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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. MICHAEL DEVAUGHN, Defendant and Appellant.	B245876 (Los Angeles County Super. Ct. No. BA388304)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed.

Robert Derham, 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.

Appellant Michael Devaughn was convicted of attempted murder for intervening in a fistfight by shooting one of the combatants. He contends the trial court erred in failing to give his requested jury instruction on defense-of-another, in refusing to continue trial to await the testimony of a police officer who had spurned a subpoena, and refusing to continue a hearing on his motion for new trial, where he anticipated a witness would testify the witness, not appellant, shot the victim. We affirm.

BACKGROUND

At around midnight on August 26, 2011, appellant and Deshawn Darby attended a gathering at a residence belonging to Stan Spencer. Also in attendance were Jayeson Henry and several of his female friends, and Darby's sister and grandfather. Darby knew Henry, but appellant did not. During a discussion between Darby and Henry regarding drug sales, Darby struck Henry with an unidentified hard object, cutting his nose. Henry responded by hitting Darby with a glass bottle, and they began to fight. Appellant then shot Henry. When Henry went down, defendant and Darby kicked him repeatedly. Spencer intervened, and Henry was taken to the hospital.

Henry gave differing accounts regarding the shooting. When first interviewed at the hospital by Los Angeles Police Officer Christian Olivos, he said two Hispanic gang members shot him. Olivos left to investigate the story, found it incredible, and returned. Henry then said Darby shot him during the fight, and appellant hit him in the head with a metal object. Police officers Lamas and Siordia interviewed Henry at his home later that day. Lamas's report of the interview indicated Henry told the officers Darby shot him. (At trial, however, Lamas testified the report was inaccurate—she and Siordia did not ask Henry who shot him, and he did not say who did.) Two weeks later, Henry told Los Angeles Police Detective Carlton Jones that appellant shot him. At trial, Henry testified appellant shot him.

None of those gathered at the Spencer residence witnessed the shooting. Spencer told police before trial that he did not know who fired the shot. At trial he testified he was inside when it was fired. Tashauna James, one of Henry's friends, testified she too

was inside when the shot was fired. Darby's grandfather and sister testified they were at the scene of the shooting and saw the fight, but did not hear a gunshot.

The police arrested Darby and appellant on the day of the shooting. A search of their apartment and car produced the gun used to shoot Henry, with Henry's blood on it, a pair of shoes with Henry's blood on them, and a laptop that had recently been used to search for ways to "vacuum gunpowder" and clean up a crime scene. Appellant told police he had not been at the scene of the shooting.

Appellant and Darby were tried jointly. Darby was charged with assault with force likely to cause great bodily injury. (Pen. Code, § 45, subd. (a)(1).)[1] Appellant was charged with willful, premeditated, and deliberate attempted murder (§§ 664, 187, subd. (a)) and possession of a firearm by a felon (§ 12021, subd. (a)(1)), and it was alleged he personally and intentionally discharged a firearm causing great bodily injury (§ 12022.7, subd. (a)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)), and that a principal was armed with a firearm (§ 12022, subd. (a)(1)).

Appellant's defense counsel requested that the court instruct the jury on "defense of others." The trial court denied the request and also declined to give an instruction on the imperfect defense of others, which would have supported the theory that appellant was guilty only of attempted voluntary manslaughter. The court stated, "[t]he reason I am not giving those instructions, either actual defense of others or imperfect defense of others, is that there is insufficient substantial evidence . . . that defendant Devaughn was defending [appellant] Darby against actual injury or deadly injury." The court continued, "[t]he only substantial evidence at all that is if defendant Devaughn is not guilty of this crime, he was merely trying to break up the fight."

The jury found Darby not guilty but convicted appellant as charged, except it found untrue the allegation that the attempted murder was willful, premeditated, and deliberate. The court sentenced appellant to 25 years to life plus eight months in prison. He timely appealed.

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[1] Undesignated statutory references will be to the Penal Code.

DISCUSSION

1. *Defense of Another Instruction*

Appellant contends the trial court prejudicially erred in refusing to give an instruction on perfect or imperfect defense of another as an alternative defense theory. We review defendant's claims of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210; *People v. Sweeney* (2009) 175 Cal.App.4th 210, 223.)

