Filed 3/7/17 P. v. Velasco CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ARNOLD VELASCO, Defendant and Appellant.	B265059 (Los Angeles County Super. Ct. No. BA425875)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed.

Mary Jo Strnad, 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, Michael R. Johnson and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Arnold Velasco stabbed the victim, Laponda Richardson, during an altercation over a jacket. A jury found defendant guilty of attempted murder. He contends the judgment must be reversed because the jury was misinstructed on mutual combat. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

A. *Prosecution's case-in-chief*

On the morning of June 5, 2014, Laponda Richardson was at Sixth and Main in downtown Los Angeles. He had a shopping cart filled with his belongings, including his leather jacket. When someone told Richardson his jacket had been taken, Richardson ran to defendant, who had the jacket. Richardson asked, " 'Can I get my jacket back? Because you stole it off my cart.' " Defendant responded, " 'Punk, the jacket was on the ground.' " Defendant threw the jacket in Richardson's face and stabbed him in the neck with a knife. The encounter lasted "15, 20 seconds." According to Richardson, he never hit defendant with the jacket, threw a punch at defendant or otherwise threatened him. Richardson also denied having any weapon.

Jin Lee saw defendant and Richardson arguing for five to 10 minutes and heard Richardson tell defendant to " '[g]ive me back my jacket.' " Richardson took the jacket from defendant "and there was a slight pause" of about five seconds, and then defendant punched Richardson in the neck area.[1] Holding his

---

[1] Lee also said that after Richardson grabbed his jacket, "[t]hey were still saying something to each other" and then came the punch.

neck, Richardson hit defendant with the jacket. Defendant then walked away, ignoring Lee's entreaties to stop. Lee followed defendant and saw him drop, into a planter, a knife, which the police later recovered.

B. *Defense case*

Amy Meyer was walking her dogs when she saw Richardson "quickly" approach defendant and have a "conversation" with him. Richardson said something like, " 'Hey man. You stole my coat,' " to which defendant replied he " 'didn't know it was yours.' " Richardson grabbed his jacket and swung it, smacking defendant's leg with it. Distracted by the dogs during these events, Meyer next noticed Richardson in front of her saying he'd been stabbed. The incident happened "quickly."

Defendant testified that, in the past, he was attacked and severely injured for being gay. This past experience influenced his behavior on the morning of June 5, 2014. That morning, defendant did not have a knife. He saw a jacket on the ground, and, believing it had been discarded, picked it up. As he was walking away, the jacket was snatched from his hand from behind him. Richardson said, " 'You fucking fag. You took my jacket.' " He hit defendant's eye, which "kind of put [defendant] back" to the time he'd been assaulted for being gay. Richardson "was, like, 'you fucking fag. You're not going to walk on this block again. Let me catch you.' [¶] And he went to pound on me like this, but it was more like a gesture with both hands, but bam." Defendant blocked the blows with his backpack, but he denied stabbing Richardson. Richardson walked away, dropping a knife, which "I guess that's what he had in his hand because he had it – his hand was faced – the bottom of his fist was faced towards me." Before that, defendant said he never saw

Richardson with a knife, but "now that I think about it I seen the metal piece coming out from the bottom of his hand." Defendant picked up the knife, but when he heard Lee yelling at him, defendant put it in a planter, not wanting the knife to be used against him.

II. Procedural background

On March 13, 2015, a jury found defendant guilty of attempted murder (Pen. Code, §§ 187, subd. (a), 664)[2] and found true personal weapon use (§ 12022, subd. (b)(1)), and personal infliction of great bodily injury (§ 12022.7, subd. (a)) allegations.[3]

Defendant was sentenced, on June 17, 2015, to seven years, doubled based on a prior strike, to 14 years. He was sentenced to a consecutive five years for a prior prison term (§ 667, subd. (a)) and to three years for personally inflicting great bodily injury (§ 12022.7, subd. (a)), for a total of 22 years in prison.

DISCUSSION

I. The mutual combat instructions

Without objection from either party, the jury was instructed on mutual combat, under CALCRIM No. 3471. Defendant contends that the instruction violated his Sixth and Fourteenth Amendment rights because it was unsupported by evidence and because it improperly required the jury to reject self-defense, on which the jury was also instructed.

