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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. WILLIE LEE FOSTER, JR., Defendant and Appellant.	B269789 (Los Angeles County Super. Ct. No. TA136485)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kelvin D. Filer, Judge. Affirmed.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Lance E. Winters, Assistant Attorneys General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

Willie Lee Foster, Jr., appeals from his judgment of conviction of three counts of attempted carjacking and two counts of assault with a deadly weapon. He challenges the sufficiency of the evidence supporting the convictions and argues the trial court prejudicially erred in instructing the jury with CALCRIM No. 3472 (person who provokes quarrel has no right to self-defense), in failing to sanitize all prior convictions used to impeach him, and in not allowing him to impeach one of the victims with her prior prostitution convictions. We disagree and affirm.

FACTUAL AND PROCEDURAL SUMMARY

At about 1 a.m. on February 10, 2015, Sandra Jefferson's car stalled at a traffic light on Wilmington Avenue, at the end of the off-ramp from the 105 Freeway. The area is near the Imperial Courts housing projects and is known for gang and drug activity. Carolyn Moore and Willa Giles were passengers in Jefferson's car.

Jefferson got out of the car, leaving her door open, and lifted the hood. Appellant approached from across Wilmington Avenue, and the women initially thought he was going to help them. Instead, appellant got behind the wheel and tried to start the car by turning the ignition key and fumbling with the knobs. According to Giles, he was "rambling on" that the car was his and he wanted to take it. Jefferson told him to get out because the car was not his, but appellant insisted it was and would not leave. Jefferson realized appellant was under the influence of phencyclidine (PCP), and she knew, from having herself used PCP in the past, that it made a person exceptionally strong. Because she did not think she and her passengers were "strong

enough to handle him," Jefferson tried to send appellant away by telling him his car was across the street.

After Jefferson managed to pull appellant out of the car, he walked where she directed him to go and tried to get into other cars. When he did not succeed, he returned and got back behind the wheel of Jefferson's car. The women were frightened. Moore, who also realized appellant was on PCP because of her own experience using the drug, told him to get out, but appellant continued to insist the car was his. When Moore tried to push appellant out of the car, he pushed her back. She then got out of the passenger seat, went around, and tried to pull him out. Again, he pushed her away and they struggled.

At some point, Jefferson got a metal car jack out of the trunk "[t]o defend ourselves, to defend me, to defend the ladies" because she did not want "anything to happen to them." Moore saw appellant and Jefferson struggle before she took the car jack out. Giles saw appellant lunge at Jefferson with something in his hand before Jefferson swung the car jack and hit appellant in the head, drawing blood. Appellant stooped down, opened what appeared to be a knife, and started swinging it and jabbing at Jefferson and Moore. According to Jefferson, appellant opened the knife after she had hit him twice with the car jack. After appellant swung the knife at her, Moore took an umbrella out of the trunk and tried to knock the knife out of appellant's hand, while Jefferson swung the car jack at him. By then, Giles was out of the car as well. The women circled around the car to get away from appellant, who was chasing them with the knife "like he was a madman." He persisted in trying to get in the car and at some point began scratching it with the knife.

Moore asked a passerby for help and to call police. Ricardo Ruiz, who was exiting the 105 Freeway, saw the stalled car and the three women going around it. He saw appellant going after them with some sort of a weapon, while they were fending him off with the car jack and the umbrella. When Ruiz tried to help the women, appellant came at him with the knife. Ruiz returned to his car, drove farther away, and called 911. At 1:13 a.m., a female caller reported that a man was trying to "jack" a woman's car on the 105 Freeway off-ramp; the caller said he was "beating" them and "going at them with knives."

When police arrived, appellant was seated in the driver's seat of Jefferson's car with a knife in his hand. He began walking away, and initially did not seem to understand the command to drop the knife, but eventually complied.

