Filed 7/19/17 P. v. Serna CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ELIZABETH CHERICE SERNA, Defendant and Appellant.	2d Crim. No. B270275 (Super. Ct. No. 2013038485) (Ventura County)

Elizabeth Cherice Serna appeals from the judgment entered after a jury had convicted her of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).) The jury found true an allegation that she had personally inflicted great bodily injury. (*Id.*, § 12022.7.) She was sentenced to prison for five years.

Appellant contends that the trial court erroneously (1) excluded the testimony of two defense witnesses, (2) limited appellant's own testimony, and (3) instructed the jury pursuant to CALCRIM Nos. 3472, 361, and 372. The People claim, and appellant concedes, that at sentencing the trial court failed to

impose mandatory fees. We amend the judgment to impose the omitted fees and affirm the judgment as amended.

Facts

People's Evidence

Genesis Alday and appellant got into an argument. Later that same day, Alday was walking across a street when she saw appellant and another person running toward her. Appellant lifted up her right hand and said, " '[W]hat's up now bitch'?" Appellant and Alday started "swinging at each other." Alday could not recall who threw the first punch.

Alday felt pain in her left side and had difficulty breathing. She threw appellant to the ground, "got on top of her," and "pinned her down by her arms." Appellant was holding a knife. When Alday saw the knife, she "jumped up" and said that appellant had stabbed her. Appellant and her companion ran away.

Alday was stabbed four times - in the neck, the shoulder, the armpit, and the side. She suffered a collapsed lung. Alday testified that, when appellant was pinned to the ground, she was not able "to get near where [Alday] actually ended up getting stabbed."

Appellant's Evidence

Appellant testified as follows: She was out walking with her sister-in-law, Brenda Dominguez. She had a pocket knife hidden in her bra. She looked across the street and saw Alday walking toward her at a fast pace. Appellant "knew [Alday] was coming at me to fight me." They "both swung towards each other" and began to fight. Appellant was hit in the face and felt dizzy.

Appellant and Alday ended up on the ground. Alday was on top of appellant, who was lying on her back. They were throwing punches at each other.

Appellant saw her pocket knife close by on the ground. She picked it up and pressed a button to open the blade. She "just start[ed] swinging at [Alday]" with the knife. Alday "still didn't stop. She still kept swinging." Alday pressed her knees against the inner elbow area of both of appellant's arms. Appellant was "pinned down." Alday "was punching [appellant's] head."

Appellant "noticed that [Alday] was getting tired." Appellant tried "to get up and . . . ended up on [her] bottom." Alday bit her on the back of her left shoulder. Appellant stood up and started walking fast toward Brenda Dominguez. Appellant and Dominguez left the area.

Dominguez testified that appellant and Alday "started punching each other." Dominguez crossed the street and did not see what happened after the initial punching. When the fight was over, she and appellant "ran away." Dominguez saw blood on appellant's face. She believed that the blood was coming from appellant's nose.

Allegedly Erroneous Exclusion of Testimony of Defense Witnesses

Appellant argues: "The trial court abused its discretion in not denying the [People's pretrial] motion to exclude [the proposed testimony of defense] witnesses Daysi Lopez [Daysi] and Elizabeth Lopez [Elizabeth]." (Some capitalization omitted.) The People alleged that, according to information provided by appellant, Daysi would testify as follows: "[S]he had run in's with [Alday] many months before the fight between [Alday] and [appellant]." "[Alday] approached her and so Daysi Lopez stood

up to fight [Alday]. The two began fighting until a lady yelled out loud for them to stop." Elizabeth would testify that "a few years ago when [Alday] was much younger," Elizabeth "had a couple of altercations with [her], which could have easily ended up as physical confrontations." In addition, Alday "tried to start a fight with her on three separate occasions over the past several years." "[T]he last confrontation between the two of them happened a couple of years back when [Alday] and Elizabeth had a verbal confrontation." The People claimed that the witnesses' proposed testimony is not relevant or, if relevant, should be excluded under Evidence Code section 352.[1]

At a hearing on the motion, the court asked defense counsel for an "offer of proof." Counsel replied: "Your honor, I don't, frankly, have my investigative reports in front of me at this exact moment to tell the Court exactly what it says." "If the Court wants specific information, I'd respectfully ask the Court to consider allowing us to finish . . . after 1:30 so I can bring my investigative reports with me." The court stated that it would "reserve ruling" on the motion until it has "an offer of proof -- a little more concrete offer of proof" as to the witnesses' testimony.

