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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTIAN VALDEZ,

Defendant and Appellant.

B264481

(Los Angeles County
Super. Ct. No. BA425024)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund Willcox Clarke, Jr., Judge. Affirmed.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Christian Valdez appeals from a judgment of conviction entered after a jury found him guilty of second degree murder (Pen. Code, § 187, subd. (a)).¹ The judgment also reflected Valdez’s admission to the truth of a prior felony conviction for which he served a prison term (§ 667.5, subd. (b)). The trial court sentenced Valdez to 15 years to life in prison, plus a one-year sentencing enhancement based on the prior conviction. Valdez makes two contentions on appeal. First, the trial court erred in failing to instruct the jury *sua sponte* on the lesser included offense of voluntary manslaughter based on imperfect self-defense. Second, his attorney’s failure to request such an instruction constituted ineffective assistance of counsel. Neither contention has merit. Therefore, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

On November 5, 2014, the People filed an information charging Valdez with one count of murder (§ 187, subd. (a)). The People specially alleged that, in committing the murder, Valdez “personally used a deadly and dangerous weapon[], to wit, a hammer” Additionally, the People specially alleged that Valdez had served one prior prison term on a felony conviction. (§ 667.5, subd. (b)).

Valdez entered a plea of not guilty and denied the special allegations. The case proceeded to trial.

¹ All statutory references are to the Penal Code.

B. *The Evidence at Trial*

1. *The Prosecution's Evidence*

Tino Arteaga was the general contractor on a remodeling project on Burns Avenue in the Silver Lake area of Los Angeles. Arteaga hired Valdez and Juan Sanchez, a friend of Valdez's, as day laborers on the project.

On May 19, 2014, Arteaga observed Valdez at the construction site and thought that Valdez appeared to be under the influence of drugs or alcohol. Accordingly, Arteaga asked him to leave the site permanently.

As he was leaving the site, Valdez asked Sanchez if he could borrow Sanchez's vehicle. Sanchez responded yes. While Valdez was driving Sanchez's vehicle, he collided with another vehicle. Valdez and Sanchez got in an argument later that day over payment to repair the damage that Valdez caused to the other vehicle.

Notwithstanding Arteaga's directive to Valdez that he leave the construction site permanently, Valdez returned to the site on May 22, 2014. That day, a coworker at the site, Ramon Aguayo, lent Valdez a sledgehammer for breaking up stucco. Aguayo saw both Valdez and Sanchez working at the site; he did not notice any problems between the two. After lunch, Aguayo noticed that Valdez was not working and kept going to the bathroom every 30 minutes. Another coworker, Juan Huerta, observed that Valdez began acting strangely after lunch. In particular, Huerta noticed that Valdez was not working and was acting fidgety, walking from one side of the construction site to the other.

Aguayo later looked through a window at the site and saw Valdez hitting Sanchez on the head with a framing hammer, which Valdez held in both hands. Aguayo alerted Huerta, who

also saw Valdez hitting Sanchez with a hammer. Aguayo never heard Sanchez threaten Valdez.

After Valdez stopped hitting Sanchez with the hammer, he started to leave the site. As Valdez was leaving, he ran into Aguayo and asked him for a cigarette. Aguayo noticed blood on Valdez's shirt. He asked Valdez why he had killed Sanchez. Valdez told him not to call the police and left the site. Valdez also saw Huerta as he was leaving and asked Huerta not to call the police. Huerta noticed blood on Valdez's hands. Arteaga approached the construction site and saw Valdez. Valdez told Arteaga not to call the police.

Shortly thereafter, Maria Hernandez was driving in her car, having left a parking lot on Burns Avenue near the construction site. Valdez approached her car and asked for a ride. Hernandez asked Valdez where he wanted to go. Valdez began trying to open her car door. Hernandez thought that Valdez was acting in a nervous manner and that his eyes looked like he was on drugs. Hernandez quickly drove away from Valdez.

Valdez's cousin, Berenice Avila, lived across the street from the construction site. Valdez knocked on her door at about 1:30 p.m. She did not let him in because she did not want him in her apartment anymore. Avila then received a call from someone at the construction site telling her that her cousin was in trouble again. When she left her apartment about 15 minutes later, she saw Sanchez lying on the ground in a ditch at the construction site. He had blood all over his head, face and hands. Avila checked for a pulse; Sanchez had no pulse in his hand and a faint pulse in his neck.

