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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. MICHAEL DEAN STEPHENS, Defendant and Appellant.	B231059 (Los Angeles County Super. Ct. No. PA060468)

APPEAL from the judgment of the Superior Court of Los Angeles County. Daniel B. Feldstern, Judge. Affirmed as modified.

Brett Harding Duxbury, 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, Senior Assistant Attorney General, David C. Cook and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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SUMMARY

Defendant Michael Dean Stephens was charged by information with murder (Pen. Code, § 187, subd. (a); count 1) and attempted murder (Pen. Code, §§ 187, subd. (a), 664; count 2), in addition to special allegations that defendant used dangerous and deadly weapons (Pen. Code, § 12022, subd. (b)(1); counts 1 & 2), and inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a); count 2). The jury found defendant guilty of second degree murder, and the corresponding special allegations were found true. The jury deadlocked on count 2, and the court declared a mistrial. Defendant then pleaded no contest to attempted murder and admitted the dangerous and deadly weapon allegations on count 2. The great bodily injury and premeditation allegations for this count were dismissed. Defendant was sentenced to 23 years to life, consisting of 15 years to life plus an additional consecutive year for each deadly weapon special allegation on count 1, and five years plus an additional year for the special allegation on count 2.

On appeal, defendant contends: (1) the trial court improperly failed to instruct the jury that it could consider threats by the victims and their group of friends against defendant in the CALCRIM Nos. 505 and 604 self-defense instructions; (2) the standard CALCRIM No. 505 instruction improperly states the law on self-defense; and (3) the trial court improperly imposed two deadly weapon enhancements on count 1. We disagree with all but defendant's third contention and therefore affirm the judgment with modifications.

FACTS

At around 11:30 p.m. on November 23, 2007, Jennifer Scott, Kelli Gilbert, and Jarrod Messner met outside of a friend's condominium in Stevenson Ranch, California. The friend, Joseph Wojtaszek, was out of town, and the three were there to meet another friend, who had a key to the condo. Wojtaszek's condo was a "party house." A group of young men, Bart Palacio, Cody Kendall, and Nick Walmsley, showed up at the condominium complex, looking to party. Palacio was acquainted with Scott and Messner. Scott told Palacio there was not a party at the condo, and that he and his friends should leave.

Another group, including defendant, Tim Woodhead, Daniel Bateman, Kevin Voytish, and Joey Gilardo, who were also friends of Wojtaszek, arrived soon after Palacio. They yelled that there was no party, and Palacio's group better leave or there would be a fight. As Palacio's group left, defendant's friends kicked Palacio's truck and threw beer bottles at it. Palacio pulled over at a nearby shopping center to assess the damage to his truck and discovered it was dented. He was upset and called Scott, telling her to arrange for defendant's group to meet him at the complex to fight. Palacio and his friends made additional phone calls, rallying a group of friends known as "The Distraction Crew" to meet them. This group included victims Josh Pipho and Chad Weitz, as well as Shane Falsey, Sean Sly, Joel Vargas, Eric Prevo, Matt Hager, Justin Pfieffer, and a few others. Pipho was upset about what happened to Palacio, and vowed to "f--- somebody up." Kendall was also angry, and started crafting a weapon to use against defendant's group from work supplies in Palacio's truck, hammering nails into a two-by-four.

Palacio and the Distraction Crew approached the complex's parking lot, where defendant and his friends were. Defendant was in his car, and Woodhead and Bateman were outside of the car. Voytish and Gilardo had already left. Woodhead, who had a broken clavicle and whose arm was in a sling, armed himself with a skateboard from defendant's trunk when he saw the approaching group. Bateman grabbed a baseball bat. (There is some conflicting testimony about who was armed with what, and Woodhead and Bateman may have switched weapons at some point during the altercation.)

According to Palacio, his group suggested that they "settle this . . . [and] go three on three, no weapons." Woodhead swung the bat at Palacio, glancing his ribs. Bateman swung the skateboard at Pipho, but Pipho "knocked him out."

