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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

LOUIS DANIEL LEPLAT,

Defendant and Appellant.

2d Crim. No. B234938
(Super. Ct. No. SICRF-09-48642)
(Ventura County)

Louis Daniel Leplat appeals the judgment following his conviction for second degree murder. (Pen. Code, §§ 187, subd. (a), 189.)[1] The jury found an allegation to be true that he personally used a deadly and dangerous weapon in the murder. (§ 12022, subd. (b)(1).) Leplat was sentenced to 15 years to life for the murder and a consecutive one-year term for the weapon enhancement. Leplat contends the trial court erred by failing to provide the jury with a written copy of the instruction for imperfect self-defense. He also claims the prosecutor improperly commented on his failure to testify at trial. We affirm.

FACTS

During the afternoon of June 20, 2009, victim James Rambeau and several other friends and neighbors were socializing and drinking beer at Rambeau's residence and a residence next door. Another neighbor, Kenneth Kilgore, was having a family reunion at his residence. Leplat was present. At some point, Leplat and his girlfriend were sitting in

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

his car in Rambeau's driveway. After being told that Leplat was annoying a family member, Kilgore came out of his house and got into a verbal argument with Leplat. Rambeau came out of his house and joined in the argument.

Shortly thereafter, Felis Landa came up to Leplat and told Leplat to stop disrespecting his friends. Landa then punched Leplat and knocked him to the ground. When challenged to fight, Leplat remained down, getting up only to flee to his car and drive away.

Later in the evening, Leplat came back to Rambeau's house yelling for Landa to come out. Rambeau was sitting in his living room with his wife Tonya and others but Landa was not there. One of the guests in Rambeau's house went to the door, told Leplat to leave, and closed the door in Leplat's face. She saw something "pointee" in Leplat's hand and Leplat was making stabbing motions. Leplat continued to pound on the door and shattered the glass in a window pane.

When the glass broke, Rambeau went outside onto his porch where Leplat was waiting. The two men fought and Leplat stabbed Rambeau with a knife several times. A witness saw Leplat run from the house after the stabbing. Rambeau was helped back into the house, bleeding from wounds in his chest area. Someone called 911 and Rambeau was taken to the hospital. On arrival at the hospital, Rambeau had no pulse and was pronounced dead. It was determined on autopsy that death resulted from hemorrhaging due to multiple stab wounds to the chest. The autopsy also disclosed Rambeau had defensive wounds on his leg and arm.

While in jail following his arrest, Leplat talked about the stabbing to another jail inmate, Dan Casteel. Casteel informed the authorities that Leplat had admitted killing Rambeau. Leplat also described the knife and where he had discarded it and the clothing he was wearing at the time of the attack. Police later located a knife and blood-stained clothing. Rambeau's DNA was on the knife, and Leplat's DNA was found on the clothing. Casteel later testified at trial regarding Leplat's admissions to him.

DISCUSSION

No Error in not Giving Jury Written Jury Instruction

Leplat contends that his due process rights were violated because the jury was not provided a written copy of the jury instruction for imperfect self-defense. (See CALCRIM No. 571.) Leplat claims the omission constitutes a failure to instruct on the defense, and prejudicial error. We disagree.

Section 1093, subdivision (f) states in pertinent part: "Upon the jury retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy." If the court does not advise the jury of the availability of written instructions at the jury's request, or does not provide them with a complete set of instructions after the jury has requested them, the court has erred. (*People v. Seaton* (2001) 26 Cal.4th 598, 673; *People v. Ochoa* (2001) 26 Cal.4th 398, 446-447, abrogated on other grounds as stated in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14 [omission of two instructions from written packet sent into jury room was not error].)

A criminal defendant, however, has no state or federal constitutional right to be provided with a written copy of the jury instructions. (*People v. Ochoa, supra,* 26 Cal.4th at p. 447; *People v. Samayoa* (1997) 15 Cal.4th 795, 845.) "Nor does the statutory requirement underlie or embody a fundamental notion of due process or some other constitutional value. It is a purely statutory requirement." (*People v. Blakley* (1992) 6 Cal.App.4th 1019, 1023.)

Here, the trial court orally instructed the jury on imperfect self-defense as well as on first and second degree murder, manslaughter, provocation, and complete self-defense. It is undisputed that the trial court advised the jury of the availability of written jury instructions and stated affirmatively that it would provide a copy of the instructions for use in the jury room. The trial court gave the jury a packet of written instructions which appears to have omitted the instruction on imperfect self-defense. The jury never requested a

written version of that instruction but did request 11 copies of certain other instructions. Those included instructions on the degrees of murder, heat of passion manslaughter, complete self-defense, provocation, the right to eject a trespasser, and voluntary intoxication.