" '[M]utual combat' means not merely a reciprocal exchange of blows but one *pursuant to mutual intention, consent, or*

---

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

[3] The jury did not return a verdict on a count of assault with a deadly weapon (§ 245, subd. (a)(1)).

agreement preceding the initiation of hostilities." (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1045.) Mutual combat requires evidence from which a jury could reasonably find that the combatants actually consented or intended to fight before the claimed occasion for self-defense arose. (*Id.* at p. 1047.) A person who engages in mutual combat or who starts a fight therefore has a right to self-defense if (1) he tried in good faith to stop fighting, (2) he indicated to his opponent that he wanted to stop fighting, and (3) he gave his opponent a chance to stop fighting. (CALCRIM No. 3471.)[4]

---

[4] As recited to the jury, CALCRIM No. 3471 provides: "A person who engages in mutual combat or who starts a fight has a right to self-defense only if, first; [¶] He actually in good faith tries to stop fighting, and; [¶] Second, he indicated by word or 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; [¶] Third, he gave his opponent a chance to stop fighting. [¶] If the defendant meets these requirements he then had a right to self-defense if the opponent continued to fight. [¶] 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. [¶] A fight is mutual combat if it began and continued by mutual consent or agreement. [¶] That agreement may be expressly stated or implied and must occur before a claim of self-defense arose."

The jury was also instructed with CALCRIM No. 3472: " '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.' "

The mutual combat instruction, CALCRIM No. 3471, contains two concepts: first, mutual combat and, second, "initial aggressor" or one who "starts a fight." We agree with defendant that there was scant, if any, evidence of the first concept, an agreement to fight. At best, such an agreement might be inferred from Lee's testimony he saw defendant and Richardson arguing for five to 10 minutes before Richardson grabbed his jacket and defendant stabbed Richardson. But Lee did not hear what the men said, and no witness heard anything tantamount to an agreement to fight. Because there was insufficient evidence to show mutual combat, it was error, to that extent, to give CALCRIM No. 3471. (See generally *People v. Guiton* (1993) 4 Cal.4th 1116, 1129 [error to give an instruction having no application to the facts of the case].)

We review such error under the reasonable probability standard of review, i.e., under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Debose* (2014) 59 Cal.4th 177, 206.) Under that standard of review, instruction on an irrelevant point is usually harmless. (See *People v. Rollo* (1977) 20 Cal.3d 109, 123, superseded by statute on another ground as stated in *People v. Edwards* (2013) 57 Cal.4th 658, 723; *People v. Ross*, *supra*, 155 Cal.App.4th at p. 1056 [had jury been properly instructed on mutual combat on the present facts, they would have presumably ignored the instruction]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381 [instructing on mutual combat harmless error]; but see *People v. Rogers* (1958) 164 Cal.App.2d 555 [instruction on mutual combat prejudicial error].)

We fail to see prejudice requiring reversal. Given the absence of evidence that defendant and Richardson agreed to fight, it is not reasonably probable the jury relied on a mutual

combat theory. "If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129 [such error is not one of federal constitutional dimension].) We do note that the prosecutor discussed the theory, but she focused on what a person must do to stop mutual combat once it has, by agreement, begun.[5] She did not discuss the underlying notion of "mutuality," which CALCRIM No. 3471 told the jury requires "mutual consent or agreement" and which "may be expressly stated or implied and must occur before a claim of self-defense arose." There being no evidence of such an agreement, the jury would never have

---

[5] She said, "But let's start with . . . a person who engages in mutual combat or starts a fight has a right to self-defense only if he actually and in good faith tried to stop fighting, if he tried to stop fighting or did he elevate the fighting? [¶] He indicated by word or conduct to his opponent he wanted to stop the fight and he had stopped fighting. [¶] Did he ever say, 'Hey, hey, look, here, take your jacket. I'll see you. Thanks.' [¶] No, he doesn't. He pauses. Pauses. Puts out his knife. Whips out the blade and stabs. [¶] He gave his opponent an opportunity to stop fighting. [¶] Now, if the defendant meets these requirements he then has a right to self-defense if . . . Richardson continued to fight. [¶] But really how could [Richardson] continue to fight with blood spurting out of his neck? He couldn't. [¶] So then if you think that all three, the defendant has all those three elements, he tried to stop fighting and conveyed he wanted to stop the fighting and gave [Richardson] a chance to stop fighting then you continue to ask yourself well, did he reasonable believe that he was in imminent danger of being killed?"

reached the issue of whether defendant tried to discontinue the fight in the context of mutual combat. Indeed, the jury was instructed that some "of these instructions may not apply depending on your findings about the facts of the case. [¶] Do not assume that just because I give a particular instruction that I am suggesting anything about the facts. [¶] After you have decided what the facts are follow the instructions that do apply to the facts as you find them." (CALCRIM No. 200.)[6]

Notwithstanding the inapplicability of mutual combat, it was not error to give CALCRIM No. 3471 because there was evidence of its second concept, i.e., that defendant was the initial aggressor. Richardson testified that defendant took his jacket, and when Richardson asked for it back, defendant threw the jacket at Richardson and stabbed him. Therefore, to the extent CALCRIM No. 3471 pertains to initial aggressors, there was sufficient evidence to support giving the instruction.

