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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JERRY WIZAR, Defendant and Appellant.	B237886 (Los Angeles County Super. Ct. No. LA065270)

APPEAL from a judgment of the Superior Court of Los Angeles County, Susan M. Speer, Judge. Affirmed.

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Jerry Wizar of second degree murder (Pen. Code, § 187, subd. (a))[1] and found true the allegation he personally used a deadly weapon in the commission of the crime (§ 12022, subd. (b)(1)). The trial court sentenced him to state prison for 15 years to life plus a determinate term of one year for weapon use. On appeal, Wizar challenges the sufficiency of the evidence to support his second degree murder conviction and contends that the trial court committed prejudicial error by instructing the jury on mutual combat. We conclude that there was sufficient evidence to support the conviction and that any instructional error, to the extent Wizar did not waive his right to challenge it by not objecting at trial, was harmless. We therefore affirm the judgment.

FACTUAL BACKGROUND

A. *Preliminary Facts*

Wizar, his mother Barbara Lagunas, stepfather Frank Lagunas, half-sister Monique Lagunas, and cousin Richard Olivas, lived in the Lagunas home in Canoga Park.[2] On the evening of June 4, 2010 Michael Silva, Frank's employer whom he met while incarcerated in state prison, was loitering in front of the house, "high as a kite," drinking beers and smoking cigarettes. According to a voicemail on Frank's cell phone, Silva was waiting for Frank and insisted on staying until Frank came out with him. Silva claimed Frank owed him money.

A DVR recording from a surveillance camera attached to the Lagunases' home showed Silva loitering in the yard for more than four hours that night, interacting with

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1 All further statutory references are to the Penal Code.

2 We use the Lagunas family members' first names to avoid confusion and intend no disrespect. (See *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1104, fn. 2; *In re Marriage of Simundza* (2004) 121 Cal.App.4th 1513, 1514, fn. 1.)

Wizar and various family members. The recording showed Silva and Wizar talking throughout the night, drinking beers, and driving and smoking in Silva's truck. At one point, Silva sent Wizar in his truck to buy more cigarettes.

B. *The Struggle*

At approximately 1:00 a.m. on June 5, 2010 Silva's girlfriend, Victoria Wallace, received phone calls from Barbara and Wizar alerting her that Silva was very drunk. According to Wallace and Silva's ex-wife, Silva was an alcoholic who became angry and abusive when drunk. In the past, he had set his ex-wife's car on fire, and he had numerous physical altercations with Wallace when drunk.

The surveillance video, although not entirely clear, showed that at 1:54 a.m. an individual came quickly down the driveway, and headlights flashed from the street in front of the house where Monique had parked her Nissan. Los Angeles Police Detective Ammon Williams testified that the individual on the video appeared to be a female of smaller stature. Less than a minute after the figure went back toward the house, two individuals appeared on the video, moving down the driveway next to where Wizar had parked his truck. One of the individuals appeared to move backwards and the other appeared to pursue him. A struggle ensued next to the driver's side of Wizar's truck. The video showed a metallic flash near the chest area of the pursuer, followed by both individuals falling to the ground. Detective Williams testified that the DVR recording showed a flash of reflective material that he had previously identified on Wizar's shoes. Following the struggle, one of the two individuals involved in the struggle entered Wizar's truck and drove away.

Los Angeles Police Detectives Patrick McCarty and Nick Pikor responded to the crime scene. Detective Pikor observed Silva's dead body half on the driveway and half on the grass. Beer bottles and other items littered the ground. A large blade was sticking out of the back of Silva's neck, and Silva's shirt and pants were soaked in blood. Detective Pikor also observed tire marks on Silva's pants just above the knee where Wizar's truck had driven over Silva's leg as the truck left the scene.

Detective McCarty interviewed Barbara, Richard, and Monique as potential witnesses. The police identified Frank and Wizar as potential suspects and detained Frank near the house but did not find Wizar. After Barbara stated that her son had been involved in a physical altercation with a man at her house, the police began to look for Wizar.

On June 30, 2010 Wizar surrendered to the Los Angeles Police Department. Detectives visually inspected his body and saw no signs of injury.

C. *Barbara's Testimony*

Barbara testified that she feared Silva was going to harm her family that night. Throughout the night, Silva boasted about killing people and made derogatory and sexually vulgar comments to Barbara. He repeatedly threatened, "I'm not leaving until Poncho [Frank] gets here, he owes me money and he's going to make it right and when he gets here I'm gonna put him on his fuckin' knees and show him who's boss." According to Barbara, Silva threatened to kill both Frank and Wizar.

