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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DWIGHT NIBLETT,

Defendant and Appellant.

B236863

(Los Angeles County
Super. Ct. No. BA381125)

APPEAL from a judgment of the Superior Court of Los Angeles County. Monica Bachner, Judge. Affirmed.

Laura G. Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven R. Mercer and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Dwight Niblett appeals from his conviction for voluntary manslaughter, asserting two claims of instructional error. We affirm.

BACKGROUND

The information charged Niblett with one count of murder in violation of Penal Code section 187 (count 1) and one count of possession of a firearm by a felon in violation of subdivision (a)(1) of Penal Code section 12021 (count 2).¹ As to count 1, the information further alleged that Niblett personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury and death, within the meaning of section 12022.53, subdivisions (b), (c), and (d). As to both counts, the information alleged both that Niblett had served five prior prison terms within the meaning of section 667.5, subdivision (b), and that he had suffered one prior conviction of a serious or violent felony within the meaning of section 1170.12, subdivisions (a) through (d), and section 667, subdivisions (b) through (i).

Niblett initially pleaded not guilty to both of the charges and denied all of the allegations. Later, he withdrew his not guilty plea as to count 2 and pleaded guilty to that count, and he admitted the truth of the prior conviction allegations. Count 1 was tried to a jury, which acquitted Niblett of murder but convicted him of the lesser included offense of voluntary manslaughter. The jury also found true the allegation that he personally used a handgun within the meaning of section 12022.5.

The trial court denied Niblett's motion to dismiss the prior serious or violent felony conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, but the court on its own motion (unopposed by the prosecution) struck the prior prison term allegations. The court sentenced Niblett to 32 years in prison, calculated as follows: the upper term of 11 years as to count 1, doubled because of the serious or violent felony conviction, plus 10 years for the firearm allegation, plus a concurrent term of six years as to count 2 (the upper term of three years, doubled because of the serious or violent felony

¹ All subsequent statutory references are to the Penal Code.

conviction). The court also imposed various statutory fines and fees, including a \$10,000 restitution fine, and credited Niblett with 1,129 days of presentence custody (982 days actual time and 147 days good time/work time). Niblett timely appealed.

The evidence introduced at trial showed the following facts: At approximately 2:15 p.m. on July 24, 2008, the clerk at a 98 Cent Store in Los Angeles saw Niblett “struggling” or “wrestling” with another man, later identified as Dominick Anderson. Anderson entered the store and tried to shut the door to keep Niblett out, but Niblett entered, holding a handgun at his side. Inside the store, Anderson and Niblett exchanged words, Anderson took a swing at Niblett and then attempted to flee, and Niblett shot Anderson once in the head, killing him. The store’s surveillance cameras recorded the confrontation inside the store, including the shooting. Relevant portions of video recordings from three different cameras were played for the jury.

Niblett testified that before the shooting he had gone to a nearby clothing store to buy a t-shirt. The store did not have what he was looking for, so he left. When he came out of the store, someone attacked him—the assailant “came from nowhere” and started “beating me in my face.” Niblett “was dazed,” “saw stars,” and “couldn’t tell who it was.” The assailant then stopped punching Niblett and “started going for my pocket.” Niblett eventually realized that the assailant was Anderson, whom he knew. Niblett believes Anderson attacked him because Anderson knew that Niblett carried a lot of cash.

Niblett “was trying to get away from” Anderson, and when Niblett got closer to the 98 Cent Store, he (Niblett) drew his gun. Niblett normally carries a gun, because he had been shot in the head and attacked on previous occasions near this same location. Asked what he was planning to do when he pulled out the gun, Niblett testified, “I just wanted him to leave me alone.”

According to Niblett, Anderson was not deterred, however, and continued to come toward Niblett and swing at him, saying “‘You pulling that gun? What you going to do with it?’” Anderson added, “‘You know you dead. I’m going to call the homeys. They’re going to kill you. You pull out a gun? This is my ’hood.’” Niblett knew Anderson to be a member of the Hoover Crips, a “ruthless” neighborhood gang. The

testimony of other witnesses confirmed that Anderson was a gang member, a violent bully, and a user of illegal drugs; the coroner's report showed that Anderson's blood and urine tested positive for PCP, and his blood tested positive for cocaine.

Niblett testified that he feared for his life but was also angry at Anderson's attempt to rob him. Anderson eventually retreated into the 98 Cent Store. Niblett testified that he pursued Anderson into the store because he "was scared [Anderson] was going to come and kill me" and "his homeys are around there . . . that's the gang-banger block right there." Once inside the store, Niblett angrily told Anderson, "Leave me alone. Leave me the fuck alone. Why are you messing with me?" Anderson came toward him and swung at him again, and Niblett feared that Anderson was "going to take the gun," which Niblett was holding at his side, pointing straight down. (The surveillance video confirms that Anderson swung at Niblett, who was holding the gun as described.) Niblett then raised the gun "[j]ust to get him off, to scare him off of me." Niblett fired once, killing Anderson, and then left the store and sat on the curb, saying "What did I do? What did I do?" He was still "scared" because he knew he "did something wrong." Someone came up to him and said "'You better get out of here or they're going to kill you,'" referring to Anderson's fellow gang members. Niblett went to his car and drove away.

