Filed 2/22/12 P. v. Fay CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. IVAN GLEN FAY, Defendant and Appellant.	B232102 (Los Angeles County Super. Ct. No. YA077876)

APPEAL from a judgment of the Superior Court of Los Angeles County. Eric C. Taylor, Judge. Affirmed.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Ivan Glen Fay appeals from the judgment entered upon his conviction by jury of first degree murder (Pen. Code, § 187, subd. (a)).[1] The jury found to be true the firearm use allegations within the meaning of section 12022.53, subdivisions (b), (c), and (d). The trial court sentenced appellant to an aggregate state prison term of 50 years to life. Appellant contends that the trial court erred in refusing his request for an instruction on the habitation defense in accordance with CALCRIM No. 506.

We affirm.

FACTUAL BACKGROUND

The prosecution's evidence

The roommates

On April 23, 2010, Michael Worth (Worth) lived in a house that he rented on Ogram Avenue, in Torrance (the house). Appellant and Chris Chorpening (Chorpening) rented rooms in the house from Worth. Appellant's room was in the front, left side of the house and Chorpening's was in the front, right side of the house, separated from appellant's room by a hallway. Each of the three roommates had his own room, with a door that locked.

Appellant and Chorpening were both disabled and unemployed. Chorpening tried to make money by working on cars with tools lent to him by appellant, in return for which Chorpening agreed to share the money he earned with appellant. Both appellant and Chorpening were large and overweight, Chorpening exceeding 300 pounds. Chorpening suffered regular migraine headaches.

Appellant and Chorpening did not like each other, often bickering and accusing each other of stealing the other's food. They also argued about Chorpening's failure to pay appellant as agreed for the use of appellant's tools. The arguments never became physical.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

The shooting

Between 7:30 and 8:30 p.m., on April 23, 2010, Chisa Dubrey (Dubrey) came to visit Worth. They watched television in his room. At 9:30 p.m., Dubrey decided to leave. Worth walked her to the door. On the way, Dubrey saw Chorpening screaming at appellant that appellant had been getting on his nerves for a long time, and Chorpening was sick of him. Appellant was sitting in the living room and making a mocking gesture at Chorpening. Dubrey knew Chorpening to be a nice person and had never seen him so angry.

Shortly after midnight, appellant telephoned 911 from Alondra Park, a two or three minute car ride from the house, and reported shooting his roommate. Police officers responded to the park and found appellant. They asked him if he had a gun and had hurt anyone. Appellant said that he shot his roommate, who frightened him with threats of physical beatings. Appellant's statements were surreptitiously recorded.

Appellant did not appear to the officers to have been in a physical altercation. He did not seem nervous or excited, was not perspiring, his clothes were not disheveled, and he had no visible injury. He said his car was in the park parking lot and admitted that a gun inside belonged to him and that he had been drinking.

The investigation

Upon searching appellant's car, the officers found a black Colt Python .357-Magnum revolver. Four bullets and two empty bullet casings were in the gun's cylinder. They also found an ATM receipt in the car, reflecting that at 11:40 p.m., on April 23, 2010, someone unsuccessfully tried to withdraw $40 from appellant's account, from an ATM that was a six or seven minute drive from the house. The account had insufficient funds. A cane was also found in the car.

Officers James Walker and his partner, Phillip Salas responded to the Ogram Avenue residence. Inside Chorpening's 10 foot by 10 foot room, the officers found littered medication bottles and Chorpening's dead body, lying on the television remote and a newspaper, face-down on his bed, in a pool of blood. The television in his room was on. There were no weapons near his body. He had suffered two lethal gunshot

wounds, one to the head and one passing through his chest. The bullets had been fired from more than a foot and one-half away, with a trajectory consistent with the shots being fired at a person leaping from the chair. Chorpening also had superficial lacerations on his hands.

Next to one wall was a chair with a small round hole in the wall to its right. An expended bullet, that appeared to have been fired in a downward angle from the doorway, was found when some of the drywall was removed. That bullet and the bullet fragment removed from Chorpening's neck were fired from the gun found in appellant's car. The house, including Chorpening's room, showed no signs of a struggle.

Pursuant to a search warrant, near 4:30 a.m., Torrance Police Detective Ryan Galassi searched appellant's room. In a dresser drawer, he found a shoulder holster in which the gun recovered from appellant's car fit.