When Wizar asked Silva to stop disrespecting his mother, things got physical. Barbara saw Silva pin Wizar in a corner with his hands on Wizar's throat so that he could not move. She thought Silva was going to go after her daughter, Monique, so she ran into the house to call 911. The call did not go through, however, because Barbara hung up the phone. Even though she testified that she feared Silva's threats to her family, Barbara attempted to call 911 only once that night. After realizing that Wizar was involved in something serious, Barbara removed the DVR recording from the surveillance camera and gave it to Monique.

D. *Richard's Testimony*

Richard testified that when he arrived home earlier that night, Silva confronted him outside and spoke to him in an angry and aggressive manner. Silva showed Richard the tattoos on his arms and said he was from the Mexican Mafia and that he had harmed some people.

After Richard was able to get inside the house, he went to his room and fell asleep. A few hours later, he awoke to the sound of shouting and heard Wizar say, "You're gonna kill me?" as though responding to someone's threat. He heard two people fighting, followed by a woman's scream. He ran to the fence, peered over the hedge, and saw Wizar bending down right beside his truck. Once he determined that Wizar was alive, he went back to comfort Monique, who was worried about Wizar's safety. Richard testified that he did not see the struggle because it had ended by the time he went outside.

E. *The Stab Wounds and Toxicology Report*

The medical examiner who performed Silva's autopsy determined that Silva had suffered 16 stab wounds to his body, two of which were fatal. The examiner characterized six of the wounds as defensive wounds resulting from the victim raising his arms to fend off an attack. One of the fatal stab wounds went seven inches into Silva's chest cavity and pierced the right lung. The second fatal wound pierced five and one-half inches into the pulmonary artery, aorta, and heart, causing hemorrhaging from the heart and blood vessels. Based on the wounds, it was not possible to tell who was the initial aggressor.

At the time of his death, Silva had a blood-alcohol concentration of between .31 and .36. In an interview at the police station the night of the incident, Barbara said that Silva was drunk and could barely stand, although at trial she denied saying this. The toxicology report also showed the presence of cocaethylene, which only occurs when cocaine and alcohol are ingested at the same time. The toxicologist testified that this combination of drugs sometimes leads to violent, aggressive, and confrontational behavior, but an individual's reaction to cocaine and alcohol is not entirely predictable.

F. *Blood Evidence on Wizar's Truck*

Two days after the homicide, police officers found Wizar's truck approximately 1.5 miles from the crime scene. They found bloodstains on the rim of the driver's side wheel, the handle to the tailgate, the driver's side door handle, and the steering wheel.

Several bloodstains from the truck's exterior and interior matched Silva's DNA profile, including a mixture in which Wizar and Silva were both possible contributors.

DISCUSSION

A. *There Was Sufficient Evidence To Support Wizar's Conviction for Second Degree Murder*

In determining whether there is sufficient evidence to support a conviction, we review "the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Cravens* (2012) 53 Cal.4th 500, 507.) "The standard of review is the same in cases in which the People rely mainly on circumstantial evidence." (*Ibid*.) The jury, not the appellate court, must be convinced of the defendant's guilt beyond a reasonable doubt. (*Id.* at pp. 507-508.) If the circumstances reasonably support the jury's finding of guilt beyond a reasonable doubt, we will not reverse even if we believe that we might reasonably reconcile the circumstances with a contrary finding. (*Id.* at p. 508.) We will affirm the conviction "'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."'" (*Ibid.*)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) There are two degrees of murder. Willful, deliberate, and premeditated killings constitute first degree murder. (See § 189; *People v. Knoller* (2007) 41 Cal.4th 139, 151.) Second degree murder occurs when a person kills unlawfully and intentionally but does not form the intent to kill after premeditation and deliberation. (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653.) If the defendant commits an unlawful, intentional killing but lacks malice, he or she is guilty of the lesser-included offense of voluntary manslaughter. (§ 192; *People v. Barton* (1995) 12 Cal.4th 186, 199.) Two circumstances may negate malice aforethought and thus reduce murder to voluntary

manslaughter: (1) when the defendant acts in a "sudden quarrel or heat of passion," or (2) when the defendant kills in an unreasonable but good faith belief in having to act in self-defense. (§ 192, subd. (a); *Barton*, *supra*, at p. 199.)