"[A] trial court in a criminal case is required—with or without a request—to give correct jury instructions on the general principles of law relevant to issues raised by the evidence." (*People v. Mutuma* (2006) 144 Cal.App.4th 635, 640.) The trial court has a duty to instruct sua sponte regarding a defense """if it appears that the [appellant] is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the [appellant's] theory of the case."""" (*People v. Maury* (2003) 30 Cal.4th 342, 424.) If the appellant requests an instruction, the trial court must give it if it is supported by substantial evidence, even if it is inconsistent with another defense advanced by the appellant. (*In re Christian S.* (1994) 7 Cal.4th 768, 783; *People v. Elize* (1999) 71 Cal.App.4th 605, 615.) Substantial evidence is that which, if believed, would be sufficient for a jury to find a reasonable doubt as to defendant's guilt. (*People v. Michaels* (2002) 28 Cal.4th 486, 529; *People v. Salas* (2006) 37 Cal.4th 967, 982-983.)

Defense of another against an assault requires an actual and reasonable belief in the need to defend against an imminent danger of bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Jefferson* (2004) 119 Cal.App.4th 508, 518.) The trier of fact "must consider what 'would appear to be necessary to a reasonable person'" in the position of appellant, with the appellant's knowledge and awareness. (*Humphrey*, at pp. 1082-1083.) CALCRIM No. 3470 provides in pertinent part that a defendant acts in lawful defense of another and is not guilty of assault, if (1) he reasonably believed someone else was in imminent danger of suffering great bodily injury; (2) he reasonably believed the immediate use of force was necessary to defend against that danger; and (3) he used no more force than was reasonably necessary to

defend against that danger. CALCRIM No. 3474 instructs that the right to use force in self-defense or defense of another continues only until the danger no longer exists or reasonably appears to exist.

An actual but unreasonable belief in the need to defend oneself or another from imminent danger of death or great bodily injury negates the mental state of malice aforethought and reduces a killing from murder to voluntary manslaughter. (*People v. Randle* (2005) 35 Cal.4th 987, 990, 994, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) This doctrine is commonly known as imperfect defense of another. (*Randle*, at p. 994.)

CALCRIM No. 3471 instructs that an initial aggressor has a right to self-defense only if he has tried to stop fighting, he has communicated that to his opponent, and he has given his opponent an opportunity to stop. It charges a jury to make a preliminary determination of whether the person needing protection was the initial aggressor. An aggressor whose victim fights back in self-defense may not invoke the doctrine of self-defense against the victim's legally justified acts. (*In re Christian S.*, *supra*, 7 Cal.4th at p. 773, fn. 1.) If the aggressor attempts to break off the fight and communicates this to the victim, but the victim continues to attack, the aggressor may then use self-defense against the victim to the same extent as if he or she had not been the initial aggressor. (§ 197, subd. (3); *People v. Trevino* (1988) 200 Cal.App.3d 874, 879; see CALCRIM No. 3471, Right to Self-Defense: Mutual Combat or Initial Aggressor.) In addition, if the victim responds with a sudden escalation of force, the aggressor may legally defend against the use of force. (*People v. Quach* (2004) 116 Cal.App.4th 294, 301-302; see CALCRIM No. 3471.)

The question whether the trial court erred in refusing to instruct the jury on the defense-of-another theory turns on whether the record contains substantial evidence that, if believed by the jury, would raise a reasonable doubt as to whether appellant shot Henry in a reasonable effort to defend Darby. Appellant argues the evidence supported the theory that he intervened in the fight between Darby and Henry to save Darby. Respondent argues Darby initiated the fight, and there was no evidence from which the

jury could have inferred appellant believed—reasonably or unreasonably—that Darby was in imminent danger of being killed or suffering great bodily injury.

We conclude the evidence was insufficient to support a determination that appellant shot Henry in a reasonable effort to defend Darby. The undisputed evidence was that Darby, not Henry, instigated the use of force by striking Henry with an object, resulting in a laceration. Henry then hit Darby with a bottle, and the two began a fistfight that Henry described as a "tussle" and Darby's grandfather as a "scuffle." No evidence indicated Darby tried to end the fight, communicated that to Henry, and gave him an opportunity to stop. On the contrary, after Henry went down after being shot, Darby continued to kick and beat him. Because Darby was the initial aggressor and made no effort to discontinue the fight, appellant had no right to use force to defend him.

