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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JACOB ROCHA, Defendant and Appellant.	B234311 (Los Angeles County Super. Ct. No. LA064951)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth A. Lippitt, Judge. Affirmed as modified.

Kevin D. Sheehy, 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, Michael R. Johnsen and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

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Jacob Rocha appeals from the judgment entered upon his conviction by jury of attempted murder (Pen. Code, §§ 664, 187, subd. (a)).[1] The jury found to be true the allegation that appellant personally used a firearm within the meaning of section 12022.53, subdivisions (b), (c) and (d). The trial court sentenced appellant to an aggregate state prison term of 34 years to life, consisting of the upper term of nine years for his conviction, plus a consecutive 25 years to life for the firearm enhancement. The trial court awarded appellant 374 days of actual presentence custody credit plus 56 days of conduct credit. Appellant contends that (1) the trial court committed reversible state law and federal constitutional error by failing to instruct sua sponte on attempted voluntary manslaughter as a lesser included offense of attempted murder, and (2) the trial court did not award the proper number of presentence credits.

We modify appellant's presentence credits and otherwise affirm.

FACTUAL BACKGROUND

The prosecution's evidence

The shooting

On April 25, 2010, at approximately 11:40 p.m., uniformed Los Angeles Police Officers Lilia Raigoza and Billy Joe, in a marked patrol car, slowed down as they approached a red traffic light at the intersection of Saticoy Street and Lankershim Boulevard. The officers saw three males, later identified as appellant, Daniel Ayala (Ayala) and Jose Flores (Flores), standing near a dark Honda parked on Saticoy, at an angle, on the opposite side of the intersection.

Officer Raigoza first thought there had been a collision. But the officers then heard three to five gunshots. From across the street, they heard one or more additional gunshots and saw muzzle flashes from a gun appellant was holding in his hand, extended and pointed at someone, later identified as Julio Avalos (Avalos). Avalos fell to the

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

ground in the driveway of a 7-Eleven, 10 to 15 feet from appellant.[2] Officer Joe did not see Ayala or Flores holding anything in their hands. Appellant, Ayala and Flores quickly returned to the Honda, got inside, appellant in the rear passenger seat, Flores in the driver's seat and Ayala in the front passenger seat, and drove away.

Officer Raigoza activated the patrol car's overhead lights and sirens and pursued the Honda. At one point, the Honda pulled over and stopped. Officer Raigoza gave commands in English and Spanish for the driver to turn off the car and put his hands up where she could see them. The Honda then suddenly accelerated. Finally, the Honda was stopped, appellant got out of the rear passenger seat, and the three occupants were apprehended. The right front and rear windows were wide open, and the driver's window was slightly open. Officer Raigoza did not see anything tossed from the Honda's windows during the pursuit, but it was dark and difficult to see.

The investigation

No weapon was found in the Honda or at the scene of the shooting. However, while searching along the vehicle-chase route, officers found within a few houses of each other, an empty semiautomatic .40-caliber handgun (the handgun), a .40-caliber gun magazine, and a fully loaded, but not operational, 7.62-Nagant-caliber revolver (the revolver), with a piece missing.

At the scene of the shooting, officers found nine .40-caliber bullet casings, all by the same manufacturer, and two bullet fragments. Forensic analysis determined that the nine casings were fired from the handgun. The bullet fragments were too damaged to determine if they were also fired from that gun, though they matched the caliber of the handgun. No latent fingerprints were found on the casings, the handgun, the magazine or the revolver. The revolver was not operational.

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[2] As a result of the shooting, Avalos was shot in the left front part of his head and was hospitalized for over four months, undergoing three brain surgeries, as well as sustaining other bullet wounds and bruises on his back and hip. At the time of trial, he was still suffering loss of memory and movement of his upper and lower extremities. He had no memory of the incident or of being hospitalized.

The defense's evidence

Appellant testified on his own behalf that he had a prior conviction for selling "speed." On the night of the shooting, he got a ride to a party on Saticoy near Tujunga, where he was to meet a man called "Cocaine," who owed appellant $40 for a prior drug sale and wanted to buy more "speed." Appellant sold him another $40 worth of "speed" and was given the revolver as payment for the preexisting debt.

Appellant left the party, and outside obtained a ride from Flores and Ayala. Appellant did not know either of them. He got into the back seat and asked to be taken to an ATM at a nearby 7-Eleven. Flores stopped the car at the 7-Eleven, where "two guys [were] beating up on some other guy on the floor." Appellant testified that the assailants did not have any guns in their hands and were not beating the victim with a weapon or gun. However, he also testified that the two attackers had weapons in their hands and were kicking the victim as the victim was "trying to cover himself."

