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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE D. RUIZ, Defendant and Appellant.	B278461 (Los Angeles County Super. Ct. No. GA087785)

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

Peter Gold, 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, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Jose Ruiz guilty of second degree murder after he stabbed and killed Patrick Ortega. Ruiz contends that his conviction must be reversed because the prosecutor, first, repeatedly referred to Ortega as the "victim" and, second, committed misconduct by misstating the law. Ruiz also contends that the trial court improperly excluded evidence and failed to give a pinpoint instruction. We reject all contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

On October 6, 2012, members of the East Los Angeles Bobcats, a junior All-American football team, were at Shakey's with friends and family, including defendant Ruiz and Ruiz's friend, Michael Medina. The victim, Patrick Ortega, was also there with friends. Drunk, Ortega argued with the Bobcats and chanted, "Bulldogs, Ruff, Ruff, Ruff," referring to another team. People, including Medina, told him to be quiet and to take it outside. Lisa Sanchez told him to "Shut the 'f' up." The Bobcat's coach, Robert Sanchez, told Ortega to " 'relax' " because kids were present. Ortega said, " 'All right. I'm cool. I'm cool.' "

Anthony Macklin, Shakey's security guard, testified that he told everyone to leave, which seemed to calm things down momentarily. However, Ortega yelled, "Maravilla," referring to a gang. After Ortega yelled this, Ruiz left but soon returned. Ortega picked up a beer bottle. According to Macklin, Ortega had put the bottle down and was walking "towards the arch" when Ortega grabbed a metal ketchup dispenser.[1] Several people

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[1] In the defense case, Sanchez testified that Ortega tried to throw the dispenser, but Sanchez blocked it.

charged Ortega and attacked him with a chair. According to Corina Barragan, a guy threw a punch and then all hell broke loose.

When the police arrived, it was chaos, with people leaving in every direction. Ortega was dead, having been stabbed 15 times. No weapons were near Ortega's body. However, the police found the murder weapon, a knife, under a car in the parking lot. The police found the knife's owner, Ruiz, hiding under a blanket in a car.

Ruiz testified in his defense.[2] His father had given him the knife to use in the fields where Ruiz worked.[3] After going to the Bobcats's game, Ruiz went to Shakey's with friends and family, including his two young children. Having forgotten to leave the knife at home, Ruiz brought the knife into Shakey's. The knife was in its sheath, which was attached to the inside waistband of his shorts. Inside Shakey's, Ortega began barking and yelling "Maravilla," which frightened Ruiz. A crowd that included Ruiz's friend Medina was around Ortega. Ortega had a glass in his hand, and Ruiz thought he was going to hit Medina with it. Ruiz grabbed Ortega. Then, seeing his young son and fearing that Ortega would fall on his son, Ruiz twisted his body so that he and Ortega fell. Ortega was under Ruiz, when Ruiz felt someone hit his back and heard Ortega say, "Get him, get him." Afraid that the person who had hit him would grab his knife, Ruiz grabbed his knife and stabbed Ortega.

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[2] In a statement to the police, Ruiz initially denied knowing that anyone got hurt. He then admitted stabbing Ortega.

[3] Ruiz's father also testified that he gave the knife to Ruiz.

II. Procedural background

On July 7, 2016, a jury found Ruiz not guilty of first degree murder but guilty of second degree murder (Pen. Code, § 187, subd. (a)).[4] The jury also found true a personal use of a deadly weapon, a knife, allegation (§ 12022, subd. (b)(1)). On October 13, 2016, the trial court sentenced Ruiz to 15 years to life plus one year for the weapon enhancement.

DISCUSSION

I. Referring to Ortega as the "victim"

During trial, including in closing arguments, the prosecutor repeatedly referred to Ortega as the "victim," as did some witnesses.[5] One of the court's instructions also referred to Ortega as the victim: CALCRIM No. 520 stated that "[m]alice aforethought does not require hatred or ill will toward the *victim*." (Italics added.) Ruiz now contends that these references to Ortega as the victim violated Ruiz's constitutional right to a fair trial.[6] We disagree.