The defense's evidence

Appellant testified in his own defense that Chorpening told appellant that he did not like him. He accused appellant of taking his food and bothering him for money for use of appellant's tools. Months before his death, Chorpening threatened to "beat the shit out" of appellant if he did not "quit fucking with him over the money" and stop stealing his food. Chorpening's animosity toward appellant steadily increased with time.

Chorpening suffered from migraine headaches and was constantly taking medication for them, including morphine and barbiturates. He also took medication for anxiety and as a sleep aid. Chorpening was a regular and heavy alcohol drinker, which could increase the effects of his medications. An autopsy revealed that he had a high blood alcohol level and had morphine and other prescription drugs in his system.

Appellant gave his version of the shooting, as follows: On April 23 2010, when he woke up, he had a couple of shots of vodka. During the day, he drove to Alondra Park, where he drank two bottles of vodka with two other men. Near 4:00 p.m., appellant went to the bank, withdrew $40 to purchase more vodka, went home and continued drinking.

When appellant got home, Chorpening was in the kitchen, intoxicated, "wandering around" and drinking. He began a tirade in the living room, yelling at appellant, threatening to beat him and "hovering over" him, making fists. Appellant did not say a word, but remained in his chair until Chorpening went to his room. Appellant then went to his own room and locked the door, fearing that Chorpening would kill him. Chorpening came to appellant's door, yelling that he was going to beat up appellant. Frightened, appellant did not respond or open the door. Chorpening went away and returned a minute or so later. He left again and returned a couple of additional times, increasingly more angry, each time returning to the door, ranting and raving. The last time he returned to the door, he pounded on it with his fists, causing the top of the door to shake. He yelled to appellant that when appellant came out of his room, Chorpening was going to "beat the fuck out of [him]."

Appellant knew that Chorpening had been in the Air force and feared that he might have a knife or gun, though he had no knowledge that Chorpening had a weapon. After Chorpening came to appellant's door a fourth time, appellant took his .357-caliber handgun from its shoulder holster, left his room with his gun to tell Chorpening to leave him alone.

Appellant searched for Chorpening in the kitchen and living room. When he heard the television in Chorpening's room, he went there, walking passed the front door to the house. Appellant stood in the doorway to Chorpening's room with his gun at his side. Chorpening was sitting in a chair, saw appellant and leapt at him with clenched fists. Thinking Chorpening was going to attack and kill him, appellant fired his gun. Chorpening kept coming toward appellant, so appellant cocked and fired a second time. He claimed to have fired only to stop Chorpening from attacking him.

Appellant left Chorpening's room and went to his bank to withdraw $40 to flee, but found that he had insufficient funds. He therefore decided to turn himself in. He drove to Alondra Park, called 911 and said that he thought he had shot his roommate.

DISCUSSION

Background

During the jury instruction conference, defense counsel requested that the trial court instruct the jury on the defense of habitation in accordance with CALCRIM No. 506.[2] He argued that there was evidence that Chorpening was trying to break down appellant's door to get into his room. Appellant was therefore defending his living space. The prosecutor argued that the habitation defense was designed for situations "where you have somebody coming from outside the house to go into the house." The trial court indicated that it was tentatively intending to give that instruction but would revisit that issue the next day.

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[2] CALCRIM No. 506 provides: "The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter) if (he/she) (killed/attempted to kill) to defend (himself/herself) [or any other person] in the defendant's home. Such (a/an) [attempted] killing is justified, and therefore not unlawful, if: [¶] 1. The defendant reasonably believed that (he/she) was defending a home against <insert name of decedent>, who (intended to or tried to commit <insert forcible and atrocious crime>/ [or] violently[[,] [or] riotously[,]/ [or] tumultuously] tried to enter that home intending to commit an act of violence against someone inside); [¶] 2. The defendant reasonably believed that the danger was imminent; [¶] 3. The defendant reasonably believed that the use of deadly force was necessary to defend against the danger; [¶] AND 4. The defendant used no more force than was reasonably necessary to defend against the danger. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of violence to (himself/herself/ [or] someone else). Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, then the [attempted] killing was not justified. [¶] When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. [¶] [A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury/ <insert forcible and atrocious crime>) has passed. This is so even if safety could have been achieved by retreating.] [¶] The People have the burden of

When the subject was raised the next day, the prosecutor argued that virtually all of the cases involving the habitation defense arose from burglaries where people entered others' property. Here, he argued, you have two people who are roommates and thus entitled to be in the same property. Appellant was not defending his home, "he was in front of the victim's doorway." Defense counsel argued that individual rooms, including appellant's bedroom, could be a habitation and that appellant had a right to pursue Chorpening to defend against "four attacks on his door."

