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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOSE LOPEZ, Defendant and Appellant.	B233704 (Los Angeles County Super. Ct. No. BA325159)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald Rose, Judge. Affirmed as modified.

Donna L. Harris, 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.

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A jury convicted appellant Jose Lopez of second degree murder (Pen. Code, § 187, subd. (a))[1] and attempted escape (§ 4532, subd. (b)(1)). At a subsequent sanity phase, the jury also found him sane at the time of the commission of both offenses.

After a subsequent bench trial, the trial court found true the allegations that appellant had been previously convicted of a "strike" offense (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), a serious felony (§ 667, subd. (a)), and an offense for which he was committed to the state prison and thereafter committed another state prison offense within five years of his release (§ 667.5, subd. (b)).

The trial court sentenced appellant as follows: (1) for the attempted escape conviction, the high term of three years, doubled to six years for the prior strike allegation found true; (2) for the second degree murder conviction, a consecutive indeterminate term of 15 years to life in prison, doubled to 30 years to life for the prior strike allegation found true; (3) for the prior serious felony conviction allegation found true, a consecutive five-year term; and (4) for the prior state prison conviction allegation found true, a consecutive one-year term. Appellant's total state prison sentence is thus a determinate term of 12 years, plus an indeterminate term of 30 years to life in prison.

STATEMENT OF FACTS

The following is a summary of the evidence presented during the guilt phase of appellant's trial that relates to the murder of Rosa Ramos. Because the evidence presented during the guilt phase that relates to the attempted escape conviction is not material to any issue raised on appeal, we do not summarize it in this opinion. Also, because appellant raises no issues in connection with either the sanity phase of his jury trial or the bench trial on the prior conviction allegations, neither do we summarize the evidence presented during those parts of appellant's trial.

A. The Murder of Rosa Ramos

In June 2007, appellant and Rosa Ramos had been dating for approximately 10 years. The relationship was sporadic because appellant was "always . . . in jail." As

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[1] All subsequent statutory references are to the Penal Code unless otherwise noted.

of June 23, 2007, the date of Ramos's disappearance, appellant and Ramos were living with Ramos's parents in the City of South Gate.

On June 23, 2007, at approximately 11:00 a.m., appellant and Ramos argued about whether they would attend a party given by appellant's cousin. At about noon, Ramos told her brother she was leaving to the store. She also asked her father to talk to appellant because appellant was "acting really weird." Ramos's father walked into the garage to talk to appellant, who was in the driver's seat of Ramos's red Thunderbird. He noticed that appellant looked "anxious" and "different than other times." Appellant told Ramos's father that he and Ramos were going to the store and would be right back. The two drove off in Ramos's car but neither ever returned.

A security surveillance video showed appellant and Ramos at a gasoline station in Downey between 3:25 and 3:37 p.m. on June 23.

Sometime between 2:00 and 4:00 p.m. that day, appellant arrived at the Los Angeles house of his cousin, Maria Alvarez. He looked nervous, had stains on his pants, and carried a suitcase. Appellant told Alvarez the stains on his pants were from his roosters.

Appellant and Alvarez walked to her laundry room. There, appellant told Alvarez that he "had to put someone to sleep." Alvarez asked appellant if he was referring to his first wife, Ursula, to which appellant said "no," "it was [Ramos]." Appellant told Alvarez that he "had" to do it because "[Ramos] was messing with the family." Alvarez did not believe appellant.

Appellant then asked to borrow Alvarez's car. She told him no. At about 4:30 p.m., Alvarez drove appellant to an alley at 54th and Main Street, where appellant got out of the car and walked away. Appellant told Alvarez he was going to get his car. Appellant left the suitcase at Alvarez's house. Detectives later picked up the suitcase.

At about 10:00 that night, appellant arrived at the Los Angeles house of his aunt, Mercedes Ortiz. Appellant asked Ortiz for money and told her he had killed Ramos. Ortiz told appellant she did not believe him. In response, appellant walked inside the house and showed Ortiz blood stains on his pants. Ortiz gave appellant some money.

Appellant changed from his pants into a pair of shorts. When appellant left Ortiz's house, the pants were in a bag in Ortiz's laundry room.

B. Appellant's Arrest

On June 24, 2007, at about 2:40 a.m., Madera County Deputy Sheriff Bryan Cutler was patrolling Highway 99 at Avenue 17, about four to five hours north of Los Angeles. A red Thunderbird passed him at a speed in excess of 80 miles per hour. Cutler initiated a traffic stop and approached appellant, who was the driver and sole occupant of the car.

Deputy Cutler asked appellant for his driver's license. Appellant produced a California ID card and stated he was on parole. Cutler noticed what appeared to be blood on appellant's shirt. Cutler asked appellant about the blood, and appellant told him he had gotten into a fight with "a guy named Raul." Appellant said he was driving to his parents' house and that his parole officer knew he was travelling to see his parents.

