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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. STEVEN BAIRD RAINFORD, Defendant and Appellant.	B229384 (Los Angeles County Super. Ct. No. BA364500)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lance A. Ito. Judge. Affirmed.

Christopher Nalls, 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 D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Steven Baird Rainford appeals from the judgment entered upon his conviction by jury of attempted voluntary manslaughter (Pen. Code, §§ 664, 192, subd. (a)),[1] as a lesser included offense of attempted willful, deliberate, and premeditated murder. The jury found to be true the allegations that appellant personally used a firearm within the meaning of section 12022.5, subdivision (a) and personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). The trial court sentenced appellant to an aggregate state prison term of 10 years. Appellant contends that the trial court (1) erred in failing to instruct the jury sua sponte on the antecedent threats aspect of self-defense, (2) if appellant forfeited the above-stated instructional claim by reason of his counsel's failure to request it in the trial court, appellant suffered ineffective assistance of counsel, and (3) the great bodily injury enhancement should have been stayed pursuant to section 654.

We affirm.

FACTUAL BACKGROUND

Prosecution's evidence

Events leading to shooting

In November 2009, appellant was living with Rishawn Turner (Turner) in apartment No. 4, in a building on Ursula Avenue, in Los Angeles, an area claimed by a Bloods gang. Gregory Daniels (Daniels), previously affiliated with a Bloods gang, had lived in apartment No. 4 but had moved to apartment No. 3. He and Turner hated each other and frequently argued. Daniels knew appellant and had no problem with him.

On November 1, 2009, Daniels began drinking in the mid-afternoon, becoming drunk and belligerent. He got into an argument with Turner, threatening, "If you cross this line, I might have to deal with you," and "You got one more time to cross that line, and then I'm going to be me." Daniels became hostile to everyone in apartment No. 4 and said, "Fuck the whole house." At another point, he called his sister and asked her to

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

come and beat up Turner. Daniels admitted that he likely mentioned the Blood gang in his rantings, as he often identified his gang relationship when in his "aggressive mode."

Daniels's girlfriend telephoned the live-in building manager, Lashawn Moore (Moore), to come down because Daniels was "drunk and fussing." Moore found Daniels outside his apartment yelling and cursing. Turner and tenants from nearby apartments were in the hallway. Moore pushed Daniels into his apartment and tried to calm him down. He started "screaming and hollering and tearing up the place." He yelled, "I'll just get anybody over here, I can get somebody over here."

Moore returned to her apartment and could hear Daniels still yelling. She called the police. Sometime during the evening, Moore saw Daniels fight with a man she did not know, who was a guest at Turner's apartment.

Daniels went into the alley to "blow some steam off." Near 10:00 p.m., he ran into Damon Jones (Jones), an acquaintance, who was leaving another apartment building near the alley. They drank a beer and talked for 10 to 20 minutes. The two men agreed that Jones would go back to his house to get money to buy some liquor. Jones left, and Daniels went back inside his building.

The shooting

According to Jones, when he returned to Daniels's apartment building, the front security gate was locked. He called Daniels's cell phone, but Daniels did not answer. Jones was able to enter when someone exited. He went to apartment No. 4, not knowing that Daniels had moved to apartment No. 3. Jones saw appellant, whom he did not know, standing in front of the door and asked him if he knew where Daniels lived. Appellant pointed at an apartment. As Jones turned to leave, he saw that appellant was pointing a gun at his shoulder area. Jones then felt gunshots and heard a male near the door say, "Finish him." Jones ran down the stairs and ran home. He was shot twice in his left arm, once in his right arm, and once in the back. He was hospitalized for four days. He had scars on the back of his arms and back and one bullet remained lodged in his body. He lost full movement of his left arm.

Jones denied stepping foot into apartment No. 4, making threatening or aggressive moves toward appellant or being asked by Daniels to carry out any threats. On the night of the shooting, Jones had no weapons on him. He claimed he was not then, and had never been, a gang member but had two prior convictions for vehicle theft.

Moore told police that she saw an unknown man enter the building and approach apartment No. 4, where he had a verbal confrontation with appellant at the stairwell outside of the apartment. Appellant was standing in front of the doorway of apartment No. 4. She then heard someone yell, "Get your ass out of here," followed by gunshots.