Neither could a jury conclude the level of force appellant used was reasonably necessary. Appellant shot Henry during a fistfight that up to that point had caused no serious injury. After the fight, Darby, who was bleeding on the back of his neck, was taken upstairs by his grandfather, who testified he washed Darby up in "a few minutes." Appellant made no verbal or physical attempt to stop the fight by lesser means, and indeed had no interest in stopping it, as evidenced by appellant's beating and kicking the victim after shooting him. Under these circumstances, no reasonable jury could have concluded appellant was entitled to a defense of another instruction.

Appellant argues substantial evidence exists that Henry, not Darby started the fight. The argument is without merit. The evidence to which appellant alludes is the testimony of Lynnida Wilson, Darby's sister. When asked, "What drew your attention to the fight," Wilson responded, "I don't remember the guy's name but he hit [Darby] in the head with a bottle." Wilson thus testified only that Henry's action drew her attention to the fight, not that he started it.

2. *Trial continuance*

Appellant argues his trial counsel provided ineffective assistance when moving for a continuance or mistrial, in that she failed to provide the trial court with available

evidence that would have persuaded the court to grant one or both of the motions. We disagree.

At the hospital, Henry told Officer Olivos that Darby shot him. Later that day he was interviewed by Officers Lamas and Siordia. Siordia's report of that interview stated that Henry twice reported Darby shot him, first at the hospital and later at his home. The report stated that when Henry was interviewed at his home by Siordia and Lamas, he "stated that he used to be roommates with Suspect-Darby approximately two years ago. Victim said that Suspect-Darby believed he owed him money regarding a truck that broke down a few years ago. Victim denied owing Suspect-Darby any money. Suspect-Darby then struck him in the face with the glass bottle. Suspect-Devaughn struck Victim in the head with a hard object (believed to be the handgun). Suspect-Darby then shot Victim as he raised his arm to protect himself from the gunshot."

But at trial, Lamas testified they did not ask Henry during the second interview who shot him, and he did not say who did. They merely showed him photographic arrays and asked if appellant and Darby were the two who assaulted him. The interview was recorded, and Lamas testified she listened to the recording before trial and was able to confirm that Henry did not identify who shot him. This is consistent with Siordia's affidavit, which does not indicate Henry said during the second interview that Darby shot him. Jones testified Siordia's report reflected a synopsis of all the conversations Henry had with police, and should not be considered a transcript of any single interview.

Appellant subpoenaed Siordia to testify, but the officer was on vacation in San Diego and did not honor the subpoena. The trial court found appellant was not diligent in procuring Siordia's attendance at trial, but also stated it did not find him to be at fault. Appellant then moved for a continuance to await the availability of Siordia, and barring that a mistrial. Appellant's counsel referenced Siordia's probable cause affidavit, but failed to remind the court about Siordia's police report. The court denied both motions, finding Siordia's testimony would be "speculative at best" and would have a "negligible effect on the outcome of the trial."

Appellant argues that if his attorney had brought Siordia's police report to the court's attention, the court would have been persuaded that Siordia would testify Henry told him Darby, not appellant was the shooter. He argues the court would therefore have granted the motion for continuance or mistrial.

A claim that counsel was ineffective requires a showing, by a preponderance of the evidence, that counsel's performance fell below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's unprofessional errors, defendant would have obtained a more favorable result. (*In re Jones* (1996) 13 Cal.4th 552, 561.) Defendant must overcome presumptions that counsel was effective and that the challenged action might be considered sound trial strategy. (*Ibid.*) To prevail on an ineffective assistance claim, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. (*People v. Majors* (1998) 18 Cal.4th 385, 403.) We consider counsel's overall performance throughout the case, evaluating it from counsel's perspective at the time of the challenged act or omission and in light of all the circumstances. (*People v. Bolin* (1998) 18 Cal.4th 297, 335.) "To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .' [Citation.]" (*Id.* at p. 333.)

Appellant's argument is premised on an assumption that the trial court was unaware of the content of Siordia's report. If the court had been aware of the report, the argument goes, it would have believed Siordia's testimony would assist appellant and would have granted a continuance to obtain it. The premise is false, as the court knew about the report and was informed of the exact statements appellant contends would have been persuasive. Defense counsel questioned Lamas and Jones in detail about the report and its discrepancies. The officers explained that Siordia, in summarizing Henry's conversations with police, inadvertently transferred a statement he made in the morning at the hospital to an afternoon interview at his home. Because the court knew about

Siordia's report, appellant's attorney's failure to mention it during her motion for a continuance could not possibly have made a difference.