Deputy Cutler ordered appellant out of his car. Appellant was wearing a plaid shirt, cowboy boots, and shorts. Cutler noticed blood on the boots. Before searching the trunk of the Thunderbird, Cutler asked appellant if he would find anything unusual inside; appellant said "there might be a little bit of blood in [the] trunk." Inside the trunk, Cutler found a sweatshirt with blood stains, clumps of hair, a VCR with blood stains, prescription pill bottles in appellant's name, and a claw hammer. Cutler could also see a pool of wet blood in the wheel well beneath the spare tire. When asked about the blood and hair clumps, appellant said Raul was a "long-haired rocker" and had used the sweatshirt to wipe off his face. He also said that Raul was bleeding from both sides of his head after the fight. Cutler arrested appellant, who was eventually transported to Madera County Sheriff's headquarters.

C. Appellant's Admissions

Madera County Sheriff's Detectives Zachary Zamudio and Saldivar interviewed appellant early in the morning of June 24 after obtaining a waiver of his *Miranda* rights.[2] Appellant told the detectives that the blood in the Thunderbird's trunk belonged to Raul,

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2 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

with whom he had fought. When told that Ramos was missing, he said that she was probably with her friends. He denied that the blood in the Thunderbird belonged to Ramos. He also said that the last time he had seen her was at about 11:00 a.m. on June 23 at her house. He denied that he and Ramos went anywhere together. Appellant told the detectives he was on psychiatric medication, and that he took medication because he hears voices.

Los Angeles County Sheriff's Homicide Investigator Angus Ferguson and his partner, Investigator Shipe, interviewed appellant at the Madera County jail on the night of June 24. Prior to speaking with appellant, the investigators obtained a waiver of his *Miranda* rights. Appellant denied killing Ramos and told the investigators he did not know where she was. He said that he had last seen her at her house at about 11:00 a.m. on June 23.

The investigators told appellant about that the gas station security video. Appellant told them he had dropped off Ramos at her house after going to the gas station. After dropping off Ramos, appellant said he went to his cousin's house where he got into a fight with his friend Oscar. Initially, appellant said the blood in the Thunderbird belonged to Oscar. Later, appellant told the investigators he got into a fight with Ramos, punched her in the nose and split her lip. Ramos wiped blood off of her face with his sweatshirt. Appellant told the investigators that he hears "voices" and that he punched Ramos because of the voices. Appellant dropped Ramos off at her house after he punched her.

Appellant denied that he told his aunt he had killed Ramos. He only told her that he had punched Ramos, that they had gotten into a "scrap."

D. The Search for Ramos

Investigators Ferguson and Shipe attempted to locate Ramos. She left her purse at the house when she left with appellant on June 23. Inside her purse, they found her wallet containing credit cards and her driver's license. They attempted to reach her by calling her cell phone number but were unsuccessful. They contacted friends and other family members but were unable to locate her. They also sent teletypes containing

Ramos's description to Sheriff's and Coroner's offices throughout the state, as well as a "med alert" to area hospitals.

The investigators contacted Ramos's credit card companies to monitor account activity, but the cards were not used after June 23. They interviewed coworkers who said Ramos was always punctual and a good worker. They also left their business cards with Ramos's friends but received no return phone calls indicating contact with Ramos. Ferguson went to the cell tower which recorded Ramos's last cell phone activity. It was located in a vacant lot off the 110 Freeway in Downtown Los Angeles. He could locate no evidence of Ramos in the vicinity of the cell tower.

E. Forensic Evidence

Investigator Ferguson recovered the suitcase left by appellant at his cousin's house. Inside, he found clothing with blood stains and a pair of eight-inch metal scissors with blood stains.

Because Ramos was never located, investigators obtained blood reference samples from her mother and father. Forensic examiners conducted DNA analysis on blood stains from a number of items: the scissors, the suitcase, a shirt from inside the suitcase, the VCR found inside the trunk of the Thunderbird, and the boots and tank top worn by appellant. The DNA from the blood on the scissors was a mixture of two persons: the major contributor was consistent with DNA from a female offspring of Ramos's parents.[3] The DNA from the blood on the suitcase, shirt, and VCR was consistent with a female offspring of Ramos's parents. DNA from the blood on appellant's tank top and on one of his boots was a mixture of two persons. The major contributor in each case was consistent with an offspring of Ramos's parents. DNA from the blood on the second boot came from a single source, and was consistent with an offspring of Ramos's parents.

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[3] The DNA profiles developed from Ramos's parents' reference samples, as well as the major contributor DNA profile developed from the blood stain on the scissors, were entered into the CODIS missing persons data base.

The pool of blood contained in the wheel well beneath the spare tire of the Thunderbird was almost two inches in depth. It appeared to have flown over the VCR and down into the wheel well.

Some of the blood on appellant's tank top and boots was in a spatter pattern consistent with the application of force. Other stains demonstrated a transfer pattern, consistent with brushing against a bloody object.

F. Defense Evidence

Appellant's sister, Brenda Lopez, testified in his defense.