"[M]alice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.) Malice may be implied "'when a person does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. . . .'" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 104; accord, *People v. Knoller*, *supra*, 41 Cal.4th at p. 143.)

In *People v. Cravens*, *supra*, 53 Cal.4th 500 the Supreme Court found sufficient evidence of implied malice to support a conviction of second degree murder where the defendant sucker-punched an undermatched, inebriated, and impaired victim, causing the victim's death. (*Id*. at p. 508.) The court concluded that a jury reasonably could have found that the victim posed no threat at the time the defendant attacked and that the defendant's actions supported a finding of implied malice because the act was dangerous to human life. (*Id.* at pp. 509.) In *People v. Matta* (1976) 57 Cal.App.3d 472 the court found sufficient evidence of implied malice where the defendant inflicted repeated beatings on the victim, ultimately causing the victim's death. (*Id.* at p. 480.) The defendant's willful acts under circumstances where there was a strong likelihood that death or great bodily injury would result were sufficient to sustain a second degree murder conviction. (*Ibid.*)

Here, the jury reasonably could have found the evidence that Wizar repeatedly stabbed Silva sufficient to find that Wizar acted with conscious disregard for human life or an abandoned and malignant heart. Like the defendant in *Cravens* who punched the inebriated victim, Wizar stabbed Silva while Silva was under the influence of alcohol, with a blood-alcohol concentration between .31 and .36, and was visibly impaired. Wizar's infliction of 16 stab wounds was likely to result in death or serious bodily injury

to Silva. In addition, as in *Matta*, where the defendant's repeated beatings provided sufficient evidence of implied malice, Wizar's repeated stab wounds were predictably dangerous to human life and provided evidence of an abandoned and malignant heart. Even if Wizar reasonably feared Silva's threats of serious bodily injury or death, that fear was no longer reasonable after Wizar had inflicted enough stab wounds to render Silva incapable of harming him. The jury also reasonably rejected Wizar's claims of provocation or heat of passion to reduce the conviction to manslaughter, and Wizar does not contest that finding on appeal. Therefore, there is sufficient evidence to support Wizar's conviction for second degree murder.[3]

Wizar also argues that there was insufficient evidence to support his second degree murder conviction because the evidence shows he acted in self-defense. He does not deny that he killed Silva, but urges that the offense should be reduced to manslaughter because the killing was in self-defense or imperfect self-defense. In light of the totality of the circumstances, however, even if Silva's threats initially justified the use of force in response to Silva's actions, the jury reasonably could have found that Wizar did not act in self-defense.

The defense of self-defense requires that the defendant acted in actual fear of imminent harm. (*People v. Stitely* (2005) 35 Cal.4th 514, 552.) Fear of future harm will not suffice and the defendant's fear must be of imminent danger to life or great bodily injury. (*Id.* at p. 551.) The defendant does not have to retreat and may pursue the assailant until the danger has passed, "but [the] defendant may use force only as long as

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[3] Wizar relies on *People v. Kelley* (1929) 208 Cal. 387 where the defendant, after an afternoon of "drinking whisky and indulging in sexual intercourse" (*id*. at p. 389) with his lover, accidentally killed her by inflicting "disgusting, bestial and shocking" (*id*. at p. 393) injuries "during a sexual debauch in which the decedent was a willing participant, and while the passions of both were probably more or less inflamed by the use of intoxicating drink" (*id.* at p. 390). The court reduced the conviction to manslaughter because the evidence was insufficient to support a finding of express or implied malice. (*Id*. at p. 393.) Unlike in the defendant's conduct in *Kelley*, Wizar's multiple stab wounds were predictably dangerous to human life.

the danger exists or reasonably appears to exist." (*People v. Clark* (2011) 201 Cal.App.4th 235, 250.) The defendant's right to use force in self-defense ends when the attacker no longer appears capable of inflicting any injury, or when the threat is no longer imminent. (*Ibid.*; *People v. Gleghorn* (1987) 193 Cal.App.3d 196, 202.)