According to Woodhead, the Destruction Crew members were the aggressors. One of the crew hit Bateman, causing him to fall to the ground. Two or three members of the crew then started stomping him until he began convulsing. Woodhead waved the bat to protect Bateman and hit one of the crew. Pipho then hit Woodhead in the back of the head and took the bat. Woodhead ran away as Pipho hit his broken collarbone with the

bat. Bateman testified that Pipho hit him as he tried to brandish the skateboard to protect himself. The next thing he remembered was waking up at defendant's house, with extensive injuries.

Hager testified that Falsey told defendant to stay out of the fight, when it appeared he was attempting to help his friends, and defendant responded, "'I'm not in this. I'm not with them.'" Palacio also testified that defendant was not involved in the fight, except that he yelled "Is he dead? Is he dead?" when Bateman was knocked unconscious. Falsey confirmed that he told defendant to stay out of the fight.

Palacio and Hager testified that Weitz broke defendant's windshield with the bat, and then the crew dispersed. Woodhead heard defendant's windshield break, and defendant screamed he "didn't want to have anything to do with this." The crew then left the complex. Falsey heard defendant exclaim, "Go get . . . those f------," as the crew was leaving.

Defendant got in his car and drove toward the crew members as they left the complex, causing them to scatter. Defendant got out of his car, took a knife from his pocket and challenged Palacio and Pipho to come at him. Palacio told Pipho, "Let's get out of here; he's got something." Pipho responded, "I don't give a rat's ass what he's got," and placed himself between defendant and Palacio. Pipho lunged at defendant, and defendant stabbed him repeatedly.

Defendant then drove back to his friends and helped pull the injured Bateman into the car. Defendant seemed scared and told Woodhead he had "stabbed someone." Defendant then again drove toward Palacio, Falsey, and Weitz, who were standing around Pipho's body. He ran over Pipho, and hit Weitz, bouncing him off the hood of the car. Defendant got out of the car, and exclaimed, "I'm going to kill that mother------," and started stabbing Weitz. Weitz squeezed defendant's shoulders, and defendant kept telling Weitz, "Let me go!" When Weitz let go, defendant ran back to his car.

Defendant drove to his home with Woodhead and Bateman and immediately washed his clothes. He told Woodhead, "Maybe I lost it," and admitted to Bateman that he "stabbed two fools."

Defendant testified that when he saw the crew approaching, he was sitting in his car, talking on the phone. He locked his car doors because he did not want to fight. The crew attacked Woodhead and Bateman, and defendant became scared because Bateman's face was covered in blood and he was being stomped and kicked on the ground. Defendant got out of his car and asked whether Bateman was dead, thinking this would stop the assault. When he moved towards Bateman, and pushed one of Bateman's attackers, someone swung at him and kicked him. When he tried to help Woodhead, who was being hit by Pipho, one of the crew members told him to stay out of the fight, and defendant backed off, responding that he "didn't want any problems."

The crew ran away when someone yelled that the police were coming. Defendant gave chase in his car because he was angry and wanted to confront them. He drove his car towards the retreating crew, dispersing them. He stopped his car, confronted Palacio and Pipho, asking, "What the f--- [is your] problem? Why did you just [beat me] and my buddies . . . [and] my car?" They told him, "F--- you and your car."

Defendant took his knife from his pocket when he recognized Pipho as the person who had attacked his friends, and saw that Pipho had a skateboard in his hands. When Pipho lunged at him, defendant was stunned and stabbed him. Pipho continued to hit defendant, and defendant kept stabbing him until he stopped.

Defendant did not intend to run over Pipho's body, or hit Weitz. He crashed his car after veering to avoid hitting Weitz. When defendant got out of the car to assess the damage, Weitz chased after him and started choking him, saying, "You killed my homie." Defendant stabbed him until he let go of defendant's neck.