The trial court noted that appellant was not defending his home or habitation when he shot Chorpening at Chorpening's bedroom door, on the other side of the house. It refused to give CALCRIM No. 506, stating: "I think this [instruction] more specifically applies to entering into a dwelling, say, the decedent had kicked the door in and entered into that home, into that particular place, and the defendant armed himself at some point. But in this instance, banging on the door, going to the other person's room, standing on the threshold armed with a weapon, I don't think this instruction applies in this particular set of circumstances. It's just not the same thing." The trial court did instruct the jury on self-defense and imperfect self-defense in accordance with CALCRIM Nos. 505 and 571 and on first and second degree murder and voluntary manslaughter based on heat of passion.

Appellant filed a motion for new trial, arguing that the trial court erred in refusing to instruct the jury in accordance with CALCRIM No. 506. After substantial argument, the trial court denied the motion.

Contention

Appellant contends that the trial court improperly refused to instruct the jury on the defense of habitation in accordance with CALCRIM No. 506. He argues that without such an instruction "the jury was likely to believe that as long as the door to appellant's

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proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of [attempted] (murder/ [or] manslaughter)."

room was not breached, appellant was unjustified in undertaking to defend himself. [¶] In order to properly determine whether appellant was guilty of murder or had committed a justifiable homicide, the jury needed to understand that appellant had a right to defend his place of habitation from someone 'who manifestly intends or endeavors, in a violent, riotous or tumultuous manner,' to enter his place of habitation, in order to commit an act of violence against him." The jury was not informed of this right. This contention is meritless.

Duty to instruct

In criminal cases, "'"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This duty "'encompasses an obligation to instruct on defenses . . .'" (*People v. Lopez* (1992) 11 Cal.App.4th 1115, 1120) that are "supported by substantial evidence [and] that are not inconsistent with the defendant's theory of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047).

"[T]he existence of '*any* evidence, no matter how weak' will not justify instructions . . . , but such instructions are required whenever evidence . . . is 'substantial enough to merit consideration' by the jury." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) "'Substantial evidence' . . . is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]'" that the [defense] was [applicable]." (*Ibid.*) In making this assessment, the court is not to assess the credibility of witnesses, a task for the jury. (*Ibid.*)

The habitation defense

The habitation defense finds its statutory genesis in section 197, originally adopted in 1872 in substantially its current form, which states in part: "Homicide is also justifiable when committed by any person in any of the following cases: [¶] . . . [¶] 2. When committed in *defense of habitation*, property, or person, against one who

manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein. . . ." (Italics added.)

"Defense of habitation applies where the defendant uses reasonable force to exclude someone he or she reasonably believes is trespassing in, or about to trespass in, his or her home. However, the intentional use of deadly force merely to protect property is never reasonable. Accordingly, a homicide involving the *intentional* use of deadly force can never be justified by defense of habitation alone. The defendant must also show either self-defense or defense of others, i.e., that he or she reasonably believed the intruder intended to kill or inflict serious injury on someone in the home." (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1360 (*Curtis*). "Like traditional self-defense, . . . defense of habitation applies only if the defendant's belief that a trespass is occurring or about to occur is reasonable." (*Id.* at p. 1361.)

"'[T]he right of defending one's dwelling is in some sense superior to that of the defense of his person; for in the latter case it is frequently the duty of the assaulted to flee, if the fierceness of the assault will permit, while in the former a man assaulted in his dwelling is not obligated to retreat, but may stand his ground, defend his possession, and use such means as are absolutely necessary to repel the assailant from his house, even to the taking of life.'" (*People v. Hubbard* (1923) 64 Cal.App. 27, 36.)

Section 198.5 provides a presumption to aid in establishing the habitation defense. It states: "Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred." (§ 198.5.) The purpose of section 198.5 is "to permit residential occupants to defend themselves from intruders without fear of legal repercussions, to

give 'the benefit of the doubt in such cases to the resident. . . .'" (*People v. Owen* (1991) 226 Cal.App.3d 996, 1005.)