Here, Silva was an unwanted guest at the Lagunas household. He was belligerent, disorderly, and drunk. Throughout the night he insulted and threatened members of the Lagunas family, claiming to be a member of the Mexican Mafia and suggesting that he had killed people. When Silva's insults drew rebuke from Wizar, Silva took him by the throat and the two of them fought. While the surveillance video showed a metallic flash near the chest area of one of the individuals, it did not clearly show who was the initial aggressor. Silva's autopsy revealed 16 wounds, including two fatal wounds through the chest and lungs. Multiple defensive wounds suggested that Silva attempted to raise his arms to fend off an attack. When police first arrived at the crime scene, a large knife was still lodged in the back of Silva's neck and his shirt and pants were soaked in blood. Wizar had fled the scene, driving over his victim's leg.

From this evidence, the jury reasonably could have found that even if Wizar had initially acted in justifiable self-defense in response to Silva's threats, Wizar's need for self-defense did not exist throughout the duration of the struggle. It is a very reasonable inference from the evidence that at some point Silva was defending himself from Wizar and was no longer an imminent threat. As in *People v. Gleghorn*, *supra*, 193 Cal.App.3d at page 202, where self-defense was no longer justifiable when the defendant continued to beat his attacker long after the attacker was disabled, the jury reasonably could have found that at some point Wizar was no longer justified in continuing his attack on Silva. In addition, when Wizar turned himself into the Los Angeles Police Department 25 days after the altercation, there were no visible signs of injury to indicate that he had been involved in an altercation that justified his use of deadly force. Even if Silva were intoxicated, extremely aggressive, and the instigator, a reasonable trier of fact could have concluded that the imminence of Silva's threats had dissipated at some point after the start of the altercation and that Wizar was no longer acting in self-defense.

Citing *People v. Anderson* (1968) 70 Cal.2d 15, Wizar argues that the number of stab wounds does not prove the absence of self-defense. Wizar's reliance on *Anderson* is misplaced. It is true, as the Supreme Court held in *Anderson*, that the brutality of a killing alone does not support a finding of first degree murder. (*Id.* at pp. 24-25; see *People v. Pensinger* (1991) 52 Cal.3d 1210, 1238 ["brutality alone cannot show premeditation; a brutal killing is as consistent with a killing in the heat of passion as with a premeditated killing"].) The issue in this case, however, is whether Wizar's evidence of self-defense can reduce the conviction from second degree murder to manslaughter, not whether the number of stab wounds demonstrates that Wizar acted with deliberation and premeditation. The number of stab wounds inflicted by Wizar is significant because Wizar's right to use force in self-defense ended when the threat was no longer imminent or when Silva no longer appeared capable of inflicting any injury. (*People v. Clark*, *supra*, 201 Cal.App.4th at p. 250.)

In addition, the trial court properly instructed the jury that Wizar's flight could be evidence indicating his consciousness of guilt. (§ 1127c; *People v. McWhorter* (2009) 47 Cal.4th 318, 377; *People v. Mendoza* (2000) 24 Cal.4th 130, 180.) Even though evidence of Wizar's flight alone was not sufficient to prove guilt, the jury was entitled to evaluate the significance of that conduct in conjunction with other evidence suggesting that Wizar did not act in self-defense. (See *People v. Streeter* (2012) 54 Cal.4th 205, 253-254; *People v. Loker* (2008) 44 Cal.4th 691, 706-707.) Given the totality of circumstances, there was sufficient evidence for the jury to find Wizar guilty of second degree murder beyond a reasonable doubt.

B. *Any Instructional Error on Mutual Combat Was Harmless*

Wizar contends that the trial court prejudicially erred in instructing the jury pursuant to CALCRIM No. 3471. This instruction provides: "A person who engages in mutual combat or who is the initial aggressor has a right to self-defense only if: [¶] (1) He actually and in good faith tries to stop fighting; and [¶] (2) He indicates, by word or by conduct, to his opponent, in a way that a reasonable person would understand,

that he wants to stop fighting and that he has stopped fighting; and [¶] (3) He gives his opponent a chance to stop fighting. [¶] If a person meets these requirements, he then has a right to self-defense if the opponent continues 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."

Wizar contends that this instruction was erroneous because there was no evidence of mutual combat or that he was the initial aggressor. He argues that the instructional error deprived him "of a jury trial on a valid defense theory of self-defense and imperfect self-defense." We conclude that Wizar waived his right to challenge the instruction on appeal, and, even if he had not waived his claim, any error in giving the mutual combat instruction was harmless.