Our California Supreme Court has held that where, as here, the question in a case is whether a crime occurred, using the term "victim" may be improper. (*People v. Williams* (1860)

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[4] All further undesignated statutory references are to the Penal Code.

[5] By appellate counsel's count, the prosecutor referred to Ortega as the victim over 75 times while questioning witnesses and 20 times during closing arguments. We agree that the references were numerous.

[6] The trial court overruled defense counsel's timely objection to the prosecutor's use of the term "victim."

17 Cal. 142 (*Williams*).) The defendant in *Williams* raised the defense of self-defense to murder. In an instruction, the trial court referred to the deceased as the "victim."[7] *Williams* explained that the term improperly assumed that "the deceased was wrongfully killed, when the very issue was as to the character of the killing." (*Id.* at p. 147.) *Williams* thus admonished that a court "should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression." (*Ibid.*)

Years after *Willams*, the Supreme Court addressed the issue again in *People v. Wolfe* (1954) 42 Cal.2d 663. The issue arose in *Wolfe* in the context of the *prosecutor's* use of "victim," as opposed to the trial court's, as in *Williams*. The prosecutor said that the defendant's knife had been left in the " 'victim's back.' " (*Id.* at p. 666.) *Wolfe* distinguished *Williams* because "the expression did not come from the judge, but from the prosecuting attorney without objection by defense counsel or motion to strike being made, and the jury was instructed that it was the sole judge of the value and effect of the evidence; that it could not convict a defendant upon mere suspicion; that the prosecution was 'bound to establish the guilt of a defendant beyond a reasonable doubt, and unless the prosecution does so, then it is your duty to find the defendant not guilty.' " (*Ibid.*)

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[7] The instruction was: " 'The fact that the deceased was a Chinaman gave the defendant no more right to take his life than if he had been a white person; nor did the fact, if you so find, that the defendant was seeking to enforce the collection of taxes against another Chinaman, or even against his victim, give the defendant any right to take his life.' " (*Williams*, *supra*, 17 Cal. at p. 146.)

Wolfe's distinction between a *prosecutor's* use of the term "victim" and a *trial court's* use of it is apt. The prosecutor is an advocate whose purpose is to prove the deceased was the "victim" of a crime. Hence, of course a prosecutor would argue that the deceased is a "victim." Here too the prosecutor primarily referred to Ortega as the "victim," although at least one of the court's instructions also used that term. Under *Wolfe*, we doubt it was error for the prosecutor to refer to Ortega as the victim. We further doubt that it was error for witnesses to refer to Ortega as the victim in their answers to questions.

But, to the extent any error occurred by virtue of any use of the term "victim" by the prosecutor or in the instructions, the error was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 [conviction should be reversed unless People prove error harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [reversal not required unless "it is reasonably probable that a result more favorable to the appealing party would have been reached in absence of the error"]; see also *People v. Sanchez* (1989) 208 Cal.App.3d 721, 739–740 [no reasonable probability of a determination more favorable to defendant in absence of use of "victim" terminology].)

We understand the argument that calling Ortega the "victim" undermined the presumption of innocence by implying that the ultimate issue had been decided—i.e., that Ortega had been unlawfully killed as opposed to killed in self-defense. But, were we to find that use of the term "victim" requires reversal, we would also have to find that the jury disregarded all of the instructions and, indeed, its *raison d'être*, which was to determine whether Ruiz was guilty of the charged offense. We instead " 'credit jurors with intelligence and common sense [citation] and

do not assume that these virtues will abandon them when presented with a court's instructions.' " (*People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1024.) The term "victim is a " 'malleable term' the meaning of which depends on the context in which it is used." (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 416.) Being creatures presumably of common sense, the jurors would have understood that any reference to the deceased Ortega as "the victim" meant, "The person who was killed," not "Ruiz is guilty." Jurors would have understood it is common to speak of a "homicide victim" even though the homicide may not be criminal.