Furthermore, even if Siordia were to testify that Henry told him Darby was the shooter, that testimony would have established a fact that was not in dispute—Henry initially told police that somebody other than appellant shot him. He initially told Olivos at the hospital that two Hispanic gang members shot him and then that Darby did. And he supposedly told Lamas and Siordia at his home that Darby shot him. Siordia's only contribution would have been to establish that Henry lied to police three times rather than twice. But as the court stated, such a contribution would have been negligible.

Defense counsel's decision not to belabor a police report of which the court was already aware, in an effort to encourage speculation that duplicative evidence would become available, was arguably effective, not ineffective assistance, but at any rate constituted a defensible tactical choice we cannot second guess.

3. *New Trial Motion*

Appellant contends the trial court erred in refusing to grant either his motion for new trial or a continuance to afford him an opportunity to obtain evidence to support a motion for new trial. We disagree.

The parties appeared for sentencing on September 19, 2012. At the hearing, appellant's counsel represented that she had heard "rumors" that Darby was willing to confess he, not appellant, was the shooter. The court continued the hearing to permit appellant to file a new trial motion. On October 19, the parties appeared for a hearing on appellant's new trial motion. Appellant's counsel stated Darby had told her and her investigator that he shot Henry. They subpoenaed him to appear at the hearing, but he failed to. The court again continued the matter. On November 14, the parties appeared to discuss appellant's new trial motion, which contained a declaration from trial counsel as to what Darby had said, but no declaration from Darby himself. The declaration stated Darby had agreed to appear at the November 14 hearing. But again, he did not appear. The court continued the matter again. On December 11, Darby again failed to appear. The court continued the matter a fourth time, but stated, "I cannot be waiting for the

games that Darby is playing. . . . [I] find this more than coincidental that he misses every appearance[] . . . ."

On December 19, 2012, Darby failed to appear yet again. The trial court asked an attorney who had been appointed for him what advice he would give regarding his testifying that he shot Henry. The attorney stated he would advise Darby to invoke his Fifth Amendment rights and not incriminate himself. The court denied appellant's request for a continuance to present his investigator's hearsay testimony as to what Darby had told him and stated it found Darby's statement itself was not credible. It then denied appellant's motion for a new trial.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) A trial court may not deny a short continuance where to do so would deprive the defendant of a reasonable opportunity to prepare. (*People v. Sakarias* (2000) 22 Cal.4th 596, 646; *People v. Locklar* (1978) 84 Cal.App.3d 224, 230.)

But a continuance "shall be granted only upon a showing of good cause." (§ 1050, subd. (e).) "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. [Citation.] Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. [Citation.] There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589; *People v. Howard* (1992) 1 Cal.4th 1132, 1171.) "An important factor for a trial court to consider is whether a continuance would be useful." (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

"The burden is on [the defendant] to establish an abuse of judicial discretion in the denial of his request for continuance . . . . [Citation.] The resolution of the issue depends upon the circumstances of each case. [Citations.]" (*People v. Rhines* (1982) 131 Cal.App.3d 498, 506.) The right to appear and defend with all available evidence "is not absolute but must be carefully weighed against other values of substantial importance such as those seeking 'the orderly and expeditious functioning of judicial administration.' [Citation.]" (*Ibid.*)

The trial court was well within its discretion to conclude no real probability existed that Darby would appear and testify that he shot Henry. He had been given several opportunities to do so, but chose not to appear or even submit a declaration repeating what he had told defense counsel. And had he appeared he would have been advised not to incriminate himself. The court was also within its discretion to conclude Darby's statements to the defense were unreliable, and to reject the defense investigator's testimony as to what Darby told him. The court therefore properly denied a continuance.

It also properly denied appellant's motion for a new trial.

"'"'The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citations.] '"[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background."'" [Citation.] (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

A motion for new trial may be granted only when "the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) "In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."' [Citations.]" (*People v. Delgado, supra,* 5 Cal.4th at p. 328.)

Appellant possessed no evidence that would be such as to render a different result probable on a retrial. First, appellant possessed no evidence at all—Darby refused to appear. And if he had appeared, the court could only speculate that he might repeat what he told the defense—that he shot Henry. He had a strong disincentive, and apparently no desire, to do so. Second, even if Darby were to appear and testify, the court was well within its discretion to conclude the testimony would not have been credible, as it came very late in the proceedings and contradicted the testimony of the victim himself. The court therefore properly denied the motion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

MILLER, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.