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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. RUDY PUGA, Defendant and Appellant.	2d Crim. No. B233473 (Super. Ct. No. 2009030906) (Ventura County)

Appellant Rudy Puga appeals the judgment following his conviction for attempted murder (Pen. Code, § 664/187), and shooting at an occupied motor vehicle (§ 246).[1] The jury found an allegation to be true that he personally discharged a firearm in the attempted murder. (§ 12022.53, subd. (c).)[2] Appellant was sentenced to 27 years in prison, consisting of concurrent terms of 7 and 5 years for the attempted murder and shooting at an occupied motor vehicle, respectively, plus a consecutive term of 20 years for personal discharge of a firearm. He contends the trial court erred by failing to instruct the jury, sua sponte, on the lesser included offense of attempted

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

[2] The 17-year-old appellant was deemed 16 years of age or older pursuant to Welfare and Institutions Code section 707, subdivision (d)(1).

voluntary manslaughter based on the theory of imperfect defense of another. We affirm.

FACTS

At approximately 3:00 p.m. on August 22, 2009, Daniel Rodriguez was at the home of his girlfriend Liliana Puga to attend a barbeque with the Puga family. He lived there part time, and had a child with Liliana.[3] Ivan Puga and his girlfriend were also present at the Puga house. Appellant was not there. Ivan is appellant and Liliana's brother.

Ivan and Liliana, who had been drinking alcohol, were playing a game called "body blows" where each person took turns hitting the other. At some point during the game, Liliana called out to Daniel for help. Ivan, Daniel, Liliana, Liliana's sister Elizabeth, and Ivan's girlfriend all went outside. After a verbal argument, Ivan and Daniel began to punch each other and Daniel wrestled Ivan to the ground. When Ivan's girlfriend started to kick Daniel, Daniel let Ivan up and walked away. Shortly thereafter, Daniel decided to leave.

Daniel had left his car keys in the Puga house. He decided not to go into the house to retrieve them. Instead, he made a telephone call to arrange to be picked up by his brother Jesse. Driving his mother's Tahoe "SUV," and accompanied by his girlfriend Brenda Martinez, Jesse drove to the Puga house. They picked up Daniel, and drove off. A few minutes later, Jesse decided to turn around and drive back to the Puga house to talk to Maria Ceja (appellant's mother), Liliana and Ivan. Jesse was concerned about Daniel's car as well as his own car which he previously had left at the Puga house in inoperable condition. When Jesse arrived, members of the Puga family, including appellant who had come home, were standing outside. Jesse told Ceja he just wanted to get Daniel's car and arrange to have his car towed away.

[3] For clarity, we refer to Rudy Puga as "appellant" and sometimes refer to other Puga family members as well as Rodriguez family members by their first names.

An intoxicated Ivan started yelling at Jesse, and a fight began between Jesse, Ivan, and Daniel. Appellant joined in the fight by attacking Jesse allegedly with a screwdriver and telling Daniel that Daniel "was going to get blasted." Someone called the police and, upon hearing that the police were on the way, Jesse, Daniel and appellant ran off. The police arrived and interviewed Liliana and Martinez. Liliana and Martinez began fighting with each other while the police were there. The police made no arrests but ordered Martinez to drive away in the Tahoe SUV.

Martinez found Daniel and Jesse a few minutes later. They decided to return to the Puga house one more time to get Daniel's and Jesse's cars which they feared might be damaged by the Pugas. They stopped on the way to pick up Daniel's and Jesse's mother, father and uncle to help calm the situation.

When the five individuals arrived at the Puga house. Jesse jumped out of the Tahoe and ran towards Ivan Puga who appeared to be vandalizing Jesse's car. Before Jesse reached Ivan, appellant came out of the house with a gun and fired six to eight shots at Jesse. Jesse ran back to the Tahoe as shots were being fired. Neither Jesse nor anyone inside the Tahoe was wounded but multiple bullets hit the vehicle itself. Jesse yelled for his mother to drive away. Although two of the Tahoe's tires had been flattened by bullets, she was able to get away and call the police.

Appellant was identified as the shooter by Brenda, Jesse and Daniel. The identification by Daniel was based on the shooter's clothing which was otherwise identified as the clothing worn by appellant at the time of the shooting. None of the Pugas identified appellant as the shooter and the Rodriguezes' father was unable to make any identification. Appellant presented alibi evidence consisting of testimony from a cousin that he was at the cousin's house at the time of the shooting.

Appellant was charged with attempted murder of Jesse, shooting at an occupied motor vehicle, and assault with a deadly weapon. (§ 245, subd. (a)(1).) The assault charge was based on the earlier fight between appellant and Jesse involving appellant's alleged use of a screwdriver. Appellant was acquitted of the assault charge.

DISCUSSION

Appellant contends the court erred in failing to instruct the jury, sua sponte, on attempted voluntary manslaughter based on the doctrine of imperfect defense of another. (See CALCRIM No. 604.) He argues that there was substantial evidence that appellant repeatedly fired a gun at Jesse in the actual, if unreasonable, belief that he was defending Ivan Puga from imminent death or great bodily injury at the hands of Jesse. We disagree.

Even in the absence of a request, the trial court must instruct on the general principles of law 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.) The trial court must give instructions on lesser included offenses whenever there is substantial evidence that all the elements of the lesser, but not the greater, offense was committed. (*Ibid*.) Substantial evidence is not any evidence, no matter how weak, but evidence from which a reasonable jury could find the existence of the facts underlying the instruction and that the defendant was guilty only of the lesser offense. (*People v. Moye* (2009) 47 Cal.4th 537, 553.) A trial court has no sua sponte duty to instruct on defenses which are not inconsistent with the defendant's theory of the case, but has such a duty to instruct on lesser included offenses even if inconsistent with the defendant's trial theories and tactics provided the instruction is supported by substantial evidence. (*People v. Breverman*, *supra*, at p. 159; *People v. Moye*, *supra*, at p. 541.) In any event, the trial court is not required to instruct on theories the jury could not reasonably find to exist. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

California recognizes the doctrine of imperfect defense of another. (*People v. Randle* (2005) 35 Cal.4th 987, 994–1001, overruled on a different point in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) Under the doctrine, when a defendant kills or, as in this case attempts to kill, a person in the actual but unreasonable belief the victim was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and can be found guilty of no crime greater than

attempted voluntary manslaughter. (*People v. Randle*, *supra*, at pp. 996–997.) As with imperfect self-defense, imperfect defense of another requires that the defendant must have had an *actual* belief in the need to defend another. (*Id.* at pp. 994, 997.) """[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with*." . . .' [Citation.]" (*In re Christian S.* (1994) 7 Cal.4th 768, 783, italics in original.)

As we have stated, although appellant relied on an alibi defense, he would still be entitled to a jury instruction on the lesser included offense of imperfect self-defense if there was substantial evidence supporting the instruction. Here, we conclude that there was no substantial evidence that appellant actually believed Ivan was in imminent danger of death or great bodily injury, or that appellant acted for the purpose of defending Ivan. Although there had been two prior fights on the same day, the fighting earlier in the day was limited to shoving, wrestling and the use of fists. When Jesse and the other people in the Tahoe arrived at the Puga house for the third time, appellant opened fire as soon as he saw Jesse get out of the vehicle, before Jesse had reached Ivan standing near the Rodriguez cars, and after Ivan had started to run to safety. There is no evidence that appellant believed either Ivan or Jesse were armed with a weapon and, in fact, they were not. There is also no eyewitness testimony supporting the conclusion that Jesse may have posed a deadly threat to Ivan.

The only reasonable conclusion supported by evidence is that appellant fired shots in retaliation for the fighting that occurred earlier in the day, not because he was in fear for Ivan's life. The evidence shows that he simply took the matter into his own hands by firing a volley of shots as soon as Jesse and the others arrived at the Puga house.

Although appellant's failure to testify at trial was within his rights, the necessity for evidence of a state of mind consistent with imperfect defense of another remains. (See *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1262 [self-defense and unreasonable self-defense].) Such evidence might consist of out-of-court

statements by appellant, or witness testimony indicating that he was frightened or rushing to the aid of the victim. (*People v. Oropeza*, *supra*, 151 Cal.App.4th at pp. 81-82.) Here, there was no such evidence. We are also mindful that judicial authority may require an instruction on a lesser included offense even if such a theory of the case was not pursued by the defendant. (See *People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) But, a duty to instruct must arise from the evidence, not speculation.

In support of his argument on appeal, appellant asserts that there was evidence of a history of "problems" between the two families. Our review of the record does not reveal any such evidence. There was evidence that Jesse was an imposing figure who helped Daniel settle disputes, but no evidence of prior altercations or disputes between the Puga and Rodriguez families. Also, contrary to appellant's argument, evidence that various Puga family members were fearful because of the events earlier in the day does not constitute substantial evidence that Ivan was in imminent peril from Jesse at the time of the shooting.

The trial court instructed the jury on perfect defense of another, and appellant argues that, if there was sufficient evidence for that instruction, there was necessarily sufficient evidence of imperfect defense of another instruction. Appellant cites a Bench Note to CALCRIM No. 604 (2010 rev.) stating that some courts have stated that, when a perfect self-defense or defense of another instruction is given, the trial court should also give the imperfect version of the instruction. Other courts, however, have held that a perfect defense of another instruction does not necessarily require a parallel imperfect defense of another instruction. (See *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 833–834; *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1273.)

In this case, the record indicates that the perfect defense of another instruction was given for purposes of the assault with a deadly weapon charge arising from the fight earlier in the day. Perfect defense of another was argued at trial regarding the assault charge only. Neither counsel nor the court indicated in any

manner that the defense of another doctrine or instruction applied to the shooting incident.

Appellant did not present evidence that he acted in defense of his brother and the record discloses a long day of physical conflict among members of the Puga family and Daniel. The day ended in appellant's gunfire in response to the likelihood of another conflict involving Daniel's brother Jesse. There is no evidence that anyone other than appellant was armed with a weapon and no direct evidence that appellant believed he needed to intercede in the conflict. To the contrary, evidence shows that appellant was not even present during much of the day. The trial court had no duty to instruct on either reasonable or unreasonable defense of another.

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Charles W. Campbell, Judge

Superior Court County of Ventura

Mark R. Feeser for Defendant and Appellant.

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