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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

GEROME MOAALII,

Defendant and Appellant.

B290096

(Los Angeles County
Super. Ct. No. TA143460)

APPEAL from a judgment of the Superior Court of Los Angeles County. John J. Lonergan, Jr., Judge. Affirmed.

Lillian Hamrick, 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, and Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Gerome Moaalii was arrested after he pointed a loaded gun at one of two individuals who arrived at his home with a tow truck to repossess his father's truck. Following trial, Moaalii was found guilty of assault with a semi-automatic firearm. (Pen. Code, § 245, subd. (b).)¹ The jury acquitted him of misdemeanor battery. (§ 242.) The jury also found true a personal firearm use allegation. (§§ 667.5, subd. (c), 1192.7, subd. (c), 12022.5.) The court sentenced him to 10 years in state prison. On appeal, Moaalii argues the trial court erred in refusing to give his requested instruction on self-defense and defense of others, concluding insufficient evidence supported it. We find no error and affirm.

FACTUAL BACKGROUND

1. Prosecution Evidence

In June 2017, Afra Gomez and her husband, Anthony Kalac, worked for an auto repossession company. They drove a large black tow truck with the repossession company's "state I.D." and "R.A. number" on its side. Around 6:00 p.m. on June 8, they drove their tow truck to repossess a GMC Yukon owned by Moaalii's father, George Moaalii, Sr.² at the home where Moaalii also lived. Because they were conducting an involuntary possession, they did not notify the owner ahead of time. The events that unfolded were recorded on three cameras mounted on the front, side, and rear of the truck, as well as on Gomez's cell phone. The jury was shown each of these video recordings.

¹ All undesignated statutory citations refer to the Penal Code.

² We refer to Moaalii's father as George, Sr. and his brother as George, Jr. to avoid confusion.

When Gomez and Kalac arrived at the residence, the Yukon was parked in the driveway behind an unlocked gate. Recording the scene on her cell phone, Gomez opened the gate. Kalac backed the tow truck behind the Yukon and lifted it so it could be towed away. A woman came out of the house and began taking things from the passenger side of the Yukon. Gomez asked if the Yukon belonged to her and told her it was being repossessed, but the woman did not respond.

Moaalii's father George, Sr. came outside, and Gomez told him the Yukon was being repossessed. George, Sr. told Kalac, "the two of us are about to have some problems." Kalac told Gomez to call the police. George, Sr. got into the Yukon and tried to drive it off the lift, but it was chained there. He tried to unfasten the chain and Kalac attempted to prevent him from doing so.

Moaalii came out of the house in basketball shorts but no shirt or shoes. He pointed a handgun at Gomez from around 13 feet away, saying he was going to shoot her and asking "What the fuck are you doing here, bitch?" The video recordings and a still photo from Gomez's cell phone video showed Moaalii clearly spotted Gomez as he stood behind the Yukon and a second SUV, then several seconds later point the gun at her. Gomez screamed to Kalac that Moaalii had a gun, and she called 911. Fearing Moaalii was going to shoot Kalac, Gomez told Kalac to let George, Sr. take the Yukon. Kalac unhooked the chain on the Yukon and George, Sr. drove off to the left. Speaking to Moaalii, Kalac pointed to the tow truck and said, "I got a camera right there, you see?"

Holding the gun behind his back, Moaalii went inside a back gate then came back out and tried to punch Kalac. He then

charged Gomez and punched her while she was on the phone with the police dispatcher. Later, Kalac said, “You fuckin’ socked my wife in the mouth.” Moaalii responded, “I’ll shoot her ass. I’ll shoot her ass too. I don’t give a fuck.” At some point, Moaalii took Kalac’s cell phone. Moaalii also asked Kalac, “Was it worth the money?”

Moaalii threw a video tripod at Gomez as she walked away. George, Sr. threw a paving stone that shattered the tow truck’s back window and damaged the camera wires. Moaalii reached into the cab of the tow truck and tried to take Gomez’s and Kalac’s personal belongings out of it. Gomez grabbed her purse from the tow truck, cutting her arm on broken glass on the seat.

Moaalii’s brother George, Jr., arrived approximately five minutes after Moaalii first came outside with the gun. He parked his car in front of the tow truck, blocking it from leaving. He punched Kalac in the back of the head.

Police arrived and found a loaded nine-millimeter handgun in a backpack in Moaalii’s bedroom. It had a round chambered, ready to be fired.

2. *Defense Evidence*

Moaalii testified in his defense. He worked as a tow truck driver and had repossessed a vehicle once before. On the evening of the incident, he was asleep in his bedroom when he was awakened by his sister-in-law, Margaret Pouli. He heard banging outside, and Pouli told him, “Daddy is outside. Somebody is stealing the car.” Moaalii decided to go “defend [his] dad,” grabbed the gun from his closet, and ran outside. He testified the gun only “happened to be” loaded.

Once outside, he heard the “loud banging” of chains. He saw his father “getting into a scuffle with the tow-truck driver.”

He saw Gomez holding her cell phone recording the incident and described his reaction: “Well, from the angle I was coming from, slowly as I’m turning the corner to see a lady with, like, her arm out and I could hear on the other side of the truck something is going down like as in a scuffle. And I mean as soon as I saw the lady, I assumed she had like—it was like a big case in her hand. I’m assuming it’s a firearm. So that’s when I picked up my firearm. I didn’t point it at her, directly at her. I pointed it towards her direction, but not directly at her.”

Explaining his delay between seeing Gomez and pointing the gun at her, Moaalii said he saw Gomez’s arm change positions and “[s]he came into more of my whole view of how it looked like she is pointing something at me.” He positioned himself behind the Yukon “to stay protected.” He lowered the gun because “I come to see what was going on. I seen that it was just fine so—I’m just gonna leave it at that.” He was afraid when he raised the gun because “I don’t know what’s going to happen and assuming that she has a firearm too.”

Moaalii did not immediately put the gun inside the house but held it behind his back because he “realized this ain’t that big of a situation. I know that I needed to put it away, but I couldn’t really just run away like that. But I’m just taking it every moment like okay, okay. Now I’m realizing what’s really going on.” He believed there was “still a commotion going on and I didn’t want to leave my dad out there by his self.” He did not want to “miss everything” that was happening and wanted to stop Gomez and Kalac from attacking his father. He did not know the car was being repossessed. Kalac and Gomez did not show paperwork or say anything.

Kalac sprayed Moaalii with pepper spray, at which point Moaalii ran inside. He put the gun in the house, but did not call the police because he still heard commotion outside with his father and he was “fixing to go to his defense.” When asked if he put the gun back in the house because Kalac told him he was being video recorded, he denied it. But he admitted he returned the gun to the house after Kalac told him the tow truck had video.

Moaalii put his shoes on and went back outside. The video recordings showed Moaalii approach Kalac, who took a few steps toward him. Moaalii then punched him. Moaalii testified Kalac approached him and said something, but he could not remember what. Kalac was “very aggressive” and Moaalii feared he would hit him, so Moaalii “tried to swing first.” Moaalii tried to pull the driveway gate closed, but the tow truck’s boom was blocking it. Kalac was on the other side of the gate. Moaalii then chased Gomez, but he denied reaching her or punching her. He claimed he chased her as a “self-defense reflex.” The situation made him “pissed.” He admitted holding a stick made out of metal but denied throwing it at anyone.

Gomez testified in the defense case. She was shown a series of still images from the video recordings and testified to the events as they unfolded. She watched “bits and pieces” of the confrontation between Moaalii and Kalac, but her attention was diverted to answering questions from the police dispatcher on the phone. She testified again that Moaalii punched her and threw a camera tripod at her, hitting her in the back. He also threw Kalac’s cell phone at her.

Pouli testified she was married to George, Jr., Moaalii’s brother. When she saw Gomez open the driveway gate, she

“started to panic,” thinking someone was stealing the car. She ran to George, Sr.’s room and told him someone was trying to take the Yukon. He told her to go get the key, which she thought was in the Yukon. So she went outside, as did George, Sr. She ran back into the house and awakened Moaalii, telling him, “Your dad needs help. Somebody is stealing the car.”

She went back outside. The men “were scuffling” and “in each other’s face.” She tried to use her cell phone to record the scene but “everything happened so quick.” She remembered Kalac spraying mace and hearing “a lot of yelling,” but did not remember much else. She did not call 911 because she assumed someone else would and she was trying to record the incident.

DISCUSSION

Moaalii’s sole claim of error on appeal is the trial court’s denial of his requested instruction, CALCRIM No. 3740, regarding self-defense and defense of another. The court denied his request because it found no substantial evidence to support either self-defense or defense of Moaalii’s father as a defense to the charge. We review the denial of a requested jury instruction de novo. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) We find insufficient evidence supported giving a self-defense or defense of others instruction.

A requested instruction on self-defense need only be given if it is supported by substantial evidence. (*In re Christian S.* (1994) 7 Cal.4th 768, 783 (*Christian S.*)) As presented in CALCRIM No. 3470, self-defense or defense of others requires evidence (1) the defendant reasonably believed he or she or someone else was in imminent danger of suffering bodily injury; (2) the defendant reasonably believed the immediate use of force was necessary to defend against that danger; and (3) the

defendant used no more force than was reasonably necessary to defend against that danger. (CALCRIM No. 3470; see *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 (*Humphrey*).)

For self-defense to apply, the defendant “must actually and reasonably believe in the need to defend.” (*Humphrey, supra*, 13 Cal.4th at p. 1082.) For perfect self-defense, the defendant’s belief must be objectively reasonable, that is, “[t]he circumstances must be sufficient to excite the fears of a reasonable person” (*Ibid.*) In assessing objective reasonableness, “a jury must consider what ‘would appear to be necessary to a reasonable person in a similar situation and with similar knowledge. . . .’ [Citation.] It judges the reasonableness ‘from the point of view of a reasonable person in the position of defendant. . . .’” (*Id.* at pp. 1082–1083.) For the imminent danger element, “[f]ear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant’s fear must be of *imminent* danger to life or great bodily injury.” (*Id.* at p. 1082, quoting *Christian S., supra*, 7 Cal.4th at p. 783.)

Here, crediting Moaalii’s testimony that he actually feared imminent danger of bodily harm to himself or his father, there was no evidence his fear was objectively reasonable. First, when Moaalii stepped outside, he could not have reasonably believed harm was imminent due to a possible vehicle theft. The evidence showed that around 6:00 p.m. on a June evening—when it was still daylight—Pouli told Moaalii his father needed help because someone was stealing the car. She did not say his father was in danger or in a fight, and she said nothing about a gun. Moaalii nonetheless grabbed a loaded gun and went outside. Based on the video recordings, which clearly captured the incident, the tow

truck was in plain view, which would have been highly unusual for a vehicle theft, especially in broad daylight. Moaalii himself was a tow truck driver who had repossessed a vehicle before, so a reasonable person with his knowledge would have understood something other than theft was occurring.

Second, in the moment he aimed the gun at Gomez, he could not have reasonably believed he or his father were in imminent danger of bodily harm. Moaalii testified he heard loud banging from the chains and he saw his father and Kalac in a scuffle. But he did not point the gun at Kalac; he pointed the gun at Gomez. She was holding a cell phone recording the incident. Even though he claims he thought she was holding a gun, the video recordings showed she was holding a cell phone. Further, he saw her clearly, waited several seconds, and only then pointed the gun at her. He also testified he did not point the gun “directly at her” but only “towards her direction.” A reasonable person fearing imminent danger of harm from Gomez with an apparent gun would have pointed his or her own gun at her directly and immediately, not paused to look at her, assess the situation, and then point the gun “towards her direction.” Moaalii then put his gun behind his back and confronted Kalac and Gomez before going back into his house. He continued to hold the gun behind his back when Kalac told him he was being recorded.

Moaalii cites *People v. Lemus* (1988) 203 Cal.App.3d 470, but it is distinguishable. There, the trial court erroneously failed to credit the defendant’s version of the altercation that led to his conviction, which directly conflicted with the prosecution’s evidence and, if believed, would have supported self-defense. (*Id.* at pp. 477–478.) Here, in contrast, the events recounted by

Moaalii did not materially differ from the testimony from Gomez or the video recordings of the incident. The only material difference was Moaalii's mistaken assumptions Gomez was holding a firearm and his father's Yukon was being stolen. Even assuming Moaalii perceived the circumstances as he claimed and *actually* feared an imminent danger of bodily harm, the evidence was insufficient to show his belief was objectively reasonable. The trial court correctly declined to give the self-defense instruction.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

GRIMES, J.

WILEY, J.