Appellant's arrest and statement

Appellant was arrested on November 11, 2009. He told detectives that Daniels had been drunk that day and was "running off at the mouth as usual." He told Daniels to "[t]ake your punk ass in the house, before I knock you out." Appellant was standing in the doorway to his apartment when he heard Jones at the security gate saying, "Well, this is where Bloods." When Jones got through the gate, appellant stepped into his apartment and started to close the door, but Jones "looked at [him]. Looked at the other door. Looked at [him], [they] exchanged words." Jones told appellant, "Fuck Crabs," a derogatory term for Crips gang, a gang with whom appellant was associated, although he was trying to escape the gang life. Appellant thought Daniels sent Jones.

Jones then tried barging into apartment No. 4, grabbing the door handle and opening the door. He had stepped two feet through the doorway when appellant grabbed his gun, located in an open gun safe by the front door, and "shot at him, before he fucking shot at me." Appellant said that it was either "me or him, and it was not going to be me."

Defense's evidence

Appellant called Steve Workman (Workman), who lived in apartment No. 20, to testify. On the night of the shooting, at approximately 10:00 or 11:00 p.m. Workman heard a commotion and saw several people arguing, including Turner, appellant and Daniels. Daniels was the most aggressive and was yelling, "These niggas are pussies," "I give these niggas guns," and "I'm a Blood." Workman kept hearing "Blood" and "guns" being yelled for an hour or two.

Later, Workman heard Daniels leave the building, still saying things about Bloods and guns. A few minutes later Daniels returned with another man, who was telling Daniels to be quiet. Workman then heard the sound of glass breaking and then gunshots. He heard no voices or yelling from the area of apartments Nos. 3 or 4 just prior to the shots. After the shots, he heard appellant and Turner whispering, "Come on, come on, we got to go, sssh, sssh, come on right now, let's go."

DISCUSSION

1. Instructional error

A. Background

The trial court gave the jury numerous instructions regarding self-defense. These included CALJIC Nos. 5.10 (Resisting Attempt to Commit Felony), 5.12 (Justifiable Homicide In Self-defense), 5.13 (Justifiable Homicide—Lawful Defense of Self or Another), 5.15 (Charge of Murder—Burden of Proof re Justification or Excuse), 5.16 (Forcible and Atrocious Crime—Defined), 5.17 (Actual But Unreasonable Belief In Necessity to Defend—Manslaughter), 5.30 (Self-defense Against Assault), 5.31 (Assault With Fists—When Use of Deadly Weapon Not Justified), 5.32 (Use of Force In Defense of Another), 5.42 (Resisting An Intruder Upon One's Property), 5.44 (Presumption of Fear of Death/Great Bodily Injury), 5.50 (Self-defense Assailed Person Need Not Retreat), 5.51 (Self-defense-Actual Danger Not Necessary), and 5.52 (Self-defense—When Danger Ceases).

Among other things, these instructions informed the jury that a person asserting self-defense must *actually* and *reasonably* believe that there was an immediate danger that the person attempted to be killed intended to commit a forcible and atrocious crime and that the defendant could act upon appearances, whether the danger is real or merely apparent. (CALJIC Nos. 5.13, 5.30.)

Appellant did not request an instruction regarding antecedent threats, and the trial court gave no such instruction.

B. Contention

Appellant contends that the trial court erred in failing to fully instruct the jury on self-defense. He argues that the trial court had a sua sponte duty to instruct on the effect of the victim's antecedent threats against appellant and Turner on the reasonableness of appellant's conduct.

We have determined that while the accused is entitled to an instruction on this point in a proper case, the trial court has no sua sponte duty to give such an instruction and must do so only if a timely request is interposed in the trial court. No such request was made here. Hence, the trial court did not err in failing to instruct on antecedent threats.[2]

C. No duty to instruct on antecedent accident sua sponte

In criminal cases, "'"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This duty includes the duty to instruct on defenses when it appears that the defendant is relying on a defense, or if there is substantial evidence to support the defense and it is not inconsistent with the defendant's theory of the case. (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488 (*Garvin*).)

