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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL PAUL LEMASTER, Defendant and Appellant.	B272489 (Los Angeles County Super. Ct. No. TA137493)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant appeals from a conviction after a jury trial on one count of assault by means of force likely to produce great bodily injury. As his sole contention on appeal, Defendant argues the court improperly instructed the jury that a person does not have the right to self-defense if he or she provokes a fight with the intent to create an excuse to use force. Defendant maintains there was insufficient evidence that he provoked the fight with the requisite intent. Because there was evidence that Defendant continued to beat the victim after the victim was immobilized and incapable of inflicting injury, we conclude Defendant has failed to establish prejudicial error. We affirm.

FACTS AND PROCEDURAL BACKGROUND

A. *Prosecution's Evidence*

At about 8:15 p.m. on June 18, 2015, James Sheldon and his wife were driving in the vicinity of Harbor UCLA Medical Center when they witnessed Defendant kicking another man in the head. The victim was curled up on the ground and not moving. Sheldon continued driving for about half of a block and temporarily lost sight of the incident. He made a U-turn and drove back to the scene, where he observed Defendant still kicking the prostrate man in the head. The victim still was not moving.

Sheldon pulled over to the side of the road and called 911. While Sheldon spoke with the police, Defendant briefly stopped the assault. Defendant raised his arms, gestured toward the people sitting against a nearby wall, then returned to kicking the man. He was still kicking the victim when police arrived. Throughout the entire incident, Sheldon did not observe the man on the ground make any voluntary movements.

Stephen Coniglio was driving in the same vicinity when he observed a man lying motionless on the ground. The man appeared to be either unconscious or dead. Just beyond the man, Coniglio saw Defendant standing in an aggressive posture over two people who were sitting cross-legged on the ground. To confirm what he had seen, Coniglio made a U-turn and headed back toward the scene. He parked about 125 feet from the incident and exited his vehicle. He saw Defendant kick the man on the ground in either the head or chest about three times. Upon calling 911, Coniglio immediately heard police sirens and saw Defendant hurry into a nearby wheelchair. He approached the police when they arrived and identified Defendant as the assailant.

Corynn Barfield also witnessed the altercation. While she waited in her car at a stop light, she noticed Defendant across the street kicking a man in the head. The man was lying on the ground motionless and appeared to be unconscious. Defendant continued to beat the man for approximately one minute while Barfield waited for the traffic light to change. Once the light turned green, she pulled into a gas station and called 911.

Deputy Nathan Port regularly patrolled the area where the incident occurred. He arrived at the scene as paramedics were treating a man lying on the ground. The man appeared to be unconscious and he had blood on his face. Deputy Port arrested Defendant and transported him to the sheriff's station. Defendant was "belligerent" and uncooperative during the booking process.

Paramedics transported the victim, later identified as Adam Robertson, to Harbor UCLA Medical Center, where he was treated by Dr. Jennifer Smith, the on-call trauma surgeon. Her examination, including a CAT scan, showed Robertson had suffered head trauma, bleeding in and around the brain, a skull

fracture, a nasal bone fracture, and a laceration on his eye. Dr. Smith determined the injuries were caused by "blunt force trauma," consistent with being kicked in the head. Robertson's blood-alcohol level at the time was 0.386 percent, meaning he was extremely intoxicated.

B. *Defense Evidence*

Defendant testified that, on the evening of the incident, he encountered Robertson outside a liquor store near Harbor UCLA Medical Center. Robertson had asked Defendant to buy him alcohol, but Defendant refused. Robertson then offered Defendant some EBT cards to make the purchase, at which point two girls sitting against a nearby wall complained that the cards belonged to them.[1] Defendant asked Robertson to return the cards. Robertson told him to mind his own business. Defendant felt the situation had turned "ridiculous," and began to leave in his wheelchair. Robertson verbally accosted Defendant, spit on him, and "socked" him in the back of the head as he was leaving.

Defendant testified that Robertson struck him a second time, but Defendant managed to grab Robertson's arm and pull him to the ground. They wrestled on the ground, until Defendant was able to get to his feet. Defendant then retrieved an EBT card from the ground, and another from Robertson's back pocket, and returned them to the girls. He returned to his wheelchair, but Robertson grabbed him by the leg and bit him. Defendant panicked and started kicking Robertson, at least four or five times, until Robertson released Defendant. Police arrived shortly thereafter and arrested Defendant.

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[1] The Electronic Benefit Transfer (EBT) Project is the system used in California for the delivery, redemption, and reconciliation of issued public assistance benefits. (See http://www.ebtproject.ca.gov.)

On June 25, 2015, Defendant received treatment for leg pain. The treating physician testified that Defendant reported he had been bitten twice (once in the thigh and once in the lower left leg) during an "encounter" six days earlier.

C. *Prosecution's Rebuttal Evidence*

Deputy Enrique Gin responded to the dispatch regarding the assault. When he arrived, Defendant was detained in the back seat of a patrol car. When Deputy Gin asked Defendant what happened, Defendant responded, "He steals from transients so I fucked him up." Defendant later said Robertson had punched him, so he assaulted Robertson back.

D. *Verdict and Sentence*

The jury returned a verdict finding Defendant guilty of assault by means of force likely to produce great bodily injury, and that Defendant personally inflicted great bodily injury upon Robertson. The court sentenced Defendant to a term of seven years in state prison for the underlying offense and great bodily injury enhancement.