Defendant always carried the knife and told friends he wasn't scared to use it.

Pipho and Weitz were each stabbed 16 times.

DISCUSSION

1. Pinpoint Instruction on "Antecedent Threats"

"Upon request, a trial court must give jury instructions 'that "pinpoint[] the theory of the defense."'" (*People v. Earp* (1999) 20 Cal.4th 826, 886.) A pinpoint instruction is properly rejected if it is duplicative of others given (*ibid*.), or if it is not supported by

substantial evidence. (See *In re Christian S.* (1994) 7 Cal.4th 768, 783.) In deciding whether evidence is substantial enough to require an instruction, the court determines only its bare legal sufficiency, not its weight, and does not weigh the credibility of witnesses. (*People v. Flannel* (1979) 25 Cal.3d 668, 684, overruled on another ground in *Christian S.*, at p. 777.) The test is not whether there is *any* evidence, but whether there is evidence from which a reasonable jury could have found the specific facts supporting the instruction. (*Flannel*, at p. 684.) Any error in refusing a requested pinpoint instruction is subject to the *Watson* test for harmless error. (*People v. Earp*, at p. 886; see *People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

Self-defense 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 necessary to a reasonable person in the position of the defendant, with the defendant's knowledge and awareness. (*Humphrey*, at pp. 1082–1083; *Jefferson*, at p. 518.) "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. [Citation.] Such a killing is deemed to be without malice and thus cannot be murder. [Citation.]" (*People v. Booker* (2011) 51 Cal.4th 141, 182.) "[T]he doctrine is narrow. It requires without exception that the defendant must have had an *actual* belief in the need for self-defense." (*In re Christian S.*, *supra*, 7 Cal.4th at p. 783.) To aid the jury in assessing the reasonableness of defendant's conduct, a defendant may be entitled to a pinpoint instruction that the jury can consider the victim's previous threats or assaults against the defendant. (See *People v. Garvin* (2003) 110 Cal.App.4th 484, 488.)

Defendant requested that the jury be instructed with CALCRIM Nos. 505, the instruction for justifiable homicide (self-defense for the killing of Pipho), and 604, the instruction for attempted voluntary manslaughter (imperfect self-defense for the attempted killing of Weitz). The trial court gave the instructions, but defendant complains that the court erroneously failed to include in the instructions optional

bracketed pinpoint language on the victims' "antecedent threats." Specifically, defendant contends the following optional portions of the standard self-defense instructions were erroneously omitted by the court:

> "Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person." (CALCRIM No. 505.)
>
> "If you find that the defendant received a threat from someone else that (he/she) reasonably associated with [Josh Pipho], you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another)." (CALCRIM No. 505.)
>
> "If you find that the defendant received a threat from someone else that (he/she) reasonably associated with [Chad Weitz], you may consider that threat in evaluating the defendant's beliefs. (CALCRIM No. 604.)

As to CALCRIM No. 505, the trial court declined to give the requested bracketed portions of the instruction, reasoning they were not supported by substantial evidence because there was no evidence that Pipho, or anyone else "reasonably associated" with him, had threatened or harmed defendant. Instead, the trial court included the following optional language in CALCRIM No. 505: "If you find that defendant knew that Joshua Pipho had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable."

Respondent contends that any objection to CALCRIM No. 505 has been forfeited. Specifically, the trial court concluded that "[defendant] was not threatened or harmed by a person in the past. . . . [¶] . . . [¶] Just because some third party takes a swing at him doesn't necessarily mean that the person who is now approaching, Josh Pipho, is going to be doing that." Defense counsel agreed with the court, responding: "I think your point is well taken . . . because that would indicate [that] someone has been threatened or harmed by a person in the past; and I think, listening to your analysis of that, I agree with you in regard to that bracketed portion. [¶] However, with regard to the first bracketed portion, I don't believe that one indicates a specific person, that it has to be the actual[.]" The court then proposed giving the instruction which was ultimately given to the jury,

omitting the disputed antecedent threats language, and asked whether there was any objection. Defense counsel responded, "No."