"For section 198.5 to apply, four elements must be met. There must be an unlawful and forcible entry into a residence; the entry must be by someone who is not a member of the family or the household; the residential occupant must have used 'deadly' force (as defined in § 198.5) against the victim within the residence; and finally, the residential occupant must have had knowledge of the unlawful and forcible entry." (*People v. Brown* (1992) 6 Cal.App.4th 1489, 1494–1495; *People v. Hardin* (2000) 85 Cal.App.4th 625, 633, fn. 5.) A defendant, however, "is not entitled to the benefit of this presumption [where] there [is] no actual entry." (*Curtis, supra,* 30 Cal.App.4th at p. 1362.)

Insufficient evidence to support habitation defense

Sections 197 and 198.5 raise a number of thorny questions, particularly as applied to the facts presented here. Is the defense of habitation applicable where it is asserted against a roommate? Does the requirement of section 198.5, that the victim must not be a family or household member for the presumption of reasonable fear to apply, apply to the defense of habitation itself? Is the term "habitation" in section 197 synonymous with the term "residence" in section 198.5? How do sections 197 and 198.5 interplay in the analysis of the defense of habitation?

While we have serious doubts whether the defense of habitation is applicable to a domestic dispute between cohabitants, even where the cohabitants have separate rooms with doors that lock, we need not resolve that question. For here, there is no evidence that appellant was defending his habitation when he went to Chorpening's room and shot him in cold blood.

Appellant and Chorpening had a lengthy history of disputes. They regularly argued, accusing each other of stealing the other's food and bickering about Chorpening's failure to pay appellant for the use of appellant's tools. Chorpening told appellant that he did not like him and threatened to beat him up. Nonetheless, before

Chorpenings's shooting, he and appellant never had a physical altercation that would have given appellant reason to fear that Chorpening would carry through his threats.

On the evening of Chorpening's shooting, he was screaming at appellant and making threats similar to those he had made multiple times in the past; that he was going to beat up appellant. Appellant sat in a chair in the living room, without saying a word, but making a mocking gesture. Such conduct belies appellant's claim that he feared for his life.

When Chorpening finally went to his room, appellant went to his room and locked the door, claiming that he feared Chorpening. Chorpening went to appellant's door, banged on it and yelled that he was going to beat him up. Appellant did not respond or open the door. Chorpening went away and returned four times, each time his anger increasing. The fourth time Chorpening came to appellant's door he pounded on it with his fists, causing the top of the door to shake. However, he did not enter appellant's room and said, not that he was going to break down the door and come into appellant's room, but that "*whenever [appellant] came out he was going to beat [him] up.*" (Italics added.)

Chorpening eventually left appellant's door and returned to his room, where he sat in a chair facing a television that was on and smoked a cigarette. When appellant believed Chorpening was no longer outside his door, appellant left his room, armed with a gun, and hunted for Chorpening in the living room and kitchen, claiming that he did so to avoid being surprise-attacked. Appellant then walked past the front door to Chorpening's room where he heard the television on. He stood in the open doorway, and, according to appellant, when Chorpening leaped at him appellant twice fired his gun at him.

When appellant shot Chorpening, he was not defending his room. He was on the other side of the house in the doorway to Chorpening's room. Appellant had no knowledge that Chorpening was armed or was doing anything more than making the same idol threats he had made in the past. There was no evidence that Chorpening was going to enter appellant's room, rather than banging on the door to induce appellant to come out. When appellant arrived at Chorpening's room with its open door, Chorpening

gave no indication that he was readying himself to return to appellant's room. Chorpening was sitting on a chair in front of a television smoking a cigarette.

Appellant argues that when defending his habitation, unlike in ordinary self-defense, he had the right to pursue Chorpening until he had secured himself from danger. The cases he cites in support of this proposition are inapposite. In *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22 (*Hatchett*), the defendant testified that the decedent was at her home in a drunken condition and that they had been quarreling. The defendant went into the kitchen for several minutes and upon her return saw decedent with a "gun" in his hand. He pointed the gun at her and said, "'I am going to shoot you tonight.'" The defendant "'ducked'" and ran into him, and the gun went off. The defendant knocked the gun to the floor and a struggle ensued in which the defendant picked up the gun and started toward the rear door. Remembering that it was locked, she turned and saw the decedent coming toward her with a metal object in his hand. She pulled the trigger of the weapon, killing him. Decedent had a bad reputation in the community for peace and quietness.