The instructions made this point clear. The jury was instructed that it "alone" was "to decide what happened." (CALCRIM No. 200.) The trial court also instructed that a defendant is presumed to be innocent, and this presumption required the People to prove defendant guilty beyond a reasonable doubt. (CALCRIM No. 220.) Further, the jury was told that nothing "the attorneys say is evidence. In their opening and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. . . ." (CALCRIM No. 222.) Finally, the jury was instructed on the general principles of homicide, first and second degree murder, provocation, justifiable homicide, and voluntary manslaughter (imperfect self-defense). Under no standard regarding prejudicial error is it conceivable that the jury ignored all of these instructions and failed to consider whether Ruiz acted in self-defense, merely because the prosecutor and some witnesses repeatedly referred to Ortega as the "victim."[8] That they did not

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[8] This conclusion equally applies to Ruiz's contention that the court improperly referred to Ortega as the victim in an instruction.

do so is underscored by the jury's verdict finding Ruiz not guilty of first degree murder but guilty of second degree murder. No prejudicial error occurred.

II. Evidence of other patrons' fear of Ortega

The trial court denied the defense request to admit evidence that Ortega scared Shakey's patrons by yelling, "Maravilla." Ruiz now contends that excluding this evidence violated his constitutional rights to due process and to present a complete defense. We reject the contention.

The claimed relevance of the evidence was it went to Ruiz's state of mind and the reasonableness of his fear. (See generally *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 745.) That is, there must be evidence of the state of mind of a defendant such as Ruiz who claims perfect or imperfect self-defense. (*In re Christian S.* (1994) 7 Cal.4th 768, 771, 773 [perfect self-defense requires defendant have an honest and reasonable belief in the need to defend himself or another, while imperfect self-defense is the killing of another human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury].) When a defendant's state of mind is at issue, a group's reputation for violence can corroborate the defendant's fear of great bodily injury. Therefore, a defendant is entitled to present evidence that a reasonable person in his or her position would have been colored by a certain crowd's threats and reputation for violence. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1067, 1070.)

Here, the problem with the defense argument that evidence about Maravilla was relevant to defendant's state of mind is that at the pretrial hearing when counsel sought to introduce the evidence, she had not yet decided whether Ruiz would take the

stand to testify that he was afraid. Indeed, the trial court asked counsel, "But is it the defense's argument that the defendant would take the stand and say he was in fear? Because if not, then – " Defense counsel answered, "No." It was therefore unclear that the defense would present evidence the defendant had fear, in the absence of which the court was right to question the relevance of the proposed evidence. (See generally Evid. Code, § 210; see also *People v. Mills* (2010) 48 Cal.4th 158, 193.)

Similarly, the trial court also properly sustained the prosecutor's relevance objection when defense counsel asked Sanchez, the Bobcat's coach, what "Maravilla" meant to him and whether Sanchez was afraid for his family. The objection was properly sustained because the defense still had not yet indicated an intent to offer evidence Ruiz was in fear. (See generally *People v. Jablonski* (2006) 37 Cal.4th 774, 805 [trial court's ruling on admissibility of evidence reviewed for abuse of discretion].) Once the defense did offer evidence that Ruiz was in fear because Ortega shouted Maravilla, then Ruiz would have been entitled to introduce evidence that Maravilla had a reputation for violence. Shakey's patrons could have presented such reputation evidence. If others at Shakey's were afraid because of Maravilla's reputation for violence, then that would have been relevant to the jury's assessment whether Ruiz's fear of Ortega was reasonable. In other words, Ortega's association with a group having a reputation for violence could corroborate and lend credence to Ruiz's claim he was in fear because of the gang challenge. However, it was incumbent on the defense to ask the trial court to revisit its prior ruling once Ruiz presented evidence he was in fear because of the reference to Maravilla. The defense did not make such request, and, moreover, the original showing that

Maravilla was a group that had a reputation for violence was insufficient. Had the defense made such a request and showing, then the proffered evidence might have been admissible. (*People v. Minifie*, *supra*, 13 Cal.4th at pp. 1067, 1070.)