We agree that defendant has forfeited any claim of error regarding CALCRIM No. 505. "[A] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate amplifying, clarifying, or limiting language." (*People v. Farley* (1996) 45 Cal.App.4th 1697, 1711.) Here, defendant acceded to the trial court's proposed instruction, and ultimately withdrew any objection to the given instruction. Because there is no sua sponte obligation to provide the requested instruction (*People v. Garvin*, *supra*, 110 Cal.App.4th at p. 489), defendant cannot now complain about any error on appeal.

Even if defendant had not forfeited his claim, we would reject it. The evidence did not support the requested bracketed language of the instruction, and even if it had, there is no reasonable probability that defendant would have received a more favorable verdict if the additional parts of the instruction had been given. There was no evidence that Pipho harmed defendant or that anyone threatened defendant; the only thing the crew said to defendant was a warning to stay out of the fight. The evidence unequivocally showed that Woodhead and Bateman brandished weapons at the crew (some of whom defendant's group had previously threatened to fight and at whom they had thrown beer bottles). According to defendant, he tried to stay out of the ensuing fight, locking himself in his car, and attempted to intervene only when his friends were overpowered. When defendant pushed one of Bateman's attackers, someone apparently swung at him and kicked him but there was no evidence it was Pipho who did that. When defendant tried to help Woodhead, one of the crew members told him to stay out of the fight, and defendant backed off, responding that he "didn't want any problems." Moreover, the court adequately instructed the jury that it could consider Pipho's harm and threats to defendant's friends in ascertaining the reasonableness of defendant's conduct. Clearly, the jury discounted this evidence, and found that defendant's attack on Pipho, after he and his friends retreated, could not be considered self-defense.

We also agree that any claim of error regarding CALCRIM No. 604, pertaining only to the attempted murder of Chad Weitz, has been forfeited for two distinct reasons. At trial, defendant requested that the following optional language be added to CALCRIM No. 604:

> "If you find that [Chad Weitz] threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs." (CALCRIM No. 604.)

No optional language was added to CALCRIM No. 604, because the trial court concluded there was no evidence that Chad Weitz had previously threatened or harmed anyone. Defendant does not challenge the trial court's refusal to give this bracketed part of CALCRIM No. 604. Instead, defendant contends the trial court should have given language he *never* asked the trial court to include (that defendant was justified in acting more quickly or that someone reasonably associated with Weitz threatened defendant). Therefore, any error in failing to give the instructions has been forfeited. (*People v. Farley*, *supra*, 5 Cal.App.4th at p. 1711; *People v. Garvin*, *supra*, 110 Cal.App.4th at p. 489.)

We also agree with respondent that any claimed error in failing to include antecedent-threat language in CALCRIM No. 604 (concerning the attempted killing of Weitz) is barred, because defendant pled no contest to Weitz's attempted murder and failed to obtain a certificate of probable cause. Penal Code section 1237.5 provides a defendant may not appeal from a judgment of conviction following a plea of guilty or no contest unless the defendant obtains a certificate of probable cause from the trial court, based upon a showing that there are reasonable constitutional, jurisdictional or other grounds for the appeal going to the legality of the proceedings. (*People v. Shelton* (2006) 37 Cal.4th 759, 766; *In re Chavez* (2003) 30 Cal.4th 643, 650; *People v. Mendez* (1999) 19 Cal.4th 1084, 1095.)

