Filed 11/25/19 P. v. Divens CA2/2

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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. LEWIS GENE DIVENS, Defendant and Appellant.	B293537 (Los Angeles County Super. Ct. No. GA103496)

APPEAL from a judgment of the Los Angeles Superior Court, Michael D. Carter, Judge. Affirmed.

G. Martin Velez, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie A. Miyoshi and Blake Armstrong, Deputy Attorneys General, for Plaintiff and Respondent.

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Lewis Gene Divens (defendant), while homeless, told another homeless man, "Let's fight" and minutes later leapt at him with a paring knife, slicing his face and the back of his head. A jury convicted defendant of assault with a deadly weapon. On appeal, defendant argues (1) the trial court erred in not instructing the jury on perfect self-defense, and (2) imposing a restitution fine and other assessments without first conducting an ability to pay hearing, in violation of *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). Both arguments lack merit, so we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

On a Sunday morning in August 2017, Tyrone Knox (Knox) approached defendant as defendant was sitting on the steps in front of a structure with a wire-fenced top about six feet high. At that time, Knox and defendant were both homeless; Knox was 47 years old, and defendant, 54. Both men were about the same height and weight. Knox wanted to put his pillow and blankets on top of the structure, and asked defendant if he could scoot over so Knox could climb the steps. Defendant refused, saying, "Go to the other side." This was not an option for Knox because Knox was wearing a nylon and plastic boot on the lower half of his leg because of a cracked fibula and ankle, and could not reach the top of the structure from the other side.

When Knox responded by asking, "Why should I go to the other side?" defendant growled, "Let's fight" in a "loud," "hostil[e]" and "threatening" tone. Defendant also told Knox that he would "fuck [him] up."

Unwilling to walk away because of what it could mean among the homeless community, Knox bent over to begin the process of removing his walking boot so he could have "better balance with both feet" in what he anticipated would be a "fist[-]fight." It took Knox "one [or] two minutes" to unlatch the boot's three straps and step out of its plastic form. At no point did Knox ever lift the boot from the ground or otherwise wield it as a weapon.

As soon as Knox stood back up, defendant twice attacked Knox with a three-or four-inch paring knife, although Knox gave conflicting accounts of the order of the attacks. At trial, Knox testified that defendant *first* lunged at his face, slicing a long scar from his nose to his chin with a three- or four-inch paring knife and *then*, once behind him, sliced a four or five inch scar into the back of his head that required staples to close. When speaking to law enforcement immediately after the incident, Knox reversed the order of defendant's attacks.

Knox initially thought defendant had punched him, and only realized he had been stabbed when he put his hand on the back of his head and it came back bloody. Knox immediately called 911 for an ambulance on his cell phone. Defendant did not flee. As Knox was being carried away on a gurney, defendant told him, "I got your ass."

II. Procedural Background

The People charged defendant with (1) attempted premeditated murder (Pen. Code, §§ 187, 664, subd. (a)),[1] and (2) assault with a deadly weapon. (§ 245 subd. (a)) The People further alleged that defendant used a dangerous or deadly

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

weapon (§ 12022, subd. (b)(1)), and that defendant's 1999 conviction for making criminal threats constituted a "strike" within our state's Three Strikes Law (§§ 667, subd. (b)-(j), 1170.12, subd. (a)-(d)) as well as a prior "serious" felony (§ 667, subd. (a)(1)).

The matter proceeded to a jury trial. At trial, defendant called a forensic psychologist who testified to his "preliminary opinion" that defendant suffered from schizophrenia with paranoid delusions. The trial court instructed the jury on the crimes of attempted premeditated murder, attempted voluntary manslaughter (based on imperfect self-defense), and assault with a deadly weapon. The court denied defendant's request to instruct on perfect self-defense.

During deliberations, the jury asked a question whether "an action in self[-]defense excuse[s] the use of a deadly weapon, if the other party has no deadly weapon?" The court conferred with the parties, and reaffirmed its prior ruling that perfect self-defense was not available as a defense to the assault charge because, in its view, there was no "substantial evidence" that "could allow a reasonable jury to find that" defendant "reasonably believed he needed to defend himself" from Knox when all Knox did was take "the boot off" without ever "rais[ing] it up in any way or us[ing] it in any threatening manner." The court instructed the jury that "the law does not provide for a 'self-defense' defense" for the assault charge.

