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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TRACY JOY GOMEZ, Defendant and Appellant.	B271556 (Los Angeles County Super. Ct. No. TA134727)

APPEAL from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Affirmed.

Barbara A. Smith, 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, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Tracy Joy Gomez challenges her conviction for voluntary manslaughter under Penal Code section 192, subdivision (a).[1] She argues the trial court improperly instructed the jury with CALCRIM No. 3471, the standard jury instruction on the right to self-defense for initial aggressors and mutual combatants. We disagree and affirm.

FACTUAL AND PROCEDURAL SUMMARY

In March 2015, appellant was charged by information with murder under section 187, subdivision (a). It was alleged that appellant had one prior serious or violent conviction within the meaning of sections 667, subdivision (d) and 1170.12, subdivision (b), and had served one prior prison term. The case was called for a jury trial in August 2015.

At trial, the prosecution presented evidence that in June 2014, appellant and Virginia Butler met with Jazmain Dear and Luvina Miller on the Blue Line Metro platform in Willowbrook, California. Appellant approached Miller and Dear looking upset and stated that she had just "got into it with some man" who had been "gay bashing" her. She began yelling and pointed across the platform at John Whitmore, a 65-year-old man. She and Whitmore began arguing. She called Whitmore "the N word," "bitch," and "old motherfucker." Whitmore said "whatever, little boy" and "okay, little boy" to appellant. At some point, he said "God bless you. Go about your day," turned away from appellant, and waited for the train.

Appellant then walked over to Whitmore and kicked in his direction while his back was turned to her. Witness testimony

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[1] Subsequent undesignated statutory references are to the Penal Code.

was conflicting with respect to whether appellant's kick missed Whitmore, struck his body, or struck a shopping bag he was holding. A video of the incident shows appellant's kicking motion in the direction of Whitmore, but does not show whether her foot or leg made contact with him or his belongings.

Following the kick, Whitmore turned around with an angry look on his face and moved towards appellant. Whitmore swung his shopping bags in appellant's direction. Witness testimony conflicted with respect to whether the shopping bags made contact with appellant. Appellant walked backwards away from Whitmore and put her fists up. She and Butler then moved towards Whitmore and began hitting him with their hands. Whitmore also hit or tried to hit appellant. Appellant punched Whitmore multiple times with a closed fist. He fell to the ground. Appellant and Butler left the scene.

Whitmore was shaking and bleeding from the back of his head. A bystander called the police and reported that an old man had been "jumped" and assaulted by two females, who had left the scene. The caller stated the women were "laughing about it, like, like, you know, hurting people is fun." Whitmore was hospitalized and later died from his injuries.

Appellant and Butler were arrested in August 2014. The jury heard a conversation recorded by police without appellant's or Butler's knowledge. In this conversation, Butler accused appellant of grabbing Whitmore's shopping bag. In response, she acknowledged that she had kicked the bag, but stated she "didn't mention that to the cops." When Butler accused appellant of "swing[ing] on" Whitmore, she replied: "And so did you, if you really want to get technical." She stated she swung at him to help Butler.

During the surreptitiously recorded conversation, appellant told Butler that before they met on the train platform, Whitmore bumped into her ex-girlfriend Debbie. She stated she said "excuse me, sir," and, in response, Whitmore "got in [her] face." Butler recalled telling detectives that Whitmore had called appellant a "dyke bitch" and said she "ain't got no dick between [her] legs." Throughout the recording, appellant and Butler expressed the belief that the video of the incident would demonstrate that they were attacked by Whitmore and acted in self-defense. The recording also includes appellant repeatedly telling Butler to "stick to the story" that they acted in self-defense and to "make up a dramatic story."

After hearing the foregoing evidence, the jury was instructed with CALCRIM No. 3471 (Right to Self-Defense: Mutual Combat or Initial Aggressor) as follows: "A person who engages in mutual combat or who starts a fight has the right to self-defense only if: One, she actually and in good faith tried to stop fighting; And two, she indicated by word or by conduct to her opponent in a way that a reasonable person will understand that she wanted to stop fighting and that she had stopped fighting; And three, she gave her opponent a chance to stop fighting. If the defendant meets these requirements, she then had a right to self-defense if the opponent continued to fight. However, if the defendant used only non deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend herself with deadly force and was not required to try to stop fighting or to communicate the desire to stop to the opponent or give the opponent [a] chance to stop fighting. A fight is mutual combat when it began or continued by mutual consent

or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose."

Appellant did not object to this instruction. The court cautioned the jury that some of the instructions may not be relevant, depending on the jury's factual findings. The court instructed the jury to follow the instructions that applied to the facts as the jury found them.

At closing, the prosecutor argued that appellant had started the fight between herself and Whitmore by kicking at him from behind. She argued that appellant did not withdraw after beginning the fight and therefore did not possess the right to self-defense. Appellant's attorney argued that she acted in self-defense and suggested Whitmore started the fight by "charging at" appellant.

The jury found appellant guilty of the lesser included offense of voluntary manslaughter (§ 192, subd. (a)). Appellant admitted the allegation regarding her prior conviction. She was sentenced to the midterm of six years, doubled pursuant to section 1170.12 to 12 years. She also was sentenced to five years pursuant to section 667, subdivision (a)(1), resulting in a total sentence of 17 years in state prison.

This appeal followed.

DISCUSSION

Appellant argues the court erroneously instructed the jury with CALCRIM No. 3471, which she contends was inapplicable to the facts of the case.[2] We disagree.

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[2] Respondent argues appellant waived the issue of instructional error because she did not object to the instruction in the trial court. Defendants may assert instructional error

Claims of instructional error are reviewed de novo. (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1378.) The trial court has a duty to instruct the jury on general legal principles relevant to defenses raised by a criminal defendant. (*People v. Breverman* (1998) 19 Cal.4th 142, 157 (*Breverman*).) Conversely, it is error to give an instruction which is inapplicable to the facts of the case. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

CALCRIM No. 3471 was relevant to the appellant's self-defense theory and applicable to the facts of the case. The instruction provides that "a person who (engages in mutual combat/ [*or* who] starts a fight) has a right to self-defense." (CALCRIM No. 3471, italics added.) If the evidence suggests *either* mutual combat *or* that the defendant was the initial aggressor, the instruction is appropriate.

In this case, the evidence suggested appellant was the initial aggressor. A video recording of the altercation between appellant and Whitmore shows appellant kicking. This was corroborated by percipient witnesses who saw her kick in Whitmore's direction. One witness said appellant kicked at Whitmore after he stated "God bless you. Go about your day" and turned away from her. The jury reasonably could have concluded from this evidence that appellant started the fight by kicking Whitmore after he had withdrawn from their initial verbal confrontation.

Appellant raised self-defense, which created a duty for the trial court to instruct the jury on general legal principles relevant to that defense. (*Breverman*, *supra*, 19 Cal.4th at p. 157.)

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affecting their substantial rights for the first time on appeal. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103, fn. 34.) We therefore address appellant's argument.

CALCRIM No. 3471 discusses how initiating a fight affects a defendant's ability to claim self-defense. Because there was evidence appellant started the fight, CALCRIM No. 3471 was a relevant and appropriate instruction.

Even assuming the court erred by instructing the jury with CALCRIM No. 3471, any error was harmless. Providing an irrelevant or inapplicable instruction is generally considered a "'"technical error which does not constitute [a] ground for reversal."'" (*People v. Cross* (2008) 45 Cal.4th 58, 67.) And, in this case, the court cautioned the jury that some instructions may be inapplicable. The court directed the jury to disregard instructions it found irrelevant based upon its factual findings. The jury is presumed to have followed the court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.