Appellant was charged with attempted carjacking of Jefferson, Moore, and Giles with the use of a deadly weapon (Pen. Code, §§ 215, subd. (a); 664; 12022, subd. (b)(2), counts 1-3)[1] and assault with a deadly weapon against Jefferson and Moore. (§ 245, subd. (a)(1).) Two prior strike and five prior prison-term convictions were alleged. (§§ 667, 1170.12, 667.5)

At the jury trial, appellant testified in his own defense. He stated that he went to the projects from Gardena to buy PCP and blacked out after smoking it. When he came to hours later, he felt "stranded" in an unfamiliar neighborhood. Even though he had not driven there and did not own a car at the time, appellant thought he "had a car parked in the vicinity, and if [he] found [his] car everything would be all right." He was "pretty sure" he got inside Jefferson's car although he claimed not to remember

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

doing so. He remembered Jefferson telling him to "go that way," and that he went in the direction she pointed. He could not recall trying to get into other cars but remembered coming back to Jefferson's car and trying to get inside.

Appellant testified that at the time he did not know what the victims were saying, but was "pretty sure" they said the car was theirs and he said it was his. He claimed he went backwards when Jefferson and Moore started hitting him with the car jack and umbrella and wondered why the women were trying to kill him. He admitted pulling out his knife and waving it at them. He also admitted trying to get back in the car while the women kept hitting him.

Dr. Jack Rothberg, a psychiatrist and forensic psychologist, testified appellant had mental health problems and significant substance abuse history. Dr. Rothberg explained that PCP is a potent drug that causes psychotic hallucinations, distortion of reality, and paranoia. However, a blackout caused by PCP does not prevent directed conscious action, even though the person may have no memory of it. According to Dr. Rothberg, a person on PCP has "superhuman strength, and police are well aware of the danger in trying to subdue someone on PCP. They're hard to get down." Such a person also is less sensitive to pain, more aggressive, and a danger to those around him.

In response to hypotheticals based on the facts of this case, Dr. Rothberg opined that someone on PCP who believes another person's car is his and tries to drive it off with its hood up is "clearly deranged" and "not making sense out of what [he is] observing." The doctor agreed that it would be difficult for "two or three untrained civilians middle aged to elderly" to subdue a person under the influence of PCP.

The jury convicted appellant as charged, and found the deadly weapon allegations to be true. Appellant admitted his prior convictions. The court dismissed one of his strike convictions and sentenced him to 17 years, four months in prison, consisting of the middle term of 30 months, doubled, or five years on count 1; and successive terms of 20 months on each of counts 2 and 3, plus two years for the deadly weapon enhancement on each of the three counts. The court imposed and stayed a three-year middle term sentence on each of counts 4 and 5. The court struck two of appellant's prior prison convictions and imposed three one-year terms on the remaining prison priors. Appellant received 398 custody credits.

This appeal followed.

DISCUSSION

I

Appellant contends his convictions are not supported by the evidence. Specifically, he argues that voluntary intoxication provides a complete defense to the attempted carjacking convictions, and that the evidence supports his theory of self-defense as to the assault convictions.

"When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination

depends.' [Citation.] Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585.)

A. Voluntary Intoxication and Carjacking

Since the abolition of the defense of diminished capacity, evidence of voluntary intoxication is relevant only to the issue of "whether or not the defendant actually formed a required specific intent." (§ 29.4, subd. (b); see *People v. Horton* (1995) 11 Cal.4th 1068, 1119.) Hence, the defense of voluntary intoxication applies only to specific, but not general, intent crimes. (*People v. Atkins* (2001) 25 Cal.4th 76, 81.) When the definition of a crime consists solely of the description of a proscribed act, the crime is deemed to be one of general intent; when the definition refers to the intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent. (*People v. Lucero* (2016) 246 Cal.App.4th 750, 759.)

"'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).) Thus, attempted carjacking can be committed with the intent to either temporarily or permanently deprive the victim of possession of a vehicle. (*People v. Vargas* (2002) 96 Cal.App.4th 456, 462.)

