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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CARLOS G. SANCHEZ, Defendant and Appellant.	B265951 (Los Angeles County Super. Ct. No. MA064150)

APPEAL from a judgment of the Superior Court of Los Angeles County. Donna Hollingsworth, Judge. Affirmed.

Maura F. Thorpe, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Carlos G. Sanchez (defendant) was convicted of stalking, assault by means likely to produce great bodily injury and battery with great bodily injury. His sole appellate contention is that the trial court prejudicially mis-instructed the jury on "reclaimed self-defense." We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357), the evidence established that soon after defendant and Natalie B. were married in 2011, they moved in with defendant's family in Palmdale. The couple was good friends with cousins Valentin and Miguel Alcarez, with whom they socialized almost every day.[1] Defendant and Natalie separated in February 2014 and Natalie moved to Los Angeles to live with her family. One or two months after separating from defendant, Natalie began dating Valentin; she did not tell defendant because she knew he would be mad. Future events proved Natalie's concerns were justified. After discovering their relationship, defendant acted violently towards Valentin on several occasions when he saw him with Natalie. Defendant also sent Valentin threatening texts and videos. On June 4, 2014, defendant vandalized Valentin's car, chased him into an elementary school gym that had been the site of a graduation ceremony, grabbed Valentin by the back of the shirt and then hit Valentin in the face so hard it broke Valentin's nose.

Defendant was charged by amended information with stalking (§ 646.9, subd. (a); count 1), assault by means likely to produce great bodily injury (§ 245, subd. (a)(4); count 2); and battery with great bodily injury (§ 243, subd. (d); count 3); a

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[1] Because some of the witnesses have the same last names, we refer to them by their first names.

personal infliction of great bodily injury enhancement (§ 12022.7, subd. (a)) was also alleged.[2]

Valentin, Natalie and defendant testified at the trial.

1. Valentin

Valentin estimated that defendant is about five or six inches taller and about 30 pounds heavier than Valentin. Valentin described three episodes occurring in May 2014 in which defendant acted aggressively towards Valentin, apparently in response to seeing Valentin and Natalie together. In early May, defendant reached into the driver's side window of Valentin's car and tried to choke Valentin; Valentin escaped by driving away. On or about May 16th, defendant used a brick to break the front windshield and side windows of Valentin's car. A few days later, defendant punched Valentin through the open driver's side window of Valentin's car. In addition to the actual physical violence, defendant sent Valentin threatening texts and video messages. Valentin reported these incidents to the sheriff's department.

On June 4, 2014, Valentin attended his nephew's graduation ceremony in the gym at the Golden Poppy Elementary School. After the ceremony, Valentin walked to his parked car with Natalie and witness Miguel. Valentin saw that his car had been vandalized, and that defendant was approaching. At Miguel's and Natalie's urging, Valentin ran into the gym. When defendant caught up with Valentin, defendant punched him in the face with both his right and left fist, breaking his nose. While defendant was hitting him, Valentin kept his hands over his face in a protective posture. Other people in the gym eventually separated them and defendant left the gym.

2. Natalie

Natalie's description of the incidents occurring in May 2014 was consistent with Valentin's in all material respects. Natalie's

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[2] All undesignated statutory references are to the Penal Code.

family urged her to get a restraining order against defendant, but Natalie refused, confident he would not hurt her.

Natalie testified that on June 4, 2014, she realized that not only had Valentin's car been vandalized, but her makeup had been stolen out of the car. When she saw defendant walk towards them, Natalie yelled at Valentin to run because she was fearful that defendant would become violent. As defendant chased Valentin and Miguel, Natalie ran after the three men, yelling at defendant to stop. When she caught up with them inside the gym, Natalie saw defendant swing at Valentin two or three times, hitting him in the face at least once. Valentin kept his hands over his face and never hit defendant. One of several women who were trying to pull defendant away from Valentin hit defendant with an umbrella. Eventually, defendant ran out of the gym, towards his mother's house. While Valentin and his family talked to sheriff's deputies at the school, Natalie went to the house to retrieve her stolen makeup.

3. Defendant

Defendant testified that Valentin was a shy, quiet person. On defendant's birthday in February 2014, Natalie told him she needed to take a break from their relationship, but did not tell him why. About one month after Natalie moved to Los Angeles, defendant also moved to Los Angeles, into the home of a friend. Although they were separated, defendant visited Natalie at her parents' home about four times a week. If she was not there when he arrived, he would socialize with her family while he waited for her to come home; no one told him he was not welcome. Defendant always responded affirmatively when Natalie asked defendant for help with things like picking up her sister from school. Eventually, defendant began to suspect Natalie was having an affair with Valentin. One day, when he saw Valentin's car parked in front of Natalie's parents' home, defendant used a brick to break the car windows. On another occasion, when he saw Valentin with Natalie, he hit Valentin.

Defendant described the incident: "I was coming from the top of the hill, and I saw them parked in the corner. I got off, and

I hit him. Then Natalie blocked him. . . . At that time, I didn't hit him no more 'cuz I was not going to hit Natalie; so I started walking in the middle of the street down, and he had his car on the way, and when he took off, he almost ran over me; so I had to jump to the sidewalk."

Defendant had the impression that Natalie was enjoying having two men fight for her attention. Defendant admitted texting messages to Valentin, which he hoped would make Valentin stop seeing Natalie.

On June 4, 2014, defendant was in a friend's vehicle when he saw Valentin's car parked at the Golden Poppy School. Defendant got out of his friend's car and looked into Valentin's car; there, defendant saw Natalie's makeup and a blanket on the back seat. As soon as defendant saw the blanket, he knew Natalie and Valentin were having sex because defendant and Natalie used to keep a blanket in the back seat for that purpose. Defendant reached into the car through the open window, destroyed the center console and took the makeup and blanket.

As he was walking back to his friend's car, defendant saw Natalie, Valentin and Miguel. Defendant walked towards them with the intention of talking to them about what was going on. But when Valentin started to run, defendant chased after him. Defendant caught up to Valentin in the gym, grabbed the back of his shirt and said, "Let's go outside to talk." But Valentin responded by saying "No" and grabbing defendant by his shirt collar. Defendant was surprised by how hard Valentin grabbed him. Thinking that Valentin was going to hit him, defendant hit Valentin in the face. While a group of between 8 and 10 adults tried to separate defendant and Valentin, Valentin hit defendant in the face. Defendant responded by trying to hit Valentin on the top of his head. After the altercation with Valentin in the gym, defendant went home. Natalie joined him later and eventually the police arrived.

4. Verdict and Sentencing

A jury found defendant guilty of all three counts and found true the GBI enhancement. Defendant was sentenced to a total of

six years in prison, comprised of the three-year mid-term on count 2 (felony assault), plus a consecutive three years for the enhancement, plus a concurrent two years on count 1 (stalking). Sentence on count 3 (felony battery) was stayed pursuant to section 654. Defendant timely appealed.

DISCUSSION

Defendant contends the trial court erred in (1) omitting from CALCRIM No. 3471 a description of the defense known as "reclaimed self-defense" and (2) giving CALCRIM No. 3472. He argues there was substantial evidence to support a defense of reclaimed self-defense and, in the absence of instructions on reclaimed self-defense, the jury may have misinterpreted CALCRIM No. 3472 to bar the defense. We disagree.

1. Standard of Review

It is well settled that in criminal cases the trial court has a sua sponte duty to " '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.' [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This includes "any affirmative defense for which the record contains substantial evidence [citation] – evidence sufficient for a reasonable jury to find in favor of the defendant unless the defense is inconsistent with the defendant's theory of the case [citation]. In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' [Citations.]" (*People v. Salas* (2006) 37 Cal.4th 967, 983.)

2. CACRIM No. 3471

The jury was instructed with CALCRIM Nos. 3470 [Right to Self-Defense (Non-Homicide)], 3471 [Right to Self-Defense: Mutual Combat or Initial Aggressor] and 3472 [Right to Self-

Defense: May Not Be Contrived], as well as 917 [Insulting Words Are Not a Defense].

As given, CALCRIM No. 3471 read:

> "A person who engages in mutual combat or who starts a fight has a right to self-defense only if:
> 1. He actually and in good faith tried to stop fighting;
> 2. He indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting.
>
> AND
>
> 3. He gave his opponent a chance to stop fighting.
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> If the defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight. A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose." (Italics in original.)

Defendant did not request, and the trial court did not include in its CALCRIM No. 3471 instruction, the following language:

> "However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting, or communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting."

Defendant argues the trial court had a sua sponte duty to give the omitted portion of instruction based upon the evidence that Valentin "escalat[ed] the situation giving rise to [defendant's] need to defend himself in response to that escalation . . . ." He is incorrect.

The "reclaimed self-defense" doctrine arises in the context of mutual combat. Pursuant to that doctrine, a "victim may respond to an attacker's initial physical assault with a physical counterassault, and an attacker who provoked the fight may not in asserting he was injured in the fray claim self-defense against the victim's *lawful* resistance." (*People v. Ramirez* (2015) 233 Cal.App.4th 940, 947, italics added.) But, " 'Where the original aggressor is not guilty of a deadly attack, but of a simple assault or trespass, the victim has no right to use deadly or other excessive force. . . . If the victim uses such force, the aggressor's right of self-defense arises. . . .' [Citation.]" (*People v. Quach* (2004) 116 Cal.App.4th 294, 301, citing 1 Witkin & Epstein, Cal.Criminal Law (3d ed.2000) Defenses § 75, p. 410.) When warranted by the evidence, it is "reversible error to instruct on mutual combat without further instructing on the right of a mutual combatant to reclaim the privilege of self-defense when subjected to an attack ' "so sudden and perilous that he cannot withdraw . . . ." ' [Citation.]" (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1046; see *Ramirez*, *supra*, at p. 951 [in murder prosecution, imperfect self-defense defense " 'is available when the victim's use of force against the defendant is unlawful, even when the defendant set in motion the chain of events that led the victim to attack the defendant.' [Citation.]"].)