The court's concluding remarks at the hearing were as follows: "I'm not denying it, I'm not granting it. At this point in time, I don't have enough information to consider that because of those factors that we've mentioned. So those rulings are deferred. Use your rules and resources to provide additional

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[1] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

information or perhaps have those individuals appear for a[n Evidence Code section] 402 Hearing to at least flesh it out a little, and we'll go from there and see if that happens." Defense counsel replied, "Yes, your Honor."

After Alday had completed her trial testimony, the court said it was still "reserving" its ruling on the People's motion to exclude the testimony of Daysi and Elizabeth. The court asked defense counsel, "Do we have anything that you wanted me to look at?" Counsel replied, "I'll give you a few pages in a moment from Ms. Lopez." If counsel gave the pages to the court, they are not included in the record.

Appellant fails to cite any portion of the record showing that she made the offer of proof requested by the court, that the court actually ruled on the People's motion, or that she pressed the court for a ruling. The People's brief asserts, "The record does not include a ruling on the motion." In her reply brief, appellant does not dispute this assertion. Our search of the record has failed to disclose a ruling on the motion. The People note, "It is . . . possible that the defense abandoned the issue." Accordingly, appellant has failed to preserve the issue for appellate review. (See Evid. Code, § 354, subd. (a) [judgment shall not be reversed for erroneous exclusion of evidence unless "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by . . . an offer of proof"]; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1181 [defendant forfeited claim that trial court had erroneously excluded evidence because "the trial court deferred ruling on [the People's] motion to exclude the evidence and none of appellants ever raised the issue again"]; *People v. Cornejo* (2016) 3 Cal.App.5th 36, 56 ["By failing to press for a ruling . . . defendants have forfeited their . . .

contention the trial court prejudicially erred and violated their due process rights by excluding the proffered evidence"]; *Barak v. Quisenberry Law Firm* (2006) 135 Cal.App.4th 654, 660 ["Failure to provide an adequate record on an issue requires that the issue be resolved against appellant"]; *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 743 ["'If a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived'"].)

Allegedly Erroneous Limitation of Appellant's Testimony

Appellant claims that the trial court erroneously precluded her from testifying about the details of prior violent incidents involving Alday. Defense counsel asked appellant what she had been thinking when Alday was on top of her. Appellant replied: "I was scared for my life because I knew what she was capable of. . . . [M]y son's dad . . . knew her and seen her at parties getting . . . in fights, and . . . he's mentioned that she's knocked out a few people." The prosecutor made a hearsay objection, which the court sustained. It struck appellant's testimony about what her son's dad had said.

The prosecutor argued: "[Appellant] can . . . testify . . . [she] knew that [Alday] had gotten in fights before, [Alday has] beaten up people before, but it's the People's position that she can't bring up specific hearsay statements that people have told her, you know, providing detail." Defense counsel replied that the out-of-court statements are not hearsay because they are not offered "for the truth of the matter asserted." Instead, they are offered to show appellant's "state of mind."

The court ruled that appellant cannot testify as to the specific details of what other persons told her about violent

incidents involving Alday. For example, she cannot testify that "[V]ictor [her son's father] told [her] that four years ago [Alday] was in . . . a fight and she punched . . . Mary and Mary went flying through the window." The court explained: "I think that's more prejudicial than probative. There's also the [consumption of] time issues." "[W]e tip over the scales of [Evidence Code section] 352 at the point [appellant] tries to discuss details about things . . . she heard." "[S]he can testify about the source of the information but not the details of it." For example, she can say that Victor told her that Alday "could knock people out or ha[d] knocked people out."