Appellant argues that his thinking was deranged because he was under the influence of PCP, which negated his "ability to form the requisite intent" for attempted carjacking. However,

evidence of voluntary intoxication may not be used to negate the *capacity* to form specific intent. (See § 29.4, subd. (a).) Intent may be established by direct proof or inferred from "all the facts and circumstances surrounding the crime." (*People v. Lewis* (2001) 25 Cal.4th 610, 643.) Here, the evidence shows appellant intended to deprive the victims of possession of the vehicle. (See *People v. Land* (1994) 30 Cal.App.4th 220, 225 [possession requires dominion and control].)

Appellant testified that when he regained consciousness after his PCP blackout, he felt "stranded" in the projects, but believed "everything would be all right" if he found his car. He proceeded to get behind the wheel of Jefferson's car and tried to start it, actions consistent with an intent to drive off. His trial testimony indicates he was aware of the women's immediate presence in and around the car, and he was "pretty sure" they claimed it was theirs; nevertheless, he persisted in trying to get in the car. It is reasonable to infer appellant intended to take control of Jefferson's car and drive away, despite the victims' immediate presence and their asserted right of control over the car.

Appellant's claimed delusion that the car was his does not negate his intent to deprive the women of its possession since carjacking is crime against possession rather than ownership, and it is undisputed that he attempted to gain control of the car that was in the victims' immediate possession. (Cf. *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703 [claim-of-right defense is not applicable to carjacking].) Appellant's failure to realize that the car was not operational or that its hood was up does not negate this specific intent. It shows only that commission of the substantive crime of carjacking was factually impossible, but does

not prevent appellant's conviction of an attempt to commit that crime. (See *People v. Meyer* (1985) 169 Cal.App.3d 496, 505 ["[W]hen commission of the substantive offense is factually impossible, a defendant may be convicted of an *attempt* to commit the offense when it is proven that he had the specific intent to commit the offense and did those acts he believed necessary to consummate it but failed to commit the statutory offense because, unknown to the actor, one or more of the essential elements of the offense were lacking"].)

B. Self-Defense and Assault with a Deadly Weapon

Appellant argues he had the right to defend himself with a knife after Jefferson unreasonably escalated the conflict by hitting him with the car jack. He also argues that instructing the jury with CALCRIM No. 3472, and the prosecutor's argument that he was the aggressor throughout the incident misled the jury and prejudicially deprived him of a defense.

"When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner. [Citation.]" (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.)

Here, the jury received two instructions on lawful self-defense, CALCRIM Nos. 3470 and 3474. The former states in relevant part that a defendant need not retreat in the face of deadly force and may pursue an assailant until the danger of death or bodily injury has passed; the latter states that the right to self-defense ends when the assailant withdraws or is no longer capable of inflicting injury. The jury also was instructed under 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 excuse to use force."

Defendant relies on *People v. Ramirez* (2015) 233 Cal.App.4th 940, where a majority of the Court of Appeal reversed the defendants' convictions for first degree murder after finding that CALCRIM No. 3472 and the prosecutor's argument "erroneously required the jury to conclude that in contriving to use force, even to provoke only a fistfight, defendants entirely forfeited any right to self-defense." (*Ramirez*, at p. 953.) *Ramirez* is distinguishable because the prosecutor in that case argued to the jury that CALCRIM No. 3472 prevents self-defense even against "the victim's unjustified use of deadly force" in response to "nondeadly fisticuffs." (*Ramirez*, at pp. 943, 948.)

Here, the defense argued that the victims used deadly force to protect their property, and that they were able to "hold[] their own" against appellant, who was confused and pulled the knife in self-defense after he was hit with the car jack. But the prosecutor did not concede that the victims used unreasonable force to protect their property or that they unjustifiably escalated a nondeadly conflict. Rather, she presented a competing version of events.

The prosecutor argued that Jefferson and Moore used reasonable nondeadly force to pull or push appellant out of the car. Their efforts resulted in repeated struggles with appellant, who was relentless, which gave the women the right to protect themselves if they believed they were in danger. The incident escalated when appellant repeatedly came back at the victims, and eventually pulled out a knife. The prosecutor relied on the victims' testimony that they believed they were in danger and could not handle appellant, as well as on Dr. Rothberg's

testimony that a person on PCP may not feel pain, may be aggressive, and may have superhuman strength. The prosecutor also highlighted the eyewitness reports of appellant beating the victims and chasing them with a knife.