Nor does *People v. Sotelo-Urena*, *supra*, 4 Cal.App.5th 732, on which Ruiz relies, persuade us otherwise. The homeless defendant in *Sotelo-Urena* stabbed to death another homeless man in what the defendant claimed was self-defense. At his trial, the defendant sought to introduce expert witness testimony about the higher incidence of victimization and violence among the homeless and how a homeless person would react in a hypothetical situation based on the facts of the case. (*Id.* at p. 742.) The defendant argued that the evidence was relevant to his subjective belief he was in danger and needed to use lethal force to defend himself. (*Ibid.*) *Sotelo-Urena* found that the trial court erred in excluding the evidence, because the evidence would assist the jury in evaluating the situation *from defendant's perspective*. (*Id.* at p. 745.)

Even if error occurred, we fail to see how Ruiz was prejudiced.[9] There was abundant other evidence that people were upset or frightened by Ortega. Sanchez, for example, testified that he told his people they needed to leave after Ortega yelled, "Maravilla," and that people were running and "going crazy." Sanchez also described Ortega as giving a "challenging kind of laughing and saying gang stuff." Macklin, the security guard, heard Ortega say gang stuff, so he immediately called the police. Defense witness Felipe Arellano similarly testified that

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9 This is especially true given that Ruiz's defense was rooted in his alleged need to defend his son and his friend Medina from Ortega rather than in Ruiz's fear of Ortega as a gang member.

people in Shakey's were screaming and crying. Arellano was concerned for the safety of his young son. Corina Barragan described the scene as one of all hell breaking loose and of "chaos."

Because Ruiz thus did introduce evidence bearing on his defense of self-defense, we also reject his related claim that excluding the Maravilla evidence violated his constitutional right to present a defense. A state court's application of ordinary rules of evidence generally does not infringe on that right. (*People v. Cornwell* (2005) 37 Cal.4th 50, 82, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Although the complete exclusion of an accused's defense may constitute federal constitutional error, " ' "excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." ' " (*People v. Thornton* (2007) 41 Cal.4th 391, 443.) Ruiz was not precluded from presenting a defense.

III. Exclusion of defense expert witness

Ruiz next contends that the trial court abused its discretion by precluding defense expert Dr. Frank Sheridan from testifying about the relationship between being drunk and aggressive. A trial court, however, has broad discretion to admit or to exclude expert testimony, and its decision will not be reversed on appeal unless a manifest abuse of discretion is shown. (*People v. McDowell* (2012) 54 Cal.4th 395, 426; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299–1300.)

The trial court here did not abuse its discretion. At an Evidence Code 402 hearing, Dr. Sheridan conceded that he could not connect Ortega's drinking to his aggression. Dr. Sheridan said that someone with a blood alcohol level of 0.14 like Ortega's

"could be aggressive" but "[t]here's no way of saying in any given person how they will react to any given level of alcohol." He repeated, "There is no way of saying in any one individual case what the effect, as far as aggression is concerned. You can say they are intoxicated, that they are intoxicated in the legal sense, . . . but you can't say much more than that in an individual case." However, there were studies showing that people who are intoxicated are more prone to be belligerent than a person who has not been drinking, "but that's about as far as one can go." Therefore, the defense's own expert said he could not offer nonspeculative testimony or otherwise offer anything that would help the trier of fact connect Ortega's intoxication to his aggression. (See generally Evid. Code, § 801, subd. (a); *People v. Brown* (2004) 33 Cal.4th 892, 905.) The testimony was properly excluded.

IV. Instructional error

To show that Ortega had a violent character, the defense introduced evidence he threw a chair at his ex-girlfriend's window, breaking it. Based on that evidence, the defense asked the trial court to instruct the jury as follows: "You have heard evidence of specific instance of Patrick Ortega's character for violence and aggressiveness. You may consider this evidence in determining whether he acted in conformance with that character trait at the time of the offense charged against the defendant in this case. If you find that Patrick Ortega acted in conformance with that character trait, you may consider – you may find that you should . . . find that the prosecution has not proven beyond a reasonable doubt that Jose Ruiz did not act in self-defense or defense of others." Finding that this was not a proper statement of the law and that the proposed instruction

improperly limited how the jury could use the evidence, the court refused to give the instruction.

