[G]iving an irrelevant or inapplicable instruction is generally "'only a technical error which does not constitute ground for reversal.'"" (*People v. Cross*, *supra*, 45 Cal.4th at p. 67.) "'The error of instruction on an inapplicable legal theory is reviewed under the reasonable probability standard of [*Watson*].'" (*People v. Debose*, *supra*, 59 Cal.4th at pp. 205-206; see *People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130 [an erroneously given jury instruction is subject to the harmless error analysis under *Watson*]; *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1247 ["giving an irrelevant or inapplicable instruction . . . does not implicate the defendant's constitutional rights and is subject to harmless error review under [*Watson*]"].)

The trial court instructed the jury that some of its instructions might not apply, which allowed the jurors to disregard the contrived self-defense instruction if they did not believe Carr instigated the physical altercation with Perry. (See *People v. Frandsen* (2011) 196 Cal.App.4th 266, 278 ["the jury is presumed to disregard an instruction if the jury finds the evidence does not support its application"].) The trial court further instructed the jury that it should not assume, just because the court gives an instruction, the court was suggesting anything about the facts and that the jury, after deciding what

the facts were, should follow the instructions that applied to the facts. (See *People v. Edwards* (2013) 57 Cal.4th 658, 723 ["[w]e presume the jury followed the trial court's instructions"].)

And even if the trial court had not instructed the jury on contrived self-defense, there is no reasonable probability Carr would have obtained a more favorable result. Without an instruction informing the jury that Carr did not have the right to self-defense if she provoked the fight with Perry, the jury would have applied the general law of self-defense, as the trial court properly instructed with CALCRIM No. 3470. The evidence was overwhelming that Carr used excessive force in responding to Perry by biting off her finger. (See *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [a person has a right to resist a battery by using force that is reasonable under the circumstances].) It is not reasonably probable that, had the court not instructed the jury on contrived self-defense, Carr would have obtained a more favorable result.

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.