Here, the trial court had no sua sponte duty to instruct on reclaimed self-defense because there was no evidence that Valentin used unlawful or excessive force in response to defendant's assault upon him, or that defendant was subject to an attack so sudden and perilous that he could not withdraw. Even defendant testified that after he vandalized Valentin's car and stole some of the things in it, he chased Valentin into the gym, grabbed him by the back of the shirt and said, "Let's go outside to talk"; Valentin responded by grabbing defendant's shirt collar; defendant felt the pressure from Valentin tugging at his collar; defendant hit Valentin because he believed that Valentin was going to hit him. Contrary to his assertion on appeal that, "inside the gym, all he had done was to stop Val and

ask him to go outside[,]" defendant's trial testimony establishes that Valentin was running away from defendant when defendant grabbed Valentin by the shirt to stop him. Thus, the undisputed evidence establishes that the first touching occurred when defendant grabbed Valentin's shirt, making defendant the initial aggressor in the June 4th encounter. (See CALCRIM Nos. 915 and 916.)[3] There was no evidence from which a reasonable trier of fact could conclude that Valentin responded to defendant's initial aggression with excessive force. No reasonable trier of fact could conclude that it is an excessive use of force for a victim to grab his assailant's shirt collar in response to being chased and having the back of his shirt grabbed by the assailant. Defendant testified that he hit Valentin because he thought Valentin was going to hit him, not to extricate himself from Valentin's grip because Valentin was choking him. Nor could a reasonable trier of fact conclude that punching Valentin in the face hard enough to break his nose was proportional to Valentin grabbing defendant's shirt collar, especially after defendant had grabbed Valentin's shirt to stop him from running away.

Defendant's testimony that he was surprised by Valentin grabbing his shirt collar because he thought Valentin too timid to fight back does not transform Valentin's proportional response to defendant's aggression (collar grabbing in response to shirt grabbing) into an attack so sudden and perilous that defendant

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[3] In the context of simple assault, CALCRIM No. 915 instructs that the "terms application of force and apply force mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind."

Using identical language, CALCRIM No. 960 instructs that the "slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind."

could not withdraw. On this record, no evidence warranted instructions on the reclaimed self-defense doctrine.

4. CACRIM No. 3472

Defendant contends the jury was misled by CALCRIM No. 3472, which reads: "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." Relying on *Ramirez, supra,* 233 Cal.App.4th at page 952, he argues the instruction barred defendant from asserting reclaimed self-defense. We disagree.

We find *Ramirez* unhelpful. The defendants in *Ramirez* were brothers Victor Ramirez and Armando Apolinar; they were members of the same gang and convicted of the first degree murder of rival gang member Ruben Rivera. Rivera's gang had been harassing Armando, including shooting at his home on two occasions. When the brothers and fellow gang member Steven Arevalos went to confront Rivera's gang, Armando brought a gun. A fist fight broke out; there was conflicting evidence as to who threw the first punch. Armando testified that when he saw Rivera pull out a gun and walk towards the combatants, Armando fatally shot Rivera. Other than Armando's testimony, there was no evidence that Ruben or anyone in his gang had a gun. (*Ramirez*, *supra,* 233 Cal.App.4th at pp. 944-945.) The prosecutor argued that, pursuant to CALCRIM No. 3472, it did not matter whether Rivera had a gun because, having provoked the fight, the defendants did not have the right to self-defense. (*Id*. at p. 946.) Defense counsel countered that Armando regained the right to defend himself against murder charges if he truly believed Rivera suddenly escalated the fistfight to a gunfight. Invoking CALCRIM No. 3472, the prosecutor argued that "one who created the circumstances to begin with," cannot "mitigate from murder to voluntary manslaughter." (*Id*. at pp. 946-947.) The appellate court held that CALCRIM No. 3472 states a correct rule of law in appropriate circumstances, but did not accurately state governing law under the facts of the case. "[I]t is wrong to instruct the jury that: 'Having committed the first wrongful act, the plea of self-defense is foreclosed to him,

and his life is the penalty, no matter what turn the affray may subsequently take.' [Citation.]" (*Id.* at p. 947.)

Ramirez is inapposite to this case. In *Ramirez* there was evidence from which a reasonable trier of fact could conclude that the victim suddenly escalated fisticuffs to a gun fight. Such evidence supported a reclaimed self-defense defense. As we have already explained, there was no evidence to support the defense of reclaimed self-defense in this case. As such, it was not error to give CALCRIM No. 3472.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.