Because there was no express request by the jury for a written copy of the imperfect self-defense instruction, there was no error under section 1093, subdivision (f). Even if there was error, an appellate court may not reverse the conviction unless the defendant demonstrates a reasonable probability the jury would have reached a result more favorable to the defendant absent the error. (See, e.g., *People v. Seaton, supra*, 26 Cal.4th at p. 673 [failure to provide jury written set of instructions harmless error]; *People v. Cooley* (1993) 14 Cal.App.4th 1394, 1399 [same].) We conclude that any error in this case was harmless in light of the oral instructions, counsel's closing argument, and the evidence presented.

The evidence showed that Leplat assaulted Rambeau with a knife after attempting to break into Rambeau's house. The record shows that the jury indicated that the jurors were deadlocked on the first degree murder charge but reached a second degree murder verdict approximately 20 minutes after the trial court directed the jury to consider whether they could agree on a lesser charge.

Also, the trial court orally instructed the jury on imperfect self-defense and the prosecutor and defense counsel mentioned self-defense and imperfect self-defense during final argument. The record contains no questions from the jury regarding imperfect self-defense. "It is axiomatic that '[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]'" (*People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1502.) Leplat speculates that the jury may have forgotten the instruction on imperfect self-defense, but nothing in the record supports such speculation.

No Griffin Error

Leplat contends that argument by the prosecutor included improper comments on Leplat's failure to testify thereby violating his constitutional privilege against self-incrimination. We disagree.

It is error for a prosecutor to comment, directly or indirectly, on the failure of the defendant to testify. (*Griffin v. California* (1965) 380 U.S. 609, 614-615; *People v. Hughes* (2002) 27 Cal.4th 287, 371–372.) A prosecutor may comment "'. . . on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. . . .'" (*People v. Hovey* (1988) 44 Cal.3d 543, 572.) But a prosecutor may not refer to the absence of evidence that only the defendant's testimony could provide. (*Hughes,* at p. 372.) *Griffin* error occurs when there is a reasonable likelihood that jurors could have understood the prosecutor's comments to refer to defendant's failure to testify. (*People v. Clair* (1992) 2 Cal.4th 629, 663.) Nevertheless, "'brief and mild references to a defendant's failure to testify without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error.'" (*People v. Turner* (2004) 34 Cal.4th 406, 419–420.)

As respondent argues, Leplat forfeited his *Griffin* claim by not objecting to the prosecutor's remarks in the trial court. (*People v. Lancaster* (2007) 41 Cal.4th 50, 84 [*Griffin* error waived by failure to object].) Generally, the failure to object at trial waives the claim on appeal because it deprives the trial court of the opportunity to cure any harm by giving an appropriate instruction. (*People v. Valdez* (2004) 32 Cal.4th 73, 127.) Here, the record shows that any impropriety in the prosecutor's comments could have been cured by an appropriate admonition. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1060.)

Assuming that the claim has been preserved for appeal, we conclude that it has no merit. In responding to the defense argument that Leplat acted in self-defense, the prosecutor stated: "Where's the evidence of that? Where is the evidence that the defendant believed that? That the defendant only used force that was necessary." The prosecutor then stated that the defendant must actually believe he is in danger of death or great bodily injury. "Where's the evidence of that? Nobody testified to that. Not one person."

Similarly, the prosecutor asked "[w]here's the evidence of that" when discussing a claim that Leplat did not pull his knife out of its sheath until Rambeau was assaulting him and a claim that Mrs. Rambeau urged her husband to "hit him [Leplat] with a bottle."

These comments were proper comments on the state of the evidence and not inappropriate comments on Leplat's failure to testify. (See, e.g., *People v. Sanders* (1995) 11 Cal.4th 475, 527–528 [no *Griffin* error where the prosecutor commented in closing argument that the defense offered "no explanation" for "certain damning aspects" of the case]; *People v. Medina* (1995) 11 Cal.4th 694, 755–756 [prosecutor's argument that defense counsel offered no rational explanation for evidence defendant had a gun was not *Griffin* error].)

Contrary to Leplat's assertion, evidence of these matters could have come from witnesses other than Leplat's own testimony. There were multiple witnesses to events leading up to the killing who could have testified to any threats or violence by Rambeau against Leplat which might have supported a claim of imminent bodily injury. Also, evidence of defensive wounds on Leplat's body indicating resistance rather than aggression could have been presented through medical records and other testimony. Where, as here, witnesses other than the defendant could have provided contrary evidence, there is no *Griffin* error. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339-1340.)

No Cumulative Error

Leplat also argues that trial court errors were cumulatively prejudicial. Because we conclude there was no error, there could not be cumulative error.

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Charles W. Campbell, Jr., Judge*

Superior Court County of Ventura

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* (Retired Judge of the Ventura Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)