Ruiz's contention that the trial court's refusal to give this instruction violated his due process rights is wrong. "A criminal defendant is entitled, on request, to a[n] instruction 'pinpointing' the theory of his defense." (*People v. Wharton* (1991) 53 Cal.3d 522, 570.) But a request for a particular instruction may be denied if the instruction is argumentative, misstates the law or is duplicative of other instructions. (*People v. Moon* (2005) 37 Cal.4th 1, 30.) The proposed instruction here misstated the law and was argumentative. The law concerning specific instances of conduct to prove character is in Evidence Code section 1103. Under that section, evidence of the victim's character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is admissible if offered to prove the victim acted in conformity with the character or character trait. (Evid. Code, § 1103, subd. (a).) The proposed instruction went beyond Evidence Code section 1103 by directing the jury how to consider the character evidence in relation to Ruiz's claim of self-defense. It instructed the jury that if Ortega acted in conformity with a character trait, the jury may or should find that the prosecution had not proven beyond a reasonable doubt that Ruiz did not act in self-defense or defense of others. Thus, in addition to going beyond the strictures of the Evidence Code, the proposed instruction was argumentative because it suggested that the jury should find Ruiz acted in self-defense.

Nor do we agree with Ruiz that the trial court "threw the baby out with the bathwater" by failing sua sponte to edit the proposed instruction to make it conform to the law. Ruiz cites no authority stating that a trial court has such an obligation and we decline to impose one.

V. Prosecutorial misconduct

Ruiz argues that the prosecutor committed misconduct by misstating the law concerning self-defense. In the context of arguing that Ruiz did not believe he was in imminent danger, the prosecutor said:

> "So let's talk about whether he needed to use force, whether it was necessary for him. Imminent, that means belief in a future harm is not sufficient. So he can't get up here and say, well, I thought somebody was going to grab my knife because he did not tell us that there was a struggle over that knife. It would have been different if somebody grabbed the knife out of his pocket." "If somebody grabbed the knife out of his pocket and there was a struggle, that's imminent. Him saying it could have happened, him saying that people had glasses in their hands, they could have hit somebody with it, that's not imminent. Forthcoming, immediate, ready to take place, intending; that's the definition of imminent."[10]

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10 The trial court overruled defense counsel's objection that this argument was "outside of the evidence."

Although it is misconduct for a prosecutor to misstate the law (*People v. Boyette* (2002) 29 Cal.4th 381, 435), we fail to see how this argument is a misstatment of the law of self-defense. The law is that perfect and imperfect self-defense require the fear to be of imminent harm. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *In re Christian S.*, *supra*, 7 Cal.4th at p. 783.) " 'Fear 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.' " (*Humphrey*, at p. 1082.) The defendant must fear a harm that must be instantly dealt with. (*In re Christian S.*, at p. 783.)

Here, Ruiz confuses legitimate argument about imminent harm with misstating the law about it. (See generally *People v. Wharton*, *supra*, 53 Cal.3d at pp. 567–568 [prosecutor given wide latitude during argument, and argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom].) The prosecutor made the legitimate argument that there was no imminent harm to Ruiz. That is, Ruiz's fear that the person who struck Ruiz from behind might also grab Ruiz's knife was not a fear of imminent harm. The defense was free to make the counterargument that such facts did give rise to a fear of imminent harm. Indeed, the defense made that argument: "[The prosecutor] said you are not entitled to self-defense if there is a potential that someone could reach for your knife. It was no potential. He felt someone reach to this part of his hip where the knife was at. That's not potential. That's imminent."

Because the prosecutor did not misstate the law, no misconduct occurred. (See generally *People v. Samayoa* (1997) 15 Cal.4th 795, 841 [" ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' "].)

VI. Cumulative error

As we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial,' " we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235–1236.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KALRA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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