In this context, *Hatchett* found the instruction that, "a person in the exercise of her right of self defense not only has a right to stand her ground and defend herself when attacked, but she may pursue her adversary until she has secured herself from danger," was a correct statement of the law. (*Hatchett, supra,* 56 Cal.App.2d at p. 22.) However, the statement in the instruction that the defendant could "pursue her adversary" was inapplicable to the facts, as *Hatchett* did not discuss the habitation defense, did not discuss section 197, subdivision 2, and was presented with no evidence that the defendant in that case pursued the decedent. She shot him as he aggressively approached her with a metal object.

People v. Collins (1961) 189 Cal.App.2d 575, 588 (*Collins*), also relied upon by appellant for the proposition that he could pursue Chorpening to Chorpening's room, is similarly inapposite. In that case, the defendant was found guilty of voluntary manslaughter for killing Raymond Whiteside. On appeal, the defendant contended that there was insufficient evidence of manslaughter and that the evidence established

justifiable homicide under section 197. The defendant had had sexual relations with Whiteside on two prior occasions. On the occasion of the death, Whiteside went to the defendant's room, where defendant wanted to sodomize him. Whiteside placed defendant in a scissors wrestling hold with his legs around the defendant's waist. The defendant was afraid of Whiteside and did not want to be sodomized, so he hit Whiteside, who was a much bigger man, with a bottle several times until Whiteside's legs released their grip on defendant. The blows to Whiteside killed him.

The Court of Appeal, in concluding that justifiable homicide was established as a matter of law, stated: "A person who without fault on his part is exposed to a sudden felonious attack need not retreat. In the exercise of his right of self-defense he may stand his ground and defend himself by the use of all force and means apparently necessary and which would appear to be necessary to a reasonable person in the same situation and with the same knowledge; and *he may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary*. This rule applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene." (*Collins, supra,* 189 Cal.App.2d, at p. 588, italics added.) The italicized language is mere dictum, as there was no evidence in this case that the defendant, who was acting in self-defense, pursued her attacker. Furthermore, *Collins* did not discuss the case as a habitation defense case, but merely a self-defense case.

To whatever extent a person defending his home may pursue an intruder in the context of the traditional defense of habitation,[3] the same may not be said where the person invading the private space of another is a cohabitant. Where a cohabitant forces his or her way into the private space of another cohabitant, the invading cohabitant cannot be expelled from the residence because the intruder is entitled to be there. Were the rule otherwise, cohabitants could declare open season on an intruding cohabitant who

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[3] For example, we have little doubt that a person asleep in his bedroom, who hears someone break into his house through a window in another room, can pursue the intruder from room to room until the intruder is expelled from the residence or the danger of having an intruder in the home is otherwise eliminated.

attempts to enter the other's private space, as the only way to eliminate the danger would be to injure or kill the invader. The language on which appellant relies did not justify his hunting Chorpening down in Chorpening's room and shooting him, particularly when he did not at that point present a danger to appellant, that was any different than the danger he had presented by his threats and outbursts in the past.

This domestic violence case is dramatically different from the usual circumstances where the defense of habitation is applied; where someone other than a member of the defendant's household is forcing or has forced his or her way into the defendant's residence. (See *People v. Brown, supra,* 6 Cal.App.4th at p. 1495 [section 198.5 presumption "was intended to give residential occupants additional protection in situations where they are confronted in their own homes by unlawful intruders such as burglars"]; *People v. Owen, supra,* 226 Cal.App.3d at p. 1005.)

Harmless error

Even if the trial court erred in failing to instruct on defense of habitation, that instruction was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The trial court instructed the jury on self-defense and imperfect self-defense with CALCRIM Nos. 505 and 571. Having convicted appellant of first degree murder, the jury rejected appellant's testimony. It rejected that he was acting in self-defense. "[A] homicide involving the *intentional* use of deadly force can never be justified by defense of habitation alone. The defendant must also show either self-defense or defense of others. . . ." (*Curtis, supra,* 30 Cal.App.4th at p. 1360.) There was no evidence that appellant was defending his habitation from Chorpening at the time that he shot Chorpening in Chorpening's room. Appellant testified that he went to that room only to tell Chorpening to leave him alone.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD