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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. ROBERT PAUL DAVIS, Defendant and Appellant.	2d Crim. No. B230283 (Super. Ct. No. 2008051878) (Ventura County)

Robert Paul Davis appeals from the judgment entered after his conviction by a jury of active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a));[1] possession of a firearm by a felon (§ 12021, subd. (a)(1)); possession of ammunition by a felon (§ 12316, subd. (b)(1)); and two counts of attempted murder. (§§ 664, 187, subd. (a).) The jury found true allegations that appellant committed the offenses for the benefit of a criminal street gang. (§ 186.22, subd. (b)(4).) As to the attempted murder counts, the jury also found true allegations that appellant personally discharged a firearm. (§ 12022.53, subd. (c).) The jury found not true allegations that appellant knew or reasonably should have known that the victims of the attempted murders were peace officers engaged in the performance of their duties. (§ 664, subd. (e).) Appellant was sentenced to prison for 53 years, 4 months.

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

Appellant contends that the trial court denied him his constitutional right to testify in his defense. In addition, appellant contends that the court erroneously failed to instruct the jury sua sponte on imperfect self-defense. We affirm.

Facts

Prosecution Evidence

Police officers for the City of Oxnard received information that David Arrieta, a parolee, possessed two firearms and was "possibly selling narcotics from his house." The officers, who were in uniform, drove to Arrieta's house in the afternoon. They saw Arrieta standing to the rear of a parked car.

The officers exited their vehicle, identified themselves as police officers, and made eye contact with Arrieta. Arrietta ran toward the garage. He reached into his waistband, pulled out a firearm, and threw it over a fence.

The officers ran after Arrieta. They were repeatedly yelling, "Police, police, police, police." Arrieta entered the garage through a pedestrian doorway and slammed the door behind him. The officers kicked the door open. "As the door swung open," one of the officers saw a person running inside the garage. The person was "[r]ight in front" of the officer and was "facing" him. The officer "saw a bright muzzle flash and heard a pop" that he "immediately recognized as gunfire." The officer returned fire at the assailant.

The assailant was appellant, not Arrieta. Appellant and Arrieta were active members of the Sur Town Chiques criminal street gang. A gang expert opined that the shooter had fired at the police for the benefit of the gang. The expert explained that the shooter's "status within the gang" would be increased "for shooting at two police officers." In addition, "the gang overall" would be benefited "because now . . . they can show other rival gangs that they are not afraid to stand up to the police." The gang would also be benefited because the shooting would create "fear and intimidation within the community."

The expert further opined that, if the shooter had not known that he was firing at police officers, the shooting would still have been committed for the benefit of Sur Town Chiques.[2] The expert explained: "It is his [the shooter's] duty as a gang member associating with another gang member to protect his gang member. That's his job. That's his duty. That's why he's there. That's the code that gang members have amongst themselves."

Defense Evidence

Appellant testified as follows: He was living at Arrieta's house. One day while sitting inside the garage, he heard screaming and yelling outside. He could not understand what the persons outside were saying. Arrieta suddenly ran "through the [garage] door with . . . a scared look on his face" and closed the door behind him. He was "screaming as like a scream when he's running scared." Arrieta ran from the garage into the kitchen of the house.

Appellant grabbed Arrieta's gun, which was on a dresser in the garage. Appellant heard someone trying to kick in the garage door. When appellant heard "a wood crunching" noise, he fired the gun. Appellant was scared that whoever was kicking in the door intended to harm the people inside: "I thought that they were coming in to do some harm. Someone kicking in a door is not going to come in and just kick in the door by themselves. They are more likely to have a number of people with them and have some guns, weapons . . . ." "At the time I hear the [wood crunching] noise, I am thinking that somebody is out there . . . trying to come in and to either hurt or possibly kill us . . . ." Appellant knew that Arrieta had previously been shot six times by rival gang members.

After appellant fired the gun, the door opened and he saw police officers in the doorway. He then realized that he had made "the biggest mistake I could have made."

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[2] As we have previously noted, the jury found not true allegations that appellant knew he was firing at police officers engaged in the performance of their duties. (§ 664, subd. (e).)

Constitutional Right to Testify

The matter was retried after the trial court declared a mistrial because the jury was unable to reach a verdict. During the People's case in chief at the retrial, the prosecutor and his investigator read to the jury portions of appellant's testimony at the first trial. During the defense case at the retrial, the court sustained the prosecutor's objections to proposed testimony by appellant. The ground for the objections was that the proposed testimony would be cumulative of appellant's prior testimony that had been read to the jury. Appellant contends that, by sustaining these objections, the trial court denied him his constitutional right to testify in his defense at the retrial.

The prior testimony covered three incidents. Appellant offered evidence of these incidents to show that, when he shot at the police, he reasonably believed that he and Arrieta were in imminent danger of death or great bodily injury. The first incident occurred several days before appellant moved into Arrieta's house. Arrieta told appellant that a rival gang member had come to the house with the intention of stealing from Arrieta, but Arrieta had instead stolen from him. Arrieta warned appellant that the gang member might return to the house to retaliate against Arrieta. The second incident occurred two days before appellant shot at the police. (4RT 655-656) Two members of a rival gang came to Arrieta's house and said, "We are here to shoot some clowns." "Clowns" is "a disrespectful way to refer to [members of] Sur Town," the gang to which appellant and Arrieta belonged. One of the gang members appeared to have a gun concealed under his shirt. The gang members left without committing an act of violence. The third incident occurred the night before appellant shot at the police. Appellant, Arrieta, and a woman named Desiree went to a motel room where they met other persons. They left when Desiree was asked to exchange sex for dope. While they were entering their vehicle, a person came up to Arrieta and accused Desiree of stealing "the dope." Arrieta denied the accusation and drove away with appellant and Desiree. Later that night, Arrieta's mother telephoned to say "that there was a guy waiting outside . . . the garage" of Arrieta's house.

As to the first incident, appellant was not denied his constitutional right to testify in his defense. Over the prosecutor's objections, the trial court permitted appellant to testify in detail about the first incident.

As to the second and third incidents, the trial court sustained the prosecutor's objections to a detailed recounting of the incidents. But the court allowed appellant to testify that the incidents occurred as he had described them in his prior testimony that had been read to the jury. Furthermore, appellant was permitted to testify that, when he shot at the police, he had "in the back of [his] mind" the second incident involving the two rival gang members "who came to the house and said, . . . 'We are here to shoot some clowns.' " In addition, appellant was permitted to testify that he also had "in the back of [his] mind" the third incident involving Desiree that had occurred the night before the shooting.

"[T]he Fifth, Sixth, and Fourteenth Amendments to the United States Constitution guarantee that an accused has the right to testify on his or her own behalf. [Citation.] . . . [H]owever, 'the right to present relevant testimony is not without limitation. [Citation.] So long as the restrictions placed on a defendant's right to testify are not 'arbitrary or disproportionate to the purposes they are designed to serve,' a court may apply a rule of evidence to limit a defendant's testimony if 'the interests served by [the] rule justify the limitation imposed on the defendant's constitutional right to testify.' [Citation.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 821-822.)

"Here, the restriction placed on [appellant's] testimony [at the retrial]—[that he was not permitted to recount the details of the second and third incidents]—did not impinge on [his] constitutionally protected right to testify on his own behalf." (*People v. Gutierrez*, *supra*, 45 Cal.4th at p. 822.) Pursuant to Evidence Code section 352, the trial court had the authority to exclude cumulative evidence.[3] (*People v. Scheid* (1997)

[3] Evidence Code section 352 provides in relevant part: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . necessitate undue consumption of time . . . ."