DISCUSSION

As his sole contention on appeal, Defendant argues the trial court prejudicially erred when it gave the jury the following instruction from CALCRIM No. 3472: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." While Defendant concedes CALCRIM No. 3472 is a correct statement of the law (see *People v. Enraca* (2012) 53 Cal.4th 735, 761-762), he argues the court should not have given the instruction because it was irrelevant to issues raised by the evidence and may have had the effect of confusing the jury from making findings on relevant issues. (See *People v. Saddler* (1979) 24 Cal.3d 671, 681; *People v. Barker* (2001) 91 Cal.App.4th 1166, 1172.) Specifically, Defendant argues "there was no evidence presented at trial that

[Defendant] provoked a fight for the purpose of creating an excuse to use force."

We need not linger on the question of error. Even if Defendant is correct and the challenged instruction was improperly given, there was nevertheless sufficient evidence to reject Defendant's self-defense claim on a different factually valid theory. On this record, we conclude Defendant has failed to establish prejudicial error.

When an appellant asserts instructional error, the nature of our prejudicial error analysis "depends on whether a jury has been presented with a legally invalid or a factually invalid theory." (*People v. Perez* (2005) 35 Cal.4th 1219, 1233.) "When one of the theories presented to a jury is legally inadequate, such as a theory which ' "fails to come within the statutory definition of the crime" ' [citations], the jury cannot reasonably be expected to divine its legal inadequacy. The jury may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime. In such circumstances, reversal generally is required unless 'it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory.' " (*Ibid.*)

"In contrast, when one of the theories presented to a jury is factually inadequate, such as a theory that, while legally correct, has no application to the facts of the case, we apply a different standard. [Citation.] In that instance, we must assess the entire record, 'including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict.' [Citation.] We will affirm 'unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory.' " (*People v. Perez, supra,*

35 Cal.4th at p. 1233; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129 ["If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground."].)[2]

In the instant appeal, Defendant asserts the challenged instruction, CALCRIM No. 3472, presented a factually invalid theory to the jury—that is, a theory which was legally correct, but had no application to the facts of the case. However, the jury was presented with a second factual theory for rejecting Defendant's claim of self defense—one which we conclude was entirely applicable to the evidence presented. In addition to the

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[2] In *People v. Guiton*, our Supreme Court explained the underlying rationale for the harmless error standard applicable to factually inadequate theories: "[A]nalyzing evidence, and determining the facts, are functions peculiarly within the expertise of juries. Although appellate courts review the sufficiency of the evidence supporting verdicts, such review is narrowly prescribed. '[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence–that is, evidence which is reasonable, credible, and of solid value–such that a *reasonable trier of fact* could find the defendant guilty beyond a reasonable doubt.' [Citations.] [¶] This standard means that when an appellate court determines that the evidence was insufficient, it has concluded that no 'reasonable' trier of fact could have found the defendant guilty. When this occurs, an appellate court, or the trial court in the first instance, must intervene. In analyzing the prejudicial effect of error, however, an appellate court does not *assume* an unreasonable jury. Such an assumption would make it virtually impossible to ever find error harmless. *An appellate court necessarily operates on the assumption that the jury has acted reasonably, unless the record indicates otherwise*." (*People v. Guiton, supra,* 4 Cal.4th at pp. 1126-1127, third italics added.)

challenged instruction, the court instructed the jury with CALCRIM No. 3474, which states: "The right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends."

Here, testimony by three eye-witnesses supported a finding that Defendant continued to use force against Robertson after Robertson appeared incapable of inflicting injury. Sheldon testified that when he initially drove by the scene, he observed Defendant kicking Robertson in the head while Robertson lay curled up on the ground and not moving. Sheldon continued down the road and made a U-turn, yet still found Defendant kicking the prostrate Robertson in the head when he returned to the scene. Coniglio likewise testified that he witnessed Defendant kicking Robertson, who "wasn't moving and . . . appeared to be either unconscious or dead." Like Sheldon, Coniglio took the time to make a U-turn and return to the scene, where he found Defendant still kicking Robertson in the head or chest. Barfield gave a similar account of witnessing Defendant beating a motionless Robertson for approximately a full minute while she waited at a traffic light. Based on this witness testimony, it is no stretch to conclude that the jury applied the law as stated in CALCRIM No. 3474 to find Defendant continued to inflict great bodily injury upon Robertson, even after his asserted right to use force in self-defense had lapsed.

The prosecutor's closing argument provides what is perhaps the best indication that the jury eschewed the theory presented by CALCRIM No. 3472, and applied the law as stated in CALCRIM No. 3474. The prosecutor neither mentioned CALCRIM No. 3472 in her closing argument, nor suggested that Defendant provoked the altercation for the purpose of using force

against Robertson. She did, however, invoke CALCRIM No. 3474 numerous times, including in the following passage: "Did the victim throw the first punch? Very well could have. Doesn't matter in this case. What matters in this case is any right to self-defense that the Defendant had ended as soon as Mr. Robertson was no longer a threat. It ends. But the assault didn't end. It went on and on. . . . [I]n the jury room count 60 seconds. See how long that assault occurred then you're going to understand why there is brain injury." Indeed, of the four instructions given pertaining to self-defense, the only instruction the prosecutor read to the jury in her closing argument was CALCRIM No. 3474.[3] On this record, we cannot say Defendant has " 'affirmatively demonstrate[d] a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory.' " (*People v. Perez, supra,* 35 Cal.4th at p. 1233; *People v. Guiton, supra,* 4 Cal.4th at p. 1129.) The asserted error, if there was one, was harmless.

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[3] In addition to CALCRIM Nos. 3472 and 3474, the court also gave the jury CALCRIM No. 3470, regarding the right to self-defense, and CALCRIM No. 3471, regarding the right to self-defense when a person engages in mutual combat. The parties discussed the self-defense jury instructions with the court in advance of instructing the jury. Defendant did not object to the court giving CALCRIM No. 3472.

DISPOSITION

The judgment is affirmed.

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GOSWAMI, 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.