Ayala and appellant got out of the car, Flores remaining inside. Appellant screamed at the attackers, "Get out [*sic*] the street and leave him alone." The two turned and looked at appellant, who "took the revolver out of [his] sweater" and "put it in front of them so they could see [he] had it." Appellant just wanted to scare them away. Appellant then heard gunshots, which he thought were aimed at him, and ran back to the Honda. He did not know who was shooting and claimed that he never tried to fire the revolver. He did not see if Ayala had a gun. The two assailants ran across the 7-Eleven parking lot. Appellant was in the car when the gunshots ended. He told Flores to go, and Flores "started taking off."

Appellant heard sirens and became aware of the pursuit after the Honda first turned. During the chase, he threw the revolver out of his window because he had a prior conviction for a shotgun. He did not see Ayala toss anything out the window. Appellant never fired or touched any handgun that night.

Defense witness, Carlos Mier (Mier), testified that he was driving at the time of the shooting. From 20 feet away, he saw two males run out from the 7-Eleven and start hitting and kicking a third male, who was on the ground. Mier heard three or four shots,

but did not see where they came from. He did not see any firearm in the hands of the two assailants. As the shots were being fired, the two assailants ran.

DISCUSSION

I. Imperfect self-defense instruction

A. Background

Appellant's theory of the case was that when he arrived at the shooting scene, there were two other men beating Avalos and shots rang out. Appellant claimed that he did not do any shooting. Defense counsel did not request any instruction on reasonable or unreasonable self-defense. The jury was instructed on attempted murder and various firearm instructions.

B. Contention

Appellant contends that the trial court erred under state law and the federal Constitution in failing to instruct the jury sua sponte on the lesser included offense of attempted voluntary manslaughter based on unreasonable self-defense as a lesser included offense of attempted murder. This contention is without merit.

C. Duty to instruct

In criminal cases, even in the absence of a request, a trial court must instruct the jury on general principles of law applicable to the case. (*People v. Najera* (2008) 43 Cal.4th 1132, 1136; *People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) Those principles, "'"are those . . . closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."'" (*Breverman, supra,* at p. 154.)

This requirement includes instruction on lesser included offenses supported by the evidence. (*Breverman, supra,* 19 Cal.4th at pp. 148–149.) A trial court must instruct the jury sua sponte "'"on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged."'" (*Id.* at p. 154.) The trial court has this obligation not only when a defendant fails as a matter of trial tactics to

request the instruction, but when the defendant expressly objects to its being given. (*Id*. at p. 155.)

Substantial evidence exists where there is, "'"evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]"' that the lesser offense, but not the greater was committed." (*Breverman, supra,* 19 Cal.4th at p. 162.) "[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." (*Ibid*.) In making this assessment, the court is not to assess the credibility of witnesses, a task for the jury. (*Ibid*.)

Manslaughter is a lesser included offense of murder. (*People v. Avila* (2009) 46 Cal.4th 680, 705.) Attempted voluntary manslaughter is a lesser included offense of attempted murder. (*People v. Lopez* (2011) 199 Cal.App.4th 1297, 1304, fn. 35; *People v. Jones* (2010) 187 Cal.App.4th 266, 270; see also *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825.) Hence, whether or not requested, the trial court was required to give the attempted voluntary manslaughter instruction if there was substantial evidence to support it. (*Breverman, supra,* 19 Cal.4th at p. 162.) There was insufficient evidence here.

D. Elements of attempted manslaughter based on imperfect self-defense

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) "Manslaughter is 'the unlawful killing of a human being without malice.' (§ 192.) A defendant lacks malice and is guilty of voluntary manslaughter in 'limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" (§ 192, subd. (a)), or when the defendant kills in "unreasonable self-defense."'" (*People v. Lasko* (2000) 23 Cal.4th 101, 108.)

Defendant engages in imperfect or unreasonable self-defense where the defendant kills in the actual but unreasonable belief that it is necessary to defend himself from imminent peril to life or great bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) This mental state reduces the crime of murder to manslaughter because it

negates malice, an element of murder. (*Ibid.*; *People v. Flannel* (1979) 25 Cal.3d. 668, 674.)

E. Insufficient evidence of imperfect self-defense

There is insufficient evidence in the record to merit consideration by the jury of attempted manslaughter based upon imperfect self-defense, and hence to instruct on that offense. There is no evidence that appellant believed that Avalos presented an imminent danger of death or great bodily injury to appellant, requiring appellant to defend himself.

Officers Raigoza and Joe saw appellant extend his arm, point the gun at Avalos and saw the muzzle flashes as he shot Avalos in cold blood. Neither they nor appellant saw Flores or Ayala with a gun. There was no evidence that Avalos had a gun or other weapon, or presented any danger to appellant. There was also no evidence that appellant had an actual belief that he was in danger from Avalos. His testimony, rather than providing that evidence and a basis for the imperfect self-defense instruction, refutes it.