16 Cal.4th 1, 16.) It is undisputed that the excluded testimony was cumulative of appellant's prior testimony that had been read to the jury. Appellant was allowed to testify that the second and third incidents occurred as he had described them in his prior testimony. He was also allowed to testify that, when he shot at the police, these incidents were "in the back of [his] mind." Moreover, appellant testified without restriction as to the events underlying the charged offenses. "Accordingly, we conclude that [appellant's] right to testify on his own behalf was not violated, and the trial court did not err by limiting the scope of [his] testimony." (*People v. Gutierrez, supra*, 45 Cal.4th at p. 822.)

Jury Instruction on Imperfect Self-Defense

The trial court instructed the jury on perfect self-defense but not on imperfect self-defense, also referred to as unreasonable self-defense. Appellant contends that the trial court had a duty to instruct sua sponte that an attempted killing which would otherwise constitute attempted murder is reduced to attempted voluntary manslaughter if the defendant acted in imperfect self-defense. The trial court instructed on the lesser included offense of attempted voluntary manslaughter, but only on a heat of passion theory.

"For [an attempted] killing to be in [perfect] self-defense, the defendant must actually and reasonably believe in the need to defend. [Citation.]" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) "[W]hen a defendant [attempts to kill] in the actual but unreasonable belief that he or she is in imminent danger of death or great bodily injury, the doctrine of 'imperfect self-defense' applies to reduce the [attempted] killing from [attempted] murder to [attempted] voluntary manslaughter. [Citations.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) "[F]or either perfect or imperfect self-defense, the fear must be of . . . '*imminent* danger to life or great bodily injury.' [Citation.]" (*People v. Humphrey, supra*, 13 Cal.4th at p. 1082.) Imperfect self-defense is "not a true defense but 'a shorthand description of one form of voluntary manslaughter,' obligating the trial court to instruct on it, sua sponte, as a lesser offense

of murder [or attempted murder] 'whenever the evidence is such that a jury could reasonably conclude that the defendant killed [or attempted to kill] the victim in the unreasonable but good faith belief in having to act in self-defense.' [Citation.]" (*People v. Murtishaw* (2011) 51 Cal.4th 574, 594.)

The trial court did not have a duty to instruct sua sponte on imperfect self-defense. " 'Where, as here, the defendant's version of events, if believed, establishes actual self-defense, while the prosecution's version, if believed, negates both actual and imperfect self-defense, the court is not required to give the instruction [on imperfect self-defense]. [Citation.]' [Citation.] [Appellant's] testimony, if the jury believed him, could only lead to a conclusion that he acted in justifiable self-defense . . . , not to a conclusion that he acted in imperfect self-defense." (*People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1232.) Based on appellant's testimony, it was reasonable for him to believe that the door was being kicked in by armed members of a rival gang who were "trying to come in and to either hurt or possibly kill us . . . ."

Even if the trial court had erred in not instructing sua sponte on imperfect self-defense, the error would have been harmless. "Any error in failing to instruct on imperfect [self-defense or] defense of others is state law error alone, and thus subject, under article VI, section 13 of the California Constitution, to the harmless error test articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 . . . ." (*People v. Randle* (2005) 35 Cal.4th 987, 1003, overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) Pursuant to *Watson*, we " ' "evaluate whether 'it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error.' " ' [Citation.]" (*People v. Loy* (2011) 52 Cal.4th 46, 67.)

It is not reasonably probable that a result more favorable to appellant would have been reached if the jury had been instructed on imperfect self-defense. In its guilty verdicts on the attempted murder charges, the jury found true allegations that appellant committed the crimes for the benefit of his criminal street gang, Sur Town Chiques, with "the specific intent to promote, further and assist in criminal conduct by

members of Sur Town." This finding is inconsistent with imperfect self-defense, which requires that the attempted killing be motivated by an "unreasonable belief that [the defendant] is in imminent danger of death or great bodily injury." (*People v. Cruz*, *supra*, 44 Cal.4th at p. 664.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

David Long, Judge

Superior Court County of Ventura

Stephen P. Lipson, Public Defender and Kenneth N. Hamilton, Deputy, for Defendant and Appellant.

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