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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.

PORFIRIO ORTIZ REYNOSO,

Defendant and Appellant.

B255792

(Los Angeles County
Super. Ct. No. KA102134)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed with modifications.

David R. Greifinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendant challenges his conviction for assault and attempted voluntary manslaughter. He argues that the court should have instructed jurors on self-defense. We find no error and affirm his conviction. We modify the sentence to add additional fines.

FACTS AND PROCEDURE

In April 2013, defendant, the victim Rolando Castro Noguera, and witnesses Haydee Sepulveda and her husband or partner Artemo Mejorado lived near a riverbed. On the night of the incident underlying defendant's conviction, Noguera was sleeping near Sepulveda and Mejorado because he believed someone might steal his puppies.

Just before the incident, a lady told defendant he would not "see" the next day. Then according to Noguera (the victim), defendant approached Noguera. Defendant had a machete and a pistol. Defendant pointed the gun at Noguera's forehead. He attempted to shoot Noguera but the bullet did not eject.

After defendant tried to shoot him, Noguera retrieved a chain that he used to tie up his dog and hit defendant with the chain. Defendant was injured. Defendant shot Noguera again; the bullet ejected and penetrated Noguera's neck. Noguera was wounded on the left side and the back of his neck.

Sepulveda heard the incident. First, she heard a struggle over a bike. Then she heard the sound of a gun that "didn't go out." She saw Noguera hit defendant's neck with a chain. Then she heard another gunshot, and Noguera fell near her.

Mejorado heard defendant and Noguera argue about a bike. Defendant had lent the bike to Mejorado, who lent it to Noguera. Noguera thought it was Mejorado's.

Noguera observed defendant's gun, saying "oh, so you have a gun" and then hit defendant with the chain. Defendant then shot Noguera, wounding him. At the preliminary hearing, Mejorado testified that the first "unusual thing" he heard was the chain. He also testified that defendant pulled the trigger and nothing happened. This evidence was admitted at trial as impeachment evidence. At trial, Mejorado testified that he first heard a click from defendant's gun and then heard the chain. He explained that the "click" was the cocking of a weapon. Mejorado was familiar with the sound because he previously worked for a handgun manufacturer. When Mejorado later saw defendant,

defendant was holding a .25-caliber handgun. Defendant told Mejorado that Noguera gave him a “blow to the head.”

At the conclusion of the evidence, the trial court granted defendant’s Penal Code section 1118.1 motion and struck the robbery charge. Defendant was convicted of assault with a firearm and of attempted voluntary manslaughter. He was found not guilty of attempted murder. Jurors found a firearm enhancement true, but the allegation of great bodily injury not true. The court sentenced defendant to an aggregate term of 15 years six months for the voluntary manslaughter and firearm enhancement. The court stayed the sentence on the assault pursuant to Penal Code section 654. The court imposed a criminal conviction assessment fee and court operations assessment fee only on the voluntary manslaughter count.

DISCUSSION

On appeal, defendant’s sole contention is that the court should have instructed jurors on self-defense. Respondent argues that the court failed to impose mandatory fines. We discuss both contentions in turn.

1. No Self-defense Instruction Was Warranted

A trial court is required to instruct on self-defense only when substantial evidence supports that defense. (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49.) For self-defense to apply, a defendant must actually and reasonably believe in the need to defend. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) The defense is not available when a defendant “who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary’s attack or pursuit is legally justified.” (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1; see *People v. Enraca* (2012) 53 Cal.4th 735, 761.) Defendant cannot claim self-defense if the victim’s use of force against the defendant was lawful. (See *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179-1180.)

Defendant recognizes that the overwhelming majority of evidence showed he initiated a physical assault before Noguera hit him with the chain. Defendant further recognizes that self-defense is not available if he initiated the physical assault. But he

argues that Mejorado's preliminary hearing testimony, which was admitted as impeachment, suggested Noguera might have been the aggressor. We disagree.

As introduced during trial as impeachment, Mejorado previously testified that he did not hear defendant cock the gun prior to hearing Noguera's chain. Assuming this testimony supported the inference that defendant did not cock his gun, it does not contradict the undisputed testimony that defendant approached Noguera with a pistol and machete and held the gun towards Noguera's forehead. What Mejorado heard is not probative of whether defendant approached Noguera brandishing a firearm. (*People v. Bolton* (1979) 23 Cal.3d 208, 215 [defendant who pointed his gun at victim was initial aggressor].) Moreover, Mejorado testified at the preliminary hearing that defendant pointed the gun at Noguera and pulled the trigger and nothing happened, and that testimony also was admitted at trial. Because the evidence supported only the conclusion that defendant used unlawful force first, the trial court properly refused to instruct jurors on self-defense. Appellant's argument that other courts have instructed on self-defense where there is some evidence that the victim was the initial aggressor is not helpful because here there was no such evidence.

2. Additional Fines Were Required

The Attorney General argues that the abstract of judgment should be amended to add addition fines. According to the Attorney General a \$30 criminal conviction assessment fee (Gov. Code, § 70373) and \$40 court operations assessment fee (Pen. Code, § 1465.8, subd. (a)(1)) must be added for the assault (count one). Defendant does not argue otherwise.

If a fee or penalty is mandatory, the appellate court may "properly correct[] the trial court's omission of [such fees or penalties] even though the People raised the issue for the first time on appeal." (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157.) Fees that are mandatory per conviction must be imposed even if a sentence is stayed pursuant to Penal Code section 654. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 370-371.) As the Attorney General argues, the court should have imposed the criminal conviction assessment fee and court operations fee on both counts.

DISPOSITION

The judgment is modified to reflect a \$30 criminal conviction assessment fee and \$40 court operations assessment fee on the assault. As modified, the judgment is affirmed. The superior court is directed to amend the abstract of judgment accordingly and send a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.