Only two types of issues may be raised on appeal following a guilty or no contest plea without first obtaining a certificate of probable cause. These "noncertificate" grounds include issues relating to the denial of a motion to suppress evidence under Penal

Code section 1538.5, and issues arising after entry of the plea that do not challenge its validity. (See *People v. Buttram* (2003) 30 Cal.4th 773, 780; Cal. Rules of Court, rule 8.304(b)(4).) In determining whether Penal Code section 1237.5 applies, "the critical inquiry is whether a challenge . . . is in substance a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5. [Citation.]" (*People v. Panizzon* (1996) 13 Cal.4th 68, 76, italics omitted.)

The posture of this appeal is different than the typical appeal involving Penal Code section 1237.5, because the no contest plea occurred after the court declared a mistrial of the attempted murder count. Nevertheless, section 1237.5 applies to guilty and no contest pleas entered to deadlocked counts following trial, and will bar a defendant from seeking appellate review of certificate issues relating to the count on which the plea was entered. (*People v. Thurman* (2007) 157 Cal.App.4th 36, 41-43.) Defendant's claim of instructional error relating to CALCRIM No. 604 seeks reversal of his conviction for the attempted murder of Weitz. Because defendant argues on appeal that he would have received a more favorable result if the court had instructed the jury with additional bracketed parts of CALCRIM instruction (apparently, defendant assumes he would have been acquitted), the claimed error does not relate to an issue that arose after entry of the plea but to the validity of the plea. Because the gravamen of this appeal is that plaintiff was prejudiced by the instructional error, any claim of error is barred by the failure to obtain a certificate of probable cause. (*People v. Panizzon*, *supra*, 13 Cal.4th at p. 76 [an appellate court must look to what an appellant is challenging to determine whether Pen. Code, § 1237.5 applies].) We note that defendant does not appear to contend, nor could he, that CALCRIM No. 604 as given in any way tainted the proceedings resulting in his murder conviction for Pipho, because 604 pertained solely to the events concerning Weitz.

2. CALCRIM No. 505

Defendant contends that the third element of CALCRIM No. 505, that "[t]he defendant used no more force than was reasonably necessary to defend against that danger[,]" is an inaccurate statement of the law, and that the prosecutor highlighted the

error in her closing statement when she remarked that "if you use more force than is reasonable, then it is not lawful self-defense. So if [defendant] believed, in the first one or two stabs, that his life was in danger, he needs to stop. There's no lawful self-defense if you continue to stab."

Respondent contends that any claim of error was forfeited because defendant requested the instruction. (*People v. Enraca* (2012) 53 Cal.4th 735, 761.) We need not decide if any error was forfeited; the instruction was not wrong. No case has held that CALCRIM No. 505 is an inaccurate statement of the law, and case law amply upholds the third element as an essential element of the defense. (See *People v. Whitfield* (1968) 259 Cal.App.2d 605, 609 ["Any force which is excessive, i.e., unreasonable under the circumstances, is not justified and the extent to which one may make resistance against an aggressor is a fact to be determined by a jury."]; *People v. Moody* (1943) 62 Cal.App.2d 18, 23 ["When attacked one has a right to stand his ground and defend himself and he may pursue his adversary if such pursuit is necessary to a successful defense; but the extent to which one may make resistance against an aggressor is a fact which must be determined by the jury by keeping in mind the amount or extent of force which a reasonable person would employ under similar circumstances."].) We therefore find no merit in defendant's argument. Defendant, notably, does not claim that the prosecutor engaged in any misconduct by making her statements. Therefore, finding no instructional error, our inquiry ends.

3. Enhancements

Defendant contends, and respondent agrees, that two deadly weapons enhancements (one for the knife and one for the car) could not both be imposed for count 1. Penal Code section 1170.1, subdivision (f) provides, "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury." Therefore, one of the

enhancements must be stayed. (*People v. Crites* (2006) 135 Cal.App.4th 1251, 1255-1256.)

DISPOSITION

The judgment is affirmed as modified to stay one of the Penal Code section 12022, subdivision (b) enhancements on count 1. The superior court is directed to prepare an amended abstract of judgment, and shall forward a certified copy of the same to the Department of Corrections.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.