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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ERNEST W. BLACKWELL, Defendant and Appellant.	B275256 (Los Angeles County Super. Ct. No. BA437066)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Affirmed.

David L. Polsky, 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, Jaime L. Fuster and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Ernest Blackwell guilty of second degree murder and also found he personally discharged a handgun, causing the victim's death. The trial court sentenced him to 40 years to life in prison. He contends the court violated his constitutional rights by failing to instruct the jury that to prove murder, the prosecution bears the burden of disproving heat of passion and imperfect self-defense beyond a reasonable doubt. We find the court properly instructed the jury and, accordingly, affirm the judgment.

BACKGROUND

On May 27, 2015, victim Brian Johnson suffered a fatal gunshot wound to the abdomen, while at the home of his girlfriend, Tina Bagby. Babgy lived with her two adult daughters and their children. Defendant Blackwell was dating Laquanza Miller, one of Bagby's daughters. The shooting occurred during a heated argument between Blackwell and Johnson that began when Blackwell objected to the way Johnson addressed Blackwell and Miller's three-year-old daughter.[1] An information charged Blackwell with Johnson's murder and also alleged firearm enhancements.

The prosecution presented evidence indicating that, after Blackwell and Johnson argued inside the living room of the house, Blackwell went outside and Johnson entered the attached converted garage where Bagby resided. A hallway adjacent to the living room led to the garage. Blackwell returned to the

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[1] Johnson told the child to "'can it'" when she came into the living room and told him to stop arguing with her grandmother (Bagby). Johnson and Bagby had been arguing for several hours leading up to the shooting.

living room with a handgun. While standing near the entrance to the hallway, Blackwell fired one round toward the garage, striking Johnson, who was at least two to three feet away from him.

Blackwell testified in his defense. He stated that, after he argued with Johnson in the living room, he walked his daughter back to her bedroom.[2] When he returned to the living room, Johnson was holding a gun and threatening to shoot him. Blackwell grabbed onto the gun and the two men struggled for control of it. Blackwell wrested the gun from Johnson, stumbling backward about two and a half feet. According to Blackwell, the gun accidentally discharged as he was stumbling. He did not know the bullet struck Johnson. He fled the home and tossed the gun into an alley.

In addition to first and second degree murder, the trial court instructed the jury on voluntary manslaughter based on both heat of passion and imperfect self-defense. The court also instructed the jury that Blackwell did not commit murder or manslaughter if he acted in perfect self-defense or killed Johnson as a result of accident/misfortune.

The jury found Blackwell guilty of second degree murder and also found true the special allegations that he personally discharged a handgun, causing Johnson's death. (Pen. Code, § 12022.53, subds. (b)-(d).) The trial court sentenced Blackwell to 15 years to life for the murder, plus a consecutive term of 25

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[2] The prosecution presented evidence indicating that Blackwell walked his daughter back to her bedroom before he and Johnson engaged in the verbal altercation.

years to life for the firearm enhancement, for a total prison sentence of 40 years to life.

DISCUSSION

Blackwell contends the murder "instructions omitted necessary elements of the charged crime" in that they "failed to . . . inform the jury" that "the prosecution bears the burden of disproving heat of passion and imperfect self-defense beyond a reasonable doubt."[3]

As Blackwell correctly points out, "When a jury must consider both murder and voluntary manslaughter, . . . the absence of heat of passion [or imperfect self-defense] is an element of murder the prosecution must prove beyond a reasonable doubt." (*People v. Najera* (2006) 138 Cal.App.4th 212, 227, citing *People v. Rios* (2000) 23 Cal.4th 450, 462.)

Here, the trial court instructed the jury with CALCRIM No. 570 (*Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*), which states in pertinent part, "The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

The court also instructed with CALCRIM No. 571 (*Voluntary Manslaughter: Imperfect Self-Defense—Lesser*

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[3] Although Blackwell did not object to the instructions or request a clarifying instruction, he argues he did not forfeit this contention on appeal because (1) the trial court had a sua sponte duty to instruct on the elements of the crimes and the prosecution's burden of proof and (2) the purported error affected his substantial rights, so no objection or request for clarification was necessary. We will address his contention on the merits.

Included Offense), which similarly states in pertinent part, "The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense or imperfect defense of another. If the People have not met this burden, you must find the defendant not guilty of murder."

Although Blackwell acknowledges the trial court instructed the jury with CALCRIM Nos. 570 and 571, he argues the court nonetheless erred because it did not read the above-quoted language in conjunction with the instructions on murder, which preceded CALCRIM Nos. 570 and 571 (instructions on voluntary manslaughter) in the sequence of instructions. He insists that, if the jury reached its guilty verdict on second degree murder and stopped deliberating without considering heat of passion or imperfect self-defense, it would never know that "the absence of heat of passion [or imperfect self-defense] is an element of murder the prosecution must prove beyond a reasonable doubt." (*People v. Najera*, *supra*, 138 Cal.App.4th at p. 227.)

We reject Blackwell's contention of error because the trial court read all of the instructions to the jury before the parties gave their closing arguments. Thus, before beginning its deliberation, the jury heard the court explain that to prove murder, the prosecution had the burden of proving beyond a reasonable doubt (1) that Blackwell did not kill as the result of a sudden quarrel or in the heat of passion and (2) that Blackwell was not acting in imperfect self-defense. (*People v. Najera*, *supra*, 138 Cal.App.4th at pp. 227-228 ["the order of jury instructions did not lead to an improper conviction [of second degree murder] in this case. The trial court read the instructions in their entirety to the jury after closing argument. The jury therefore heard the

instruction on the prosecution's burden of proving absence of sudden quarrel or heat of passion before retiring to deliberate"].)

At the outset of its instruction, the trial court directed the jury to "Pay careful attention to *all* of these instructions and *consider them together*." (CALCRIM No. 200, italics added.) "We presume, of course, the jury understood and considered all of the instructions as a whole, in whatever order they might have been." (*People v. Najera*, *supra*, 138 Cal.App.4th at p. 228.)

Considering the entire charge, as we are required to do when reviewing a claim of instructional error, we find no error. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248 [""[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction""].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.