Los Angeles Police Department officers arrived at the construction site, where they saw Sanchez's body. The officers found a clawed framing hammer covered in blood on the ground; a sledgehammer nearby also appeared to have blood on it. A wheelbarrow was lying on its side, and it appeared to have a lot of blood in it.

The coroner testified that Sanchez died of blunt force trauma. He had been hit in the head at least 14 times, causing bruising and swelling of his brain, which, in turn, caused him to stop breathing. The coroner further testified that there were multiple lacerations to the back of Sanchez's head, as well as injuries to the front of his head.

Later on May 22, 2014, police officers went to Valdez's apartment. They detained him as he was leaving the apartment. Valdez was wearing clean clothes, but a search of his apartment revealed the clothes he had been wearing at the construction site. Sanchez's blood was on those clothes.

2. *Valdez's Evidence*

Valdez testified in his own defense. He stated that he had been close friends with Sanchez since elementary school. After Arteaga hired him for the project on Burns Avenue, Valdez asked Arteaga to hire Sanchez as well.

On May 19, 2014, Arteaga asked Valdez if he had been drinking. Valdez responded that he had consumed "a few tall cans." Arteaga told him to go home and sober up and warned him that if it happened again, he would be fired. Valdez told Sanchez that Arteaga was sending him home. He asked Sanchez if he could borrow Sanchez's truck. Sanchez agreed to that. Valdez drove Sanchez's truck to a store, where he bought

cigarettes and beer. Valdez parked the truck, drank some beer, and waited until it was time to pick Sanchez up from the construction site.

On the way to pick up Sanchez, Valdez pulled into a driveway and heard a popping sound. He thought he might have hit a garbage can. However, that evening Sanchez called him and told him he had hit a Lincoln Navigator, and that it would cost \$700 to \$1,000 to fix the damage to that vehicle. Valdez went with Sanchez the following day to meet the owner of the Navigator and inspect the damage to the vehicle. Valdez became depressed after that meeting. He did not go to work the next couple of days, which he spent drinking alcohol and using methamphetamine.

Valdez returned to the construction site on the morning of May 22, 2014 after having slept only a couple of hours the night before. While Valdez and Sanchez were removing stucco together, Sanchez talked to him about the damage to the Navigator and how much it would cost to repair. At lunch, Aguayo, Huerta, and another employee told Valdez that the repairs to the Navigator should not cost as much as Sanchez said they would.

After lunch, Valdez was preparing to remove stucco from around a window; he had a hammer in his hand. Sanchez approached him. Sanchez told Valdez that he talked to the son of the Navigator's owner, who said the owner wanted the hood of the vehicle repainted as well as the damaged door repainted; all told, the repairs would cost \$1,500 to \$2,000. In response, Valdez told Sanchez that the owner was demanding payment for additional repairs that had nothing to do with him, and that he would pay only to repair the damage he caused.

Sanchez then got close to Valdez and “took a swing” at him, which connected. Valdez testified that he could not recall where Sanchez hit him and that he was not hurt by the swing, that Sanchez said nothing to him following the swing, and that Sanchez was unarmed. Valdez stated that after Sanchez swung at him, “I flinched and I raised my hand to block myself. And then it felt like he was gonna swing again, and I went off swinging too. And I had the hammer in my hand. . . . All I could think about was defending myself.” Valdez remembered having the hammer in both hands and hitting Sanchez in the face with it. Valdez testified, “I lost control. I lost my thoughts. Everything just went—it went—like, it happened, like, in a split second.” Valdez did not recall how many times he hit Sanchez or what Sanchez did when Valdez hit him. Valdez stated that it was as if he had lost consciousness or blacked out.

When Valdez stopped hitting Sanchez, he dropped the hammer. He saw his hand, and there was blood on it. Valdez stated, “I just remember walking away. I remember going to look for the guys. And I don’t know what I was thinking. I didn’t know where to go. I didn’t know what to do.”

Valdez recalled asking a woman for a ride. He thought she agreed to give him a ride, but when he went to the door of her car, she drove away.

He then saw Aguayo with a pack of cigarettes and asked for a cigarette. Arteaga drove up and asked what happened. Valdez said Sanchez had been “fucking with” him. Arteaga asked if Valdez hurt Sanchez, and Valdez said he did not know and asked Arteaga not to call the police.

Valdez walked home. When he arrived there, his mother told him that Sanchez had been badly hurt and he needed to turn

himself in to the police. He changed his clothes and left to go to the police station, which was a block away. The police pulled up as he was leaving his residence and told him they needed to speak to him. They asked for his consent to search the residence, which he gave them.

C. *The Instructions to the Jury*

The trial court provided the jury with two instructions related to the murder charge against Valdez. The first instruction, modeled on CALCRIM No. 520 and entitled “First or Second Degree Murder With Malice Aforethought,” described the two elements necessary to prove murder: that Valdez had committed an act causing Sanchez’s death and that he had acted with malice aforethought. The instruction also defined malice. The second instruction, modeled on CALCRIM No. 521 and entitled “First Degree Murder,” informed the jury that Valdez “is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation,” all of which the instruction defined.

At Valdez’s request, the trial court also gave the jury a lesser included offense instruction modeled on CALCRIM No. 570 and entitled “Voluntary Manslaughter: Heat of Passion—Lesser Included Offense.” In pertinent part, that instruction stated, “A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion” as a result of a provocation that met certain conditions defined in the instruction.

In response to a question from the trial court, Valdez’s counsel stated that Valdez was not seeking a separate lesser

included offense instruction regarding voluntary manslaughter based on imperfect self-defense. That instruction, which is covered by CALCRIM No. 571, provides a different basis for a jury to find voluntary manslaughter in a murder case. In pertinent part, it states, “A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because (he/she) acted in (imperfect self-defense/ [or] imperfect defense of another). [¶] . . . [¶] The defendant acted in (imperfect self-defense/ [or] imperfect defense of another) if: [¶] 1. The defendant actually believed that (he/she/ [or] someone else/ <insert name of third party>) was in imminent danger of being killed or suffering great bodily injury; [¶] AND [¶] 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; [¶] BUT [¶] 3. At least one of those beliefs was unreasonable. . . .” The trial court did not sua sponte give this instruction to the jury.

In closing argument, Valdez’s counsel stated that Valdez did not deny killing Sanchez, but that he killed Sanchez in the heat of the moment after Sanchez provoked him; therefore, counsel argued, the jury should convict Valdez of the lesser included offense of voluntary manslaughter.

D. *The Verdict and Sentence*

The jury convicted Valdez of second degree murder, and thus rejected Valdez’s request for a voluntary manslaughter conviction. Valdez admitted the truth of the allegation of his prior felony conviction and prison term. The court sentenced Valdez to state prison for 15 years to life, plus a one-year enhancement for his prior prison term. The court gave Valdez

presentence custody credit for 348 days of actual custody. It dismissed the special allegation related to the weapon.

Valdez timely appealed from the judgment of conviction.

DISCUSSION

A. *The Trial Court Was Not Required To Instruct the Jury on Imperfect Self-defense*

Valdez contends the trial court erred in failing to instruct the jury sua sponte on voluntary manslaughter based on imperfect self-defense. We disagree.

A trial court must instruct the jury not only on the crime charged by the prosecution, but also on lesser offenses that are both included within the crime charged and supported by the evidence. (*People v. Barton* (1995) 12 Cal.4th 186, 190.) A lesser offense is necessarily included within a greater offense if the elements of the greater offense or the facts alleged in the accusatory pleading include all of the elements of the lesser offense. (*People v. Smith* (2013) 57 Cal.4th 232, 240.) However, “[a]n instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense, but not the greater, charged offense.’ [Citation.]” (*People v. Nelson* (2016) 1 Cal.5th 513, 538.)

Under these principles, the trial court in a case alleging that defendant committed first or second degree murder must sua sponte instruct the jury on voluntary manslaughter based on imperfect self-defense when there is substantial evidence from which the jury reasonably could conclude that the defendant killed another person “in the actual but unreasonable belief that

he [was] in imminent danger of death or great bodily injury” from the other person. (*People v. Duff* (2014) 58 Cal.4th 527, 561; accord, *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) “We review de novo a trial court’s decision not to give an imperfect self-defense instruction.” (*People v. Simon* (2016) 1 Cal.5th 98, 133; accord, *People v. Waidla* (2000) 22 Cal.4th 690, 733.)

Neither of the prosecution’s witnesses who observed Valdez hit Sanchez with a hammer, Huerta and Aguayo, testified that Sanchez struck Valdez or threatened him. Nothing in their testimony lends support to an imperfect self-defense instruction.

The same is true of Valdez’s own testimony. Valdez testified that Sanchez took one swing at him and that the swing connected. Valdez also testified, however, that he could not remember where on his body the swing connected and that he was not hurt by it. Furthermore, Valdez testified that Sanchez was unarmed and said nothing to him after the swing. None of this testimony evinces a belief by Valdez that Sanchez presented an imminent danger to him of death or great bodily injury.

Valdez did say that he believed that Sanchez was going to take a second swing at him, and that all he was thinking about at that moment was defending himself. But even this testimony does not suggest that Valdez defended himself out of a belief that Sanchez posed a grave danger. Similarly, Valdez’s testimony that he lost control or blacked out and kept hitting Sanchez with the hammer over and over again has no bearing on whether Valdez believed he was in imminent danger such that he had to hit Sanchez in the head with the hammer 14 times.

Valdez relies heavily on *People v. Vasquez* (2006) 136 Cal.App.4th 1176. But that case is inapposite. The defendant in *Valdez* was confined to a wheelchair. He verbally confronted his

cousin about an earlier incident. The cousin lunged at him and began to choke him. In response, the defendant drew a gun and shot the cousin. (*Id.* at p. 1178.) The trial court declined to instruct on voluntary manslaughter based on imperfect self-defense, questioning how the defendant “could . . . have felt imminent harm when he’s holding a gun and someone is approaching him with their hands?” (*Ibid.*, fn. omitted.) The Court of Appeal reversed. It stated that, “The prosecution’s chief witness against [the defendant] testified [the cousin] was choking [the defendant] when [the defendant] drew his gun and shot [the cousin]. It was for the jury sitting as the trier of fact to decide whether [the defendant] actually feared serious injury or death from being choked. [Citations.] That [the defendant] had a gun to rebuff [his cousin’s] attack does not mean [the defendant] could not have believed his life was in peril . . .” (*Id.* at p. 1179.)

Sanchez’s one swing at Valdez is a far cry from the victim’s choking of the defendant in *Vasquez*. There was evidence from which the jury in *Vasquez* reasonably could conclude that the defendant believed that the victim’s chokehold posed an imminent danger to him. Here, however, based on Valdez’s own testimony, there was no evidence from which the jury reasonably could conclude that Valdez believed Sanchez’s swing posed an imminent danger to Valdez.

At most, the evidence of the confrontation between Valdez and Sanchez could support the claim that Valdez’s counsel made in his closing argument: Sanchez’s demand for payment for repairs to the Navigator provoked a depressed and sleep-deprived Valdez to kill Sanchez in the heat of passion, thus warranting Valdez’s conviction on the voluntary manslaughter theory on which the trial court instructed the jury. The evidence does not,

however, reasonably support the additional voluntary manslaughter theory of imperfect self-defense. Accordingly, the trial court did not err in failing to instruct the jury on that theory.

B. *The Failure of Valdez’s Attorney to Request an Instruction on Imperfect Self-defense Did Not Constitute Ineffective Assistance of Counsel*

To prevail on a claim of ineffective assistance of counsel, a defendant “must show that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.” (*People v. Farnam* (2002) 28 Cal.4th 107, 201.) Counsel’s failure to request an instruction on a lesser included offense does not constitute ineffective assistance of counsel where the evidence indicates that the defendant was not entitled to such an instruction. (*People v. Dennis* (1998) 17 Cal.4th 468, 541.) That is the case here. Accordingly, the assistance that Valdez’s counsel provided was not ineffective.²

² Valdez’s ineffective assistance of counsel claim fails for an additional reason. Given the evidence in the case, Valdez’s counsel could have determined that it was more likely the jury would find that Valdez killed Sanchez in the heat of passion than in imperfect self-defense. Counsel’s request for an instruction on the former, but not the latter, thus was an understandable tactical decision that did not fall below an objective standard of reasonableness. (See *People v. Vines* (2011) 51 Cal.4th 830, 876 [ineffective assistance of counsel claims fail when the record reveals a reasonable tactical purpose underlying the challenged acts or omissions of counsel].)

DISPOSITION

The judgment is affirmed.

SMALL, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.