Defendant, however, argues that CALCRIM No. 3471's reference to one who "starts a fight" is additionally problematic because that phrase was undefined. One could, for example, start a fight by creating a volatile situation. (See, e.g., *People v.*

---

[6] To the extent defendant also argues it was error to give CALCRIM No. 3472, this same analysis applies. There was no evidence that defendant provoked a fight "with the intent to create an excuse to 'use force.' " (See generally *People v. Ramirez* (2015) 233 Cal.App.4th 940, 955 (dis. opn. of Fybel, J.) [CALCRIM No. 3472 contains a scienter requirement that the defendant contrived a situation in order to use force].) The jury would have ignored this factually irrelevant theory.

Vasquez (2006) 136 Cal.App.4th 1176 (*Vasquez*);[7] *People v. Randle* (2005) 35 Cal.4th 987, 1002-1003, overruled on other grounds by *People v. Chun* (2009) 45 Cal.4th 1172.) Or one could start a fight by an act of physical aggression. But, according to defendant, CALCRIM No. 3471 only applies where the defendant initiated a *physical* confrontation. Thus, CALCRIM No. 3471, by leaving undefined "starts a fight," could have led the jury incorrectly to conclude that defendant wasn't entitled to self-defense if he "started the fight" merely by taking Richardson's jacket, thereby setting in motion a chain of events that led Richardson to hit defendant with the jacket.

The first problem with defendant's contention is he never asked that the instructions be modified or clarified. "A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction

---

[7] In *Vasquez*, the defendant lured the victim to an alley, where the defendant accused the victim of raping the defendant's brother. The victim reacted by choking the defendant, who pulled out a gun and shot the victim. The trial court found that the defendant wasn't entitled to an imperfect self-defense instruction because he created the need to defend himself. But *Vasquez* held that the defendant *was* entitled to an imperfect self-defense instruction. Although that defense doesn't apply when the defendant's conduct creates a situation in which the victim is legally justified in resorting to self-defense against the defendant (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1; *Vasquez*, *supra*, 136 Cal.App.4th at p. 1179), "the 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" (*Vasquez*, at pp. 1179-1180, italics added).

forfeits the claim of error for purposes of appeal [citations]." (*People v. Lee* (2011) 51 Cal.4th 620, 638; accord, *People v. Whalen* (2013) 56 Cal.4th 1, 81-82, disapproved on another ground by *People v. Romero* (2015) 62 Cal.4th 1, 44 & fn. 17.)

In any event, we fail to see a reasonable probability of a different outcome. (See *People v. Ross*, *supra*, 155 Cal.App.4th at pp. 1054-1055.) The prosecutor did not argue that defendant's act of taking the jacket started the fight. (Compare *People v. Ramirez*, *supra*, 233 Cal.App.4th 940 [prosecutor's misstatements compounded instructional error].) But even if the jury believed that defendant started the fight by taking the jacket and that, as Meyers testified, Richardson hit defendant with it, the jury would not have found that defendant was entitled to self-defense. He responded with deadly force to Richardson's mere act of hitting him with the jacket. (See generally CALCRIM No. 3470 [defendant acting in self-defense may use no more force than reasonably necessary to defend against danger].) His deadly response is all the more disproportionate given his own ambiguous testimony that he didn't see Richardson with a weapon but also then recalling seeing something metal in Richardson's hand.

Furthermore, under defendant's own version of events in which Richardson assaulted him, the jury could have credited his claim of self-defense, notwithstanding CALCRIM No. 3471. Specifically, the instruction provides, "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." (CALCRIM No. 3471.) Thus, if the jury found that defendant started the fight merely by taking the jacket, then Richardson's act of punching defendant gave rise to defendant's right to defend himself. We therefore do not find it reasonably probable that a different outcome would have resulted in the absence of any instructional error.

Because we discern no prejudicial error, we reject defendant's related claim that his counsel provided ineffective assistance by failing to address the alleged instructional error. (See generally *Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212.)

II. Cumulative error

Defendant contends that the cumulative effect of the purported errors deprived him of a fair trial. As we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial,' " we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236; *People v. Butler* (2009) 46 Cal.4th 847, 885.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, Acting P. J.

We concur:

LAVIN, J.

GOSWAMI, J.*

---

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