Appellant's assumption that Jefferson used the car jack to protect her property is incorrect. While "the intentional use of deadly force merely to protect property is never reasonable" (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1360), carjacking is "more nearly a crime against the person than a crime against property." (*People v. Hill* (2000) 23 Cal.4th 853, 860.) Jefferson testified she used the car jack to protect herself and her passengers from appellant only after both she and Moore engaged in repeated "struggle[s]" with him, and Giles testified she saw appellant lunge at Jefferson with something in his hand before Jefferson hit him with the car jack. Jefferson knew from personal experience, and Dr. Rothberg confirmed, that a person on PCP is exceptionally strong and difficult to restrain. The eyewitnesses who saw the incident, or the latter portion of it, were in agreement that appellant continued to be the aggressor and that the women were retreating and defending themselves.

The prosecutor's argument that appellant's unrelenting aggression placed the victims in reasonable fear for their personal safety and caused the escalation of violence is supported by substantial evidence. The record does not indicate that the jury was misled into rejecting appellant's self-defense theory.

II

Appellant argues all convictions used to impeach him should have been sanitized, and the court's refusal to allow impeachment of Moore with her prostitution convictions violated his rights to due process and confrontation. These arguments are

forfeited because they were not made in the trial court. (See *People v. Cowan* (2010) 50 Cal.4th 401, 465; *People v. Kipp* (2001) 26 Cal.4th 1100, 1124.) Appellant's ineffective assistance of counsel claims fail because there is no reasonable probability of a different outcome absent counsel's challenged omissions. (See *Strickland v. Washington* (1984) 466 U.S. 668, 688, 697.)

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352. [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 931, fn. omitted.) Moore was impeached with two recent felony convictions, but the court exercised its discretion in disallowing impeachment with her misdemeanor prostitution convictions from 1986 and 1990 on the ground that they were remote and more prejudicial than probative. The ruling was not an abuse of discretion and did not violate appellant's due process and confrontation rights.

The prostitution convictions were remote and had the potential to embarrass or unfairly discredit Moore. (See *People v. Phillips* (2000) 22 Cal.4th 226, 234; *People v. Burns* (1987) 189 Cal.App.3d 734, 738.) Since Moore was impeached with two other convictions, these additional convictions were cumulative and their impeachment value marginal. (See *People v. Williams* (1997) 16 Cal.4th 153, 207–208.) The exclusion of evidence of marginal probative or impeachment value does not violate the right to confront witnesses or present a defense. (See *People v. Pearson* (2013) 56 Cal.4th 393, 455; *People v. Cunningham* (2001) 25 Cal.4th 926, 999.)

A defendant's prior conviction may be sanitized by allowing the prosecutor to refer to it in a general manner, especially where

the conviction is for the same or substantially similar conduct to the charged offense. (*People v. Sandoval* (1992) 4 Cal.4th 155, 178.) Appellant was impeached with a 2002 conviction for possession of a dangerous and deadly weapon; a 2003 conviction for assault with a deadly weapon, which was sanitized to a felony involving moral turpitude; a 2004 felony burglary conviction; and a 2006 conviction for possession of a controlled substance for sale. Appellant argues that the failure to sanitize the 2002, 2004 and 2006 convictions "for wide ranging criminal conduct" ensured the jury would conclude appellant was "entrenched in a criminal life style" and his testimony was unworthy of belief. But appellant was not entitled to a "'false aura of veracity.' [Citation.]" (*People v. Massey* (1987) 192 Cal.App.3d 819, 825.) The unsanitized convictions were not substantially similar to the carjacking or assault with a deadly weapon charges in this case in order to require sanitization. Had the court sanitized them, the jury still would have learned that appellant had four prior convictions. Appellant has shown neither error nor ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

MANELLA, J. COLLINS, J.