Appellant said nothing that indicated that Avalos presented a threat to him. Appellant testified that when he arrived at the 7-Eleven, he saw two men beating up a third man, who was on the ground being hit and kicked. He told the two attackers to leave the victim alone and took out the revolver he had been given by Cocaine so they could see he had it. They looked at appellant, but then shots rang out, and he ran to the Honda. Appellant testified that the attackers did not have a gun and were not beating the victim with a gun or weapon, though, inconsistently, he also stated at one point that they had a weapon. Appellant also testified that he did not know who fired the gunshots, indicating that his shooting of Avalos was without knowledge or belief that Avalos had a gun or presented the danger. Even more significantly, appellant testified that he did not shoot any gun at anyone that night. Thus, by his own testimony, he could not have shot Avalos in the actual belief that Avalos presented a grave threat to him.

In summary, the evidence supports two theories: the People's theory, based upon their evidence, that appellant committed a cold blooded shooting of an unarmed victim; and appellant's theory, based on his evidence, that he did not shoot anyone and did not know who was doing the shooting. There was no evidence that would support a theory

that appellant shot Avalos under the actual but unreasonable belief that Avalos presented a threat of great bodily injury or death to appellant. While appellant seeks to meld portions of each theory to concoct a nonexistent imperfect self-defense case, the evidence does not support that defense.

F. Harmless error

Even if the trial court erred in failing to instruct the jury on the lesser included offense of attempted voluntary manslaughter, it is not reasonably probable that absent that error the result would have been more favorable to defendant. (*Breverman, supra,* 19 Cal.4th at p. 165 [the failure to instruct on a lesser-included offense in a noncapital case is evaluated under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836]; see also *People v. Moore* (1988) 201 Cal.App.3d 877, 886 [*Watson* applies to failure to instruct that evidence of oral admissions must be viewed with caution].) The evidence against defendant was overwhelming.

Two officers, who were percipient witnesses to the shooting, identified appellant as the shooter, having seen the muzzle flashes from his gun from across the street, in the well-lit area near the 7-Eleven. They identified the distinctive clothes that appellant was wearing and where he sat in the Honda as he attempted to flee. When the Honda was stopped and its occupants apprehended, appellant was sitting in the same location and wearing the same clothes identified by the officers.

Appellant fled from the scene, reflecting his consciousness of guilt. He also admitted throwing the revolver out the window of the Honda during the pursuit. Though he did not admit throwing the handgun out of the window, he did testify that he did not see either of the other two occupants of the Honda with any gun, corroborating Officer Raigozo and Joe's testimony that they only saw appellant with a gun.

Forensic analysis established that all nine of the bullet casings found at the crime scene were shot from the handgun that was found on the route of the pursuit. When apprehended, the windows on the right side of the Honda, which included where appellant was sitting in the back passenger side, were wide open, suggesting that the

handgun, found along the route, was also thrown from the car. Given the strength of this evidence, any error in failing to instruct the jury was without prejudice.

Finally, the jury found appellant guilty of second degree murder, which included a finding of malice. This finding was inconsistent with a claim of imperfect self-defense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 582 ["The jury's verdict finding defendant guilty of the first degree murder . . . implicitly rejected defendant's version of the events, leaving no doubt the jury would have returned the same verdict had it been instructed regarding imperfect self-defense"].)

II. Modification of presentence credits

A. Background

The probation department's presentence report showed that appellant was arrested on April 26, 2010. He was sentenced on May 5, 2011. At sentencing, appellant was awarded 374 actual custody days and 56 days of conduct credit for a total of 430 days of presentence credit.

B. Contention

Appellant contends that the trial court miscalculated his presentence credit. He argues that he should be entitled to 375 days of actual custody credit and 56 days of conduct credit for a total of 431 days of presentence credit. The People agree with appellant, as do we.

C. Correction of judgment

A "failure to award an adequate amount of credits is a jurisdictional error which may be raised at any time." (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427–428 & fn. 8; *People v. Taylor* (2004) 119 Cal.App.4th 628, 647.) We agree with appellant's calculations. A defendant is entitled to a full day's actual presentence custody credit for each partial day the defendant is in custody. (*People v. Morgain* (2009) 177 Cal.App.4th 454, 469 ["defendant is entitled to credit for the date of his arrest and the date of sentencing"]; see also *People v. Lopez* (1992) 11 Cal.App.4th 1115, 1124.) April 26, 2010, the date of appellant's arrest, through April 25, 2011, is 365 days, and April 26, 2011, through May 5, 2011, the date of sentencing, is another 10 days for a total of 375

days that appellant was in custody, rather than the 374 days awarded by the trial court. Appellant is also entitled to only 15 percent conduct credits, having been convicted in this matter of a violent felony. (§ 2933.1, subd. (a).) Fifteen percent of 375 days is 56 days.

DISPOSITION

The judgment is modified to award appellant 431 days of presentence credits (375 days of actual custody credits and 56 days of conduct credits), and is otherwise affirmed. On remand, the trial court is directed to correct the abstract of judgment accordingly.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