"Yet this duty is limited: 'the trial court cannot be required to anticipate every possible theory that may fit the facts of the case before it and instruct the jury accordingly. [Citation.] Thus, the court is required to instruct sua sponte only on general principles which are necessary for the jury's understanding of the case. It need not

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[2] For purposes of our analysis, we assume without deciding that there was sufficient evidence in this case of an antecedent threat. We therefore do not consider whether there was such a threat to appellant, whether appellant overhearing Daniels's references to Bloods and gangs constituted a threat to appellant or Turner, and whether Daniels's threats to Turner justified appellant in defending her.

instruct on specific points or special theories which might be applicable to a particular case, absent a request for such an instruction.'" (*Garvin, supra,* 110 Cal.App.4th at pp. 488–489.) A pinpoint instruction is an instruction that relates particular evidence to an element of the offense or defense. (*People v. Rogers* (2006) 39 Cal.4th 826, 878.) "A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142), but the trial court has no obligation to give such an instruction when neither party has requested it. (*People v. Silva* (2001) 25 Cal.4th 345, 371.)

Instruction on antecedent threats is such a pinpoint instruction. (*Garvin, supra,* 110 Cal.App.4th at pp. 488–489.) As stated in *Garvin*, "[While] [t]he trial court was obligated to instruct on the basic principles of self-defense[,] [i]t satisfied this duty by giving the standard CALJIC instructions on this topic. These instructions are legally correct and the concept of antecedent assaults [or threats] is fully consistent with the general principles that are expressed therein. [Citation.] The issue of the effect of antecedent assaults against defendant on the reasonableness of defendant's timing and degree of force highlights a particular aspect of this defense and relates it to a particular piece of evidence. An instruction on the topic of antecedent assaults is analogous to a clarifying instruction. It is axiomatic that '[a] defendant who believes that an instruction requires clarification must request it.' [Citation.] Therefore, we conclude that this is a specific point and is not a general principle of law; the trial court was not obligated to instruct on this issue absent request." (*Garvin, supra,* 110 Cal.App.4th at p. 489.)

We agree with *Garvin*. The omitted antecedent threat instruction (CALJIC No. 5.50.1) is a pinpoint instruction which simply pinpoints the types of circumstances the jury can consider in determining the reasonableness of appellant's belief of the imminent danger of death or great bodily injury that would justify the use of deadly force in defense. Such pinpoint instructions must be requested to be given. This is confirmed by the Bench Notes to CALCRIM Nos. 571 and 3470, successors, at least in part, to CALJIC No. 5.50.1, adopted in 2005, which states: "If there is sufficient evidence, the

court should give the bracketed paragraphs on prior threats or assaults *on request*." (Italics added.) Having failed to request such an instruction, the trial court did not err in failing to include them.

D. Harmless error

Even if the trial court erred in failing to give an antecedent threat instruction, that error was harmless in that there is no reasonable probability that a more favorable verdict for appellant would have ensued had such an instruction been given. (See *People v. Earp* (1999) 20 Cal.4th 826, 887; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The jury was properly instructed on self-defense and imperfect self-defense. Specifically, the jury was instructed that an attempted killing is justifiable when the defendant actually and reasonably believes "[t]hat it is necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person for the purpose of avoiding death or great bodily injury to himself." (CALJIC No. 5.12.) The jury was further instructed that a person exercising his right of self-defense may "defend himself 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." (CALJIC No. 5.50) These instructions were consistent with consideration of prior threats as a circumstance related to appellant's claim of self-defense. (See *Garvin*, *supra*, 110 Cal.App.4th at p. 489.)

Defense counsel argued to the jury that appellant reasonably feared for his life, in part, because of Daniel's statements. Defense counsel was free to argue, and the jurors were free to consider, the evidence that Daniels had threatened Turner in the past, as well as on the day of the shooting, that he had affiliations with a gang that was a rival of the gang with which appellant was associated, that Daniels had made reference to guns and Blood gangs in the hours before the shooting and the evidence that Jones disrespected appellant's gang just before the shooting by calling it "Crabs," an implicit threat to a rival gang member.

Further, we agree with the People's assertion that appellant's primary defense had nothing to do with the prior threats but related to defense of habitation, embodied in

section 198.5 and articulated in CALJIC No. 5.44. That defense gave rise to a presumption that appellant had a reasonable fear of imminent peril or death or great bodily injury.

II. Ineffective assistance of counsel

A. Contention

Appellant contends that if we determine that he was not entitled to the antecedent threat instruction because his counsel did not request it in the trial court, he suffered ineffective assistance of counsel. This contention lacks merit.