Pursuant to the court's guidelines, defense counsel elicited testimony from appellant that Victor had told her that Alday "was capable of . . . badly hurting people, at some points knocking them out." Appellant further testified that other people had told her that Alday "could fight well." On cross-examination, the prosecutor asked appellant, "[Y]ou testified on direct examination that you heard in the past that [Alday] has knocked people out -- is that the words you used, she fights? She's knocked somebody out before?" Appellant replied that "a few people," including Victor, had related this information to her. The prosecutor continued, "[S]o in your mind you know that [Alday] . . . knows how to fight?" Appellant replied, "Yes. From what I've heard."

Appellant never made an offer of proof as to the details of what other persons had told her about prior violent incidents involving Alday. Appellant has therefore failed to preserve for appellate review her contention that the trial court had erroneously precluded her from testifying about these details. (Evid. Code, § 354, subd. (a).) An offer of proof is not required where "[t]he rulings of the court made [an offer of proof] futile."

(*Id*., subd. (b).) Appellant has not shown that an offer of proof would have been futile here. Indeed, she has not raised the futility issue.

In any event, we cannot reverse the judgment unless the limitation of appellant's testimony "resulted in a miscarriage of justice." (Evid. Code, § 354.) "Under these circumstances, [appellant] failed to make a record that permits a finding [s]he was prejudiced by the [trial court's ruling]." (*People v. Anderson* (2001) 25 Cal.4th 543, 581.) "[T]he reviewing court must know the substance of the excluded evidence [i.e., the excluded details of the prior violent incidents involving Alday] in order to assess prejudice. [Citations.]" (*Id*. at pp. 580-581.)

CALCRIM No. 3472

Appellant claims that the trial court erroneously instructed the jury pursuant to CALCRIM No. 3472, which provides, "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." Appellant asserts, "CALCRIM 3472 erroneously directed the jury to conclude that if [she] contrived to provoke even a nondeadly attack on Alday, there were no circumstances in which she could legitimately claim self-defense."

"CALCRIM No. 3472 is generally a correct statement of law, which might require modification in the rare case in which a defendant intended to provoke only a nondeadly confrontation and the victim responds with deadly force." (*People v. Eulian* (2016) 247 Cal.App.4th 1324, 1334.) No modification was required here because Alday did not respond with deadly force. The only person who used deadly force was appellant.

Appellant argues that Alday "escalated the fight using sudden and deadly force when she pinned appellant on the

ground and continued to punch her head." But appellant testified that she had grabbed the knife and started swinging it at Alday before her arms were pinned to the ground.[2] Moreover, there is no evidence that Alday's punches to the head constituted deadly force. Appellant testified that she had sustained only a bloody nose and facial bruises. She did not seek medical attention for her injuries. Appellant escalated a fistfight into a deadly confrontation when she armed herself with the knife.

People v. Ramirez (2015) 233 Cal.App.4th 940, is distinguishable. There, gang members got into a fist fight. The defendant testified that the victim "approached [and] raised his hand, holding an object that 'looked like a gun.'" (*Id.* at p. 945.) Thus, the defendant allegedly believed that the victim had resorted to deadly force. In response, the defendant pulled out his gun and fatally shot the victim. The defendant claimed that he had fired the gun in defense of himself and his companions. The appellate court concluded that, under the particular facts before the jury, CALCRIM No. 3472 "misstated the law" because "[a] person who contrives to start a fistfight or provoke a nondeadly quarrel" does not forfeit the right of self-defense if his adversary suddenly resorts to deadly force. (*Id.* at p. 943.)

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[2] The following testimony was elicited during cross-examination:

"[The prosecutor:] Okay. So somehow your right arm grabbed the knife but you don't recall how?

"[Appellant:] No, not exactly.

"[The prosecutor:] And then you pick up the knife. And at this point [Alday] still hasn't pinned your arms down?

"[Appellant:] No. [¶] . . . [¶]

"[The prosecutor:] And then what do you do with the knife?

"[Appellant:] I start swinging."

Unlike the adversary in *Ramirez*, there is no evidence that Alday resorted to deadly force.

Ramirez notes, "CALCRIM No. 3472 states a correct rule of law in appropriate circumstances." (*People v. Ramirez*, *supra*, 233 Cal.App.4th at p. 947.) The circumstances here were appropriate for instructing the jury pursuant to CALCRIM No. 3472.

Even if CALCRIM No. 3472 had been erroneously given, the error would have been harmless beyond a reasonable doubt. The court also gave CALCRIM No. 3471, which provided, "[I]f 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 herself with deadly force . . . ." This instruction made clear that appellant could legitimately claim self-defense if she had intended to provoke only a nondeadly quarrel and Alday had suddenly resorted to deadly force when she was on top of appellant.

CALCRIM No. 361

The People concede that the trial court erred in giving a modified version of CALCRIM No. 361, which provided: "If you find the defendant failed in her testimony to explain or deny evidence against her, and if she could reasonably be expected to have done so based on what she knew, you may consider her failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

After appellant was convicted, our Supreme Court held that CALCRIM No. 361 "applies only when a defendant completely fails to explain or deny incriminating evidence, or claims to lack knowledge and it appears from the evidence that the defendant could reasonably be expected to have that knowledge." (*People v. Cortez* (2016) 63 Cal.4th 101, 117.) The People acknowledge that the instruction should not have been given here "because appellant did not 'completely' fail to explain or deny adverse testimony."

We agree with the People that the error is harmless. The instruction does not say that appellant failed to explain or deny evidence against her. The instruction applies *only if* she failed to explain or deny such evidence. The jury was warned not to conclude that an instruction applies just because it was given: "Some of these instructions may not apply, depending on your findings about the facts of the case. [Do not assume just because I give a particular instruction that I am suggesting anything about the facts.]" (CALCRIM No. 200.) In addition, the instruction states that appellant's mere failure to explain or deny evidence against her is not enough to prove guilt.

In *People v. Lamer* (2003) 110 Cal.App.4th 1463, the trial court erroneously gave a similar instruction - CALJIC No. 2.62.[3]

[3] The instruction provided: "'In this case defendant has testified to certain matters. If you find that the defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonabl[y] be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonabl[y] be drawn therefrom those unfavorabl[e] to the defendant are the more probable. [¶] 'The failure of a defendant

Applying the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, the appellate court concluded it is not reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Lamer*, *supra*, 110 Cal.App.4th at pp. 1471-1473.) The court noted: "Although . . . courts have frequently found giving CALJIC No. 2.62 to constitute error, we have not found a single case in which an appellate court found the error to be reversible under the *Watson* standard. On the contrary, courts have routinely found that the improper giving of CALJIC No. 2.62 constitutes harmless error. [Citations.]" (*Id.* at p. 1472.) Appellant has failed to present persuasive argument why we should reach a different result here.

CALCRIM No. 372

Appellant maintains that the trial court erred in giving CALCRIM No. 372. As given, the instruction provided: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that she was aware of her guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct.

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to deny or explain evidence against him does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] 'If a defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain this evidence.'" (*People v. Lamer*, *supra*, 110 Cal.App.4th at pp. 1468-1469.)

However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

Appellant claims that CALCRIM No. 372 conflicts with the flight statute (Pen. Code, § 1127c)[4] and violates her right to due process because (1) it is impermissibly argumentative and (2) it "lighten[s] the prosecution's burden to prove [her] guilty beyond a reasonable doubt." Similar claims were rejected in *People v. Price* (2017) 8 Cal.App.5th 409, 454-458; *People v. Paysinger* (2009) 174 Cal.App.4th 26, 30-32; and *People v. Rios* (2007) 151 Cal.App.4th 1154, 1157-1159.) We find these authorities persuasive.

Mandatory Fees

The People contend that at sentencing the trial court failed to order appellant to pay mandatory fees. The omitted fees are a $30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)) and a $40 court operations assessment, formerly known as a court security fee. (Pen. Code, § 1465.8, subd. (a)(1).) Appellant concedes that the fees are required. We accept her concession.

Disposition

The judgment is amended to order appellant to pay a $30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)) and a $40 court operations assessment, formerly known as a court

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[4] Penal Code section 1127c provides: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine. [¶] No further instruction on the subject of flight need be given."

security fee. (Pen. Code, § 1465.8, subd. (a)(1).) The trial court is directed to amend the abstract of judgment to show the imposition of these fees. The court shall send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Bruce A. Young, Judge

Superior Court County of Ventura

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