A claim of instructional error is generally not cognizable on appeal if the defendant fails to object to the instruction at trial or request a clarification. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1097, fn. 29.) When the trial court discusses jury instructions with counsel and defense counsel agrees that evidence supports an instruction and does not object to the court's proposed wording, any claim of error is forfeited. (*People v. Bolin* (1998) 18 Cal.4th 297, 326; see *People v. Farnam* (2002) 28 Cal.4th 107, 165.) Here, both parties stipulated to CALCRIM No. 3471 "as to form and content" and defense counsel did not object to the instruction. Therefore, Wizar forfeited his claim of error.

Even if Wizar had not forfeited his claim, any error was harmless. We agree that there was no evidence that the struggle that resulted in Silva's death was mutual combat as defined in CALCRIM No. 3471. The surveillance video merely showed a short pursuit and a metallic flash near the chest of one of the individuals involved in the struggle; it did not show, and there was no testimony about, the beginning of the struggle, whether Wizar or Silva agreed to fight one another, or who was the initial aggressor. "Mutual combat" is not merely a reciprocal exchange of blows; it is combat pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities. (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1045.) The agreement does not need all the

characteristics of a legally binding contract, but there must be evidence from which the jury could reasonably find that both combatants consented or intended to fight before the defendant's claim of self-defense arose. (*Id.* at p. 1047.) For example, two groups of rival gang members leaving a bar to engage in a "shoot out," or an exchange of gunfire between cars belonging to rival gang members, supports giving an instruction on mutual combat. (See *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1233-1234; *People v. Quach* (2004) 116 Cal.App.4th 294, 297, 300-301.) Here, there was no evidence that Wizar and Silva mutually consented or intended to fight and thus no evidence to support an instruction on mutual combat. Thus, it was error to instruct the jury on a legal theory that, although technically correct, had no application to the facts of the case. (See *People v. Cross* (2008) 45 Cal.4th 58, 67; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

The instructional error, however, was harmless. The erroneous inclusion of such an instruction is "one of state law subject to the traditional *Watson*[4] test," where "reversal is required if it is reasonably probable the result would have been more favorable to the defendant had the error not occurred." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.) In this context, a "'reasonable probability'" "does not mean 'more likely than not,' but rather a 'probability sufficient to undermine the confidence in the outcome.'" (*People v. Ross*, *supra*, 155 Cal.App.4th at p. 1055; see *People v. Mbaabu* (2013) 213 Cal.App.4th 1139, 1149.) In determining whether to reverse the judgment, we examine the entire record to determine whether the instruction may have misled the jury to the defendant's detriment. (*Guiton*, *supra*, at p. 1130; see *People v. Cross*, *supra*, 45 Cal.4th at p. 67.) We "affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on an unsupported instruction." (*Guiton*, *supra*, at p. 1130; see *People v. Thompson* (2010) 49 Cal.4th 79, 119.)

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4 *People v. Watson* (1956) 46 Cal.2d 818, 836.

The trial court instructed the jury based on CALCRIM No. 200 that "[s]ome of these instructions may not apply, depending on your findings about the facts of the case," that the inclusion of a particular instruction does not mean that the court was "suggesting anything about the facts," and that the jury should first decide what the facts were and then "follow the instructions that do apply to [those] facts." We presume the jury followed these instructions and ignored the inapplicable instructions. (*People v. Holloway* (2004) 33 Cal.4th 96, 152-153; *People v. Guiton*, *supra*, 4 Cal.4th at p. 1131 ["The jurors' 'own intelligence and expertise will save them from' the error of giving them 'the option of relying upon a factually inadequate theory.'"].)[5]

The trial court fully and properly instructed the jury on self-defense or defense of another. Because the mutual combat instruction did not keep the jury from evaluating the defendant's self-defense claim, "'we are confident the jury was not sidetracked by the correct but irrelevant instruction, which did not figure in the closing arguments, and we conclude that the giving of the instruction was harmless error. [Citations.]' [Citation.]" (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381-1382, fn. omitted.)

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[5] The prosecutor also stated in closing argument: "Because as the instructions that are read to you, some of the instructions may not even apply. You are told that in the jury instructions. Just because you are given a legal instruction doesn't mean it necessarily applies in this case. It's up to you to decide what is applicable and what's not."

DISPOSITION

The judgment is affirmed.

SEGAL, J.*

We concur:

PERLUSS, P. J.

WOODS, J.

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