B. Duty to provide effective counsel

The standard for establishing ineffective assistance of counsel is well settled. The "'defendant bears the burden of showing, first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him.'" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052–1053; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 (*Strickland*).) It is presumed that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. (*Strickland, supra*, at p. 689; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.)

Because we have concluded that any error in the trial court's failure to give an antecedent threat instruction did not prejudice appellant, it necessarily follows that had appellant's counsel requested that instruction and had it been given, it is not reasonably probable that a different result more favorable to appellant would have ensued. We conclude that the omission to request the instruction at issue did not constitute ineffective assistance of counsel, because the absence of such an instruction did not prejudice appellant.

Further, appellant suffered no prejudice because, as noted above, defense counsel discussed during closing argument the threatening behavior of Daniels in the hours before the shooting. The instruction, whose omission appellant claims amounted to reversible

error, would have told the jury that it was to take Daniel's prior threats to appellant and Turner into consideration in determining whether appellant acted in a manner in which a reasonable person would act in protecting his own life or bodily safety. (See *People v. Moore* (1954) 43 Cal.2d 517, 528.) As another court has stated, "The concept at issue here is closer to rough and ready common sense than abstract legal principle. It is also fully consistent with the otherwise complete self-defense instructions given by the court. It is unlikely the jury hearing the evidence, the instructions given and the argument of counsel would have failed to give the defendant's position full consideration." (*People v. Gonzales* (1992) 8 Cal.App.4th 1658, 1665, fn. omitted.)

"Due to the entirely speculative nature of any detriment to defendant resulting from trial counsel's alleged shortcoming, he fails to show entitlement to relief." (*People v. Fauber* (1992) 2 Cal.4th 792, 846, fn. 17.)

III. Section 654 stay

A. Appellant's sentence

Appellant was convicted of attempted voluntary manslaughter, with true findings that he personally used a firearm (§ 12022.5, subd. (a)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)) in connection with that crime.

The trial court sentenced appellant to the middle term of three years for the attempted voluntary manslaughter conviction, plus the middle term of four years for the firearm enhancement and three years for the great bodily injury enhancement.

B. Contention

Appellant contends that the great bodily injury enhancement should have been stayed pursuant to section 654. He argues that section 654 is applicable to enhancements and "[b]ecause the firearm enhancement and the great bodily injury enhancements both arose from the same act—firing a gun at Damon Jones—section 654 should apply." We reject this claim, as our Supreme Court has recently decided this precise issue against appellant.

C. Section 654 inapplicable to great bodily injury enhancement

We agree with appellant that section 654 can apply to some enhancements. In the recent case of *People v. Ahmed* (2011) 53 Cal.4th 156, 163 (*Ahmed*), our Supreme Court so concluded, stating: "But on its [section 654] face, its language applies to enhancements. Enhancements are 'provisions of law' under which an 'act or omission' is 'punishable.' Accordingly, as a default, section 654 does apply to enhancements when the specific statutes do not provide the answer."

In *Ahmed,* the court was confronted with the identical issue posed by appellant here; "whether section 654 prohibits imposition of both enhancements [great bodily injury and firearm] because both apply to the same act." (*Ahmed, supra,* 53 Cal.4th at p. 162.) In resolving the issue, the Supreme Court reasoned, "Sometimes separate enhancements focus on different aspects of the criminal act. Here, for example, the personal use of a firearm and the infliction of great bodily injury arose from the same criminal act—shooting the victim. The personal use of a firearm was an aspect of that act that, the Legislature has determined, warrants additional punishment; similarly, the infliction of great bodily injury is a different aspect of that act that, the Legislature has determined, also warrants additional punishment." (*Id.* at pp. 163–164.) *Ahmed* concluded that, "The history of the amendments of section 1170.1 leading to its current subdivisions (f) and (g), as well as the committee reports on Senate Bill No. 721, make clear the Legislature that enacted those subdivisions intended to permit the sentencing court to impose both one weapon enhancement and one great-bodily-enhancement for *all* crimes." (*Id.* at p. 168.) Section 1170.1, subdivision (f) provides: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. *This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury.*" (Italics added.)

Hence, the trial court did not err in failing to stay the great bodily injury allegation.

DISPOSITION

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