The jury acquitted defendant of attempted premeditated murder and attempted voluntary manslaughter, but convicted him of assault with a deadly weapon. At a subsequent bench trial, the prosecutor proved defendant's prior conviction.

The trial court sentence[d] defendant to state prison for 11 years, comprised of a base sentence of three years, doubled due to the prior strike, plus five years for the prior serious felony. The trial court also imposed a restitution fine of $300 (§ 1202.4, subd. (b)(1)), a $30 criminal conviction assessment (Gov. Code, § 70373), and a $40 court operations assessment (§ 1465.8, subd. (a)(1)).

Defendant filed this timely appeal.

DISCUSSION

I. Self-Defense Instruction

Defendant argues that the trial court erred in refusing to instruct the jury—initially and after the jury note—on the theory of perfect self-defense.

The defense of perfect self-defense is available only when "the defendant . . . [(1)] actually [that is, subjectively] and [(2)] reasonably believe[s] in the need to defend" himself due to "'imminent danger to life or great bodily injury.' [Citation.]" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 (*Humphrey*), italics omitted.) In determining whether a defendant's belief is "reasonabl[e]," courts must ask (1) "whether a 'reasonable person' in defendant's situation, seeing and knowing the same facts, would be justified in believing" that (a) "he was in imminent danger of violence" and (b) "the immediate use of force was necessary to defend himself," and (2) whether the defendant "used no more force than was reasonably necessary to defend against the threat." (*People v. Jefferson* (2004) 119 Cal.App.4th 508, 519; *Humphrey*, at p. 1088; *People v. Hernandez* (2011) 51 Cal.4th 733, 747, citing CALCRIM No. 3470.) Perfect self-defense is not available if the defendant "voluntarily engage[d] in mutual combat" unless he first "endeavored to withdraw" from

that combat. (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1045 (*Ross*).)

A trial court has a duty to instruct on a requested defense only if "there is substantial evidence supporting [that] defense." (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49.) In evaluating whether substantial evidence supports a defense, we ask whether the evidence presented at trial, when viewed in the light most favorable to the defense, is enough for a reasonable jury to find that the elements of the defense have been established. (*People v. Breverman* (1998) 19 Cal.4th 142, 159; *People v. Mentch* (2008) 45 Cal.4th 274, 290.) We independently review a trial court's decision not to instruct on a defense. (*People v. Orlosky* (2015) 233 Cal.App.4th 257, 270.)

The trial court correctly refused defendant's requests to instruct the jury on perfect self-defense for three reasons.

First, there was no substantial evidence to support a jury finding that a reasonable person in defendant's situation would have believed that he was "in imminent danger of violence" from Knox and his medical boot. The uncontradicted testimony is that it took Knox one or two minutes to unlatch his boot, which is more than enough time for defendant to have retreated from Knox, who without the boot walked with a wobbly limp. Any reasonable person could have simply walked away. But defendant waited. His patience in waiting for an opportune time to lunge at Knox precludes a finding of perfect self-defense.

Second, there was no substantial evidence to support a jury finding that a reasonable person in defendant's situation would have believed that "the immediate use of force was necessary to defend himself" from Knox after Knox finished unlatching the boot. Again, the uncontradicted testimony is that Knox never

verbally threatened to use the boot and never engaged in any threatening conduct with the boot that would have caused a reasonable person to believe that the boot would be used in the melee at all. (Cf. *People v. Sam* (1969) 71 Cal.2d 194, 199, 213 [victim "assumed a karate stance with his hands up as if to strike"; self-defense available].)

Lastly, there was uncontroverted evidence that defendant "voluntarily engaged in mutual combat" without ever trying to withdraw. Defendant was the one who told Knox, "Let's fight" and who then waited for Knox to remove his boot before lunging at him with a knife.

Defendant resists this conclusion with four arguments.