DISCUSSION

I. Apprehension of a Fleeing Felon

On appeal, Niblett argues that the trial court prejudicially erred by failing to instruct the jury that homicide is justifiable "[w]hen necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace." (§ 197, subd. (4).) We disagree.

If a homicide is justifiable, then it is not unlawful. (§ 199 ["The homicide appearing to be justifiable or excusable, the person indicted must, upon his trial, be fully acquitted and discharged"].) The justifiable homicide instruction at issue is therefore not an instruction on a lesser included offense, but rather on a defense. (See CALCRIM No. 508.)

“[A] trial court’s duty to instruct, sua sponte, or on its own initiative, on particular defenses is more limited [than the duty to instruct on lesser included offenses], arising ‘only if it appears that 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.’ [Citations.]” (*People v. Barton* (1995) 12 Cal.4th 186, 195.)

Niblett concedes that at trial he did not request an instruction on the defense of apprehension of a fleeing felon. Moreover, the evidence is inconsistent with Niblett’s theory of the case, and there is no evidence to support it. There is no evidence that Niblett was attempting to apprehend Anderson. Niblett himself testified in detail about his confrontation with Anderson, and about his own thoughts and intentions during that confrontation. When asked what he was planning on doing when he drew the gun, he testified, “I just wanted him to leave me alone.” When asked why he pointed the gun at Anderson, he testified, “Just to get him off me, to scare him off of me.” In light of Niblett’s testimony, a jury could not reasonably infer that Niblett was attempting to apprehend Anderson. The trial court therefore did not err by failing to instruct sua sponte on justifiable homicide in attempting to apprehend a fleeing felon.

II. Self-Defense

Niblett argues that the trial court committed prejudicial error by instructing the jury, at the prosecution’s request, that an assault with fists does not justify the use of a deadly weapon in self-defense unless the defendant reasonably believed that the assault was likely to produce great bodily injury. Niblett cites *People v. Hunter* (2011) 202 Cal.App.4th 261 (*Hunter*) in support of his argument that the instruction “is argumentative and improperly pinpointed evidence in the case in the prosecutor’s favor, supporting the prosecution argument that ‘a punch in the face’ is not ‘worth a shot in the head.’” We are not persuaded.

In *Hunter*, the defendant contended at trial that the prosecution failed to prove beyond a reasonable doubt that he used “a real gun” in committing the charged robberies and burglary. (*Hunter, supra*, 202 Cal.App.4th at p. 264.) At the prosecution’s request,

and over defense objection, the trial court gave the jury a pinpoint instruction that began as follows: “‘When a defendant commits a robbery by displaying an object that looks like a gun, the object’s appearance and the defendant’s conduct and words in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm. The victim’s inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt as a matter of law that the gun was a firearm.’” (*Id.* at p. 267.)

The Court of Appeal found the instruction problematic for two reasons. First, its initial sentence was “unduly argumentative,” because it told the jury that “‘the object’s appearance and the defendant’s conduct and words in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm,’” but “the jury could just as accurately have been told the opposite, that when a defendant displays an object that looks like a gun, the object’s appearance and the defendant’s conduct may constitute sufficient circumstantial evidence to support a finding *that it was not a firearm.*” (*Id.* at pp. 275-276.) Second, although “the challenged instruction did not direct the jury that it *could not* find a reasonable doubt whether the gun was real based on the victims’ inability to ‘say conclusively that the gun was real and not a toy,’” it “did highlight this one aspect of the evidence as not necessarily creating a reasonable doubt, thereby permitting the jurors to interpret the instruction as a caution against finding a reasonable doubt on this basis.” (*Id.* at p. 276.) Consequently, it “impermissibly lighten[ed] the prosecution’s burden to prove the use allegation beyond a reasonable doubt.” (*Id.* at p. 264.)

The challenged instruction in this case suffers from neither of the defects identified in *Hunter*. Niblett argues that the instruction was unduly argumentative because it told the jury that “‘an assault with fists does not justify the person being assaulted in using a deadly weapon in self-defense’ unless the person reasonably believes the assault will inflict great bodily injury,” but “the opposite is also true: An assault with fists justifies the use of a deadly weapon in self-defense if the accused reasonably believes the assault will inflict great bodily injury.” We disagree; the instruction in this case is not relevantly similar to the instruction in *Hunter*. In *Hunter*, the instruction

expressly licensed one inference (i.e., that the object was a gun) but omitted the opposite but equally permissible inference that could be drawn from the same evidence (i.e., that the object was not a gun). Here, the challenged instruction made no similar omission—it informed the jury that an assault with fists does not justify use of a deadly weapon *unless the defendant reasonably believed the assault was likely to inflict great bodily injury*. For similar reasons, the instruction did not impermissibly lighten the prosecution’s burden—it in no way cautioned against a finding of self-defense on the basis of Anderson’s assault, as long as the jury found that Niblett reasonably believed that the assault was likely to inflict great bodily injury.

For the foregoing reasons, we reject Niblett’s argument that the trial court erred by giving the challenged instruction.

DISPOSITION

The judgment is affirmed.

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ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.