Ramos had lived with appellant's family in Northern California for about a year and a half while appellant served a term at Vacaville State Prison. Appellant's family had no issues or problems with Ramos. After appellant was released from prison, he and Ramos lived with appellant's family for about one month. During that time, appellant took prescription medications. He also demonstrated odd behavior: he failed to respond to questions during conversations, "star[ed] off," and would suddenly walk away during the middle of a conversation. Sometimes, he would chase cars.

After the month with appellant's family, appellant and Ramos moved back to Los Angeles. This was three or four months before Ramos disappeared.

DISCUSSION

A. Imperfect Defense of Another

At the request of appellant's trial counsel, the court below instructed the jury with CALCRIM Nos. 627 (Hallucination: Effect on Premeditation) and 3428 (Mental Impairment: Defense to Specific Intent or Mental State). The trial court did not give CALCRIM No. 571 (Voluntary Manslaughter: Imperfect Self-defense/Defense of Another). Appellant's trial counsel expressly stated she was not requesting such an instruction and, in any event, there was no evidence to support such an instruction.

On appeal, appellant contends that the trial court had a sua sponte duty to give CALCRIM No. 571. He argues that the evidence of his mental illness, along with the statements to his cousin that he "had" to kill Ramos because she "was messing with the family," provided substantial evidence for the jury to conclude that a mental delusion

caused him to kill in an actual but unreasonable belief in the need to defend some third party.

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

Initially, the People contend that neither imperfect self-defense nor, by logical extension, imperfect defense of another, applies where the belief in the need to defend from imminent harm is based on mental delusion alone. In support of that position, the People cite to the Fifth District's decision in *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1453 (*Mejia-Lenares*), which held that mental delusion alone could not provide a basis for imperfect self-defense. Appellant acknowledges *Mejia-Lenares*, but notes that the Supreme Court has not decided this issue and further argues that we should disregard *Mejia-Lenares* in light of Justice Brown's concurring opinion in *People v. Wright* (2005) 35 Cal.4th 964, 975-986 (*Wright*) (joined by Justices Baxter and Moreno).

We need not reach any issues raised by a comparison of *Mejia-Lenares* to Justice Brown's concurring opinion in *Wright.* Without so deciding, we assume, for purposes of this appeal, that *Mejia-Lenares* incorrectly restricts application of the doctrines of imperfect self-defense and imperfect defense of another. Nevertheless, we conclude that the trial court did not err in this case because there was no substantial evidence presented which would have justified such an instruction.

In *People v. Romero* (2008) 44 Cal.4th 386, 402-403, the Supreme Court summarized the standards which define the trial court's sua sponte obligation to instruct on lesser included offenses:

> "A defendant's constitutional right to have the jury determine every material issue presented includes the obligation of a trial court to instruct

> the jury on the general principles of law relevant to the issues raised by the evidence. [Citations.] Thus, a trial court must give '"'instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offenses were present [citation], but not when there is no evidence that the offense was less than that charged.'"' [Citation.] 'As our prior decisions explain, the existence of "any evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration by the jury." [Citations.] "Substantial evidence" in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]'" that the lesser offense, but not the greater, was committed.' [Citation.]"

As mentioned above, both imperfect self-defense and imperfect defense of another require evidence of imminent danger of death or great bodily injury. Here, the evidence cited by appellant shows neither danger of death or great bodily injury nor that any such danger was imminent. Viewed most favorably to appellant, the evidence shows only that hallucinatory "voices" told appellant he "had" to kill Ramos because she "was messing with the family." Even if we accept appellant's alleged delusional beliefs as being proved, they provide no evidence (1) that Ramos intended to cause death or great bodily harm to any family member or (2) that any such intent was in danger of being acted upon imminently. Although this evidence, if believed, certainly provides evidence of motive, it provides absolutely no evidence of legal mitigation in terms of the mental state required for murder. Appellant's contention to the contrary is meritless and we reject it.

B. The One-year Prison Prior

Based upon appellant's single prior conviction for robbery in 2000, the trial court imposed both a consecutive five-year term pursuant to section 667, subdivision (a), and a one-year term pursuant to section 667.5, subdivision (b). Appellant contends, and the People agree, that the one-year term must be stricken because both enhancements cannot be imposed for a single conviction. We agree. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1153.) Accordingly, the additional one-year term imposed pursuant to section 667.5, subdivision (b) is stricken. (*Ibid.*)

C. The Domestic Violence Fund Fine

The trial court imposed a $400 domestic violence fund fine pursuant to section 1203.097. Appellant contends, and the People agree, that such a fine can be imposed only when a defendant is granted probation. We agree. (§ 1203.097, subd. (a)(5); see *In re Wagner* (2005) 127 Cal.App.4th 138, 147.) Accordingly, the $400 fine imposed by the trial court is stricken.

DISPOSITION

The one-year enhancement imposed pursuant to section 667.5, subdivision (b) and the $400 fine imposed pursuant to section 1203.097, subdivision (a)(5) are both stricken. In all other respects, the judgment is affirmed.

SORTINO, J.*

We concur:

RUBIN, Acting P. J.

FLIER, 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.