First, he maintains that there *was* substantial evidence to support a finding that the imminent use of force was necessary because (1) Knox's inconsistencies about the order of defendant's attacks and Knox's reluctance to appear as a witness gave the jury ample reason to disregard his uncontroverted testimony that he did nothing with the boot, and (2) even without those inconsistencies, a reasonable person could reasonably assume that the boot, once removed, would then be used as a weapon. But neither of these premises is supported by any *evidence*; they are based on supposition and it is well settled that "[s]peculation is not substantial evidence" (*People v. Ramon* (2009) 175 Cal.App.4th 843, 851). Further, even if we accepted these arguments, they would at most eliminate one of the three reasons set forth above as to why a perfect self-defense instruction was unwarranted.

Second, defendant contends that he is not disqualified from relying on perfect self-defense for failing to attempt to withdraw after initiating a mutual combat because, in his view, mutual

combat is triggered only by violence (and not mere words), such that the mutual combat in this case did not start until *after* Knox took off his boot (when, in defendant's view, it was too late to withdraw). This contention is legally incorrect. What defines "mutual combat" is "not merely the *combat*, but the *preexisting intention to engage in it*." (*Ross*, *supra*, 155 Cal.App.4th at p. 1045.) This includes words. (See *People v. Rogers* (1958) 164 Cal.App.2d 555, 558 [noting that "words and deeds" can "show an agreement . . . for mutual combat"].) Thus, defendant's challenge, "Let's fight," offered mutual combat and Knox accepted that offer by starting to remove his boot; defendant's failure to seek to withdraw from the mutual combat he initiated disqualified him from relying on perfect self-defense.

Third, defendant asserts that Knox bragged during his trial testimony he was a "very good" fighter. However, this assertion does not factor into either the objective or subjective assessments of the need to act in self-defense because nothing Knox said or did during his encounter with defendant *communicated* his internal belief in his own fighting skill. (Accord, *People v. Stansbury* (1995) 9 Cal.4th 824, 827-828 ["subjective impressions" are irrelevant to an objective test "unless they were communicated"].)

Lastly, defendant argues that his decision to wait for law enforcement to arrive rather than to flee constitutes substantial evidence that he was entitled to a perfect self-defense instruction. We do not see the connection between defendant's *post-offense* conduct and whether substantial evidence supports the elements of perfect self-defense that existed *before and during* the offense.

II. Restitution Fine and Assessments

Relying upon *Dueñas*, defendant contends that the trial court's imposition of the $300 restitution fine and $70 in

assessments without an ability to pay hearing (1) violated due process and (2) constituted cruel and unusual punishment. These are constitutional questions that we review de novo. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1154.)

We reject defendant's due process-based argument for two reasons. First, the sole basis for defendant's argument is *Dueñas*, *supra*, 30 Cal.App.5th 1157. However, we have rejected *Dueñas*'s reasoning. (See *People v. Hicks* (2019) 40 Cal.App.5th 320.) Second, even if *Dueñas* were good law, the trial court's failure to conduct an ability to pay hearing when imposing $370 in monetary obligations was harmless because defendant will earn that amount as prison wages prior to his release. (Accord, *People v. Johnson* (2019) 35 Cal.App.5th 134, 139 ["The idea that [defendant] cannot afford to pay $370 while serving an eight-year prison sentence is unsustainable."].)

And to the extent defendant argues that the $370 in monetary obligations constitutes cruel and unusual punishment, we reject that argument as well. Whether such an obligation is excessive for these purposes turns on whether it is "grossly disproportional to the gravity of [the] defendant's offense." (*United States v. Bajakajian* (1998) 524 U.S. 321, 334, superseded by statute on other grounds as stated in *United States v. Jose* (2001) 499 F.3d 105, 110.) Factors relevant to gross disproportionality include "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay. [Citations.]" (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728.) Under this standard, a defendant's ability to pay is *a* factor, not *the only* factor. (*Bajakajian*, at pp. 337-338.) Applying these factors, we conclude that the minimum

monetary obligations totaling $370 are not grossly disproportionate to his crime of assaulting someone with a knife that resulted in substantial and lasting injuries.

DISPOSITION

The judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
ASHMANN-GERST