Filed 3/13/14 P. v. Hudson CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DONALD HUDSON, Defendant and Appellant.	B247035 (Los Angeles County Super. Ct. No. BA382290)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen A. Kennedy, Judge. Affirmed as modified.

Barbara A. Smith, 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, James William Bilderback II, Supervising Deputy Attorney General, and Alene M. Games, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Donald Hudson guilty in counts 1 and 3, respectively, of the attempted murders of Dwight Ricketts and Craig Clark (Pen. Code, §§ 664, subd. (a), 187, subd. (a))[1] but found allegations that the crimes were deliberate and premeditated not true. Defendant was also found guilty in counts 2 & 4, respectively, of assault with a deadly weapon upon Ricketts and Clark (§ 245, subd. (a)(1)). As to the attempted murder counts, the jury found defendant personally used a deadly and dangerous weapon, a knife, within the meaning of section 12022, subdivision (b)(1). The jury also found defendant personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a) as to counts 1 and 2.

The trial court sentenced defendant to 15 years in state prison. Defendant was sentenced to the upper term of nine years in count 1, plus three years for the great bodily injury enhancement, and one year for use of a dangerous and deadly weapon. In count 3, the court imposed a consecutive sentence of one year eight months (one-third the midterm), plus four months for use of a dangerous and deadly weapon. As to count 2, the court imposed the upper term of four years, plus three years for the great bodily injury enhancement, with the entire term stayed pursuant to section 654. As to count 4, the court imposed a term of one year (one-third the midterm), also stayed pursuant to section 654.

Defendant contends the trial court erred in refusing to instruct the jury on the lesser offense of attempted voluntary manslaughter based on heat of passion and provocation. Additionally, in our review of the record, we discovered the abstract of judgment erroneously reflected the trial court imposed and stayed an enhancement pursuant to section 12022.7, subdivision (a) in count 4. The record reflects the jury found the allegation not true as to count 4, and the trial court did not impose a sentence. We also noted the abstract of judgment failed to reflect the sentences imposed and stayed pursuant to section 654 in counts 2 and 4. We invited the parties to submit further

---

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

briefing on these issues. It is uncontested the abstract of judgment is in error and must be corrected.

We direct the clerk of the superior court to modify the judgment to reflect the trial court's orally pronounced judgment and affirm as modified.

FACTS

Ricketts and Clark became friends through a "12-step" program. Ricketts lived in a portion of a warehouse where he provided maintenance and security. Clark was staying with Ricketts, sleeping on the couch. Ricketts had an on-and-off romantic relationship with Laclare Robertson for about two years prior to the day of the charged offenses. Ricketts tried to help Robertson with her substance abuse problems. Robertson lived with Ricketts sometimes, but a little over a month before the incident, her substance abuse problems became too much and he had to "put her out."

Robertson also had a romantic relationship with defendant. She had been seeing defendant for about four months while still living with Ricketts. After she was ejected from Ricketts's residence, Robertson went to Sacramento with defendant for about a month but then decided to end the relationship. When she returned, she broke her ankle. Ricketts took her from the hospital back to his residence to care for her. They were not romantically involved. Over the next few days, defendant visited Robertson at Ricketts's residence a few times without incident. Robertson used Ricketts's cell phone to call defendant, and defendant called Ricketts on one occasion to tell him he was "a stand-up guy."

Then, in the very early morning on March 16, 2011, defendant came to Ricketts's residence and started banging on the door, asking to see Robertson. Ricketts testified that he asked Robertson if she wanted to see defendant, and she responded that she did not. Ricketts had spoken to Robertson's doctor earlier, and the doctor explained that she had a jaw injury as well as a broken ankle and should not speak. Ricketts told defendant Robertson did not want to see him and tried to explain that Robertson was in pain from

her injuries, but defendant insisted that he wanted to see Robertson and continued to bang on the door. Ricketts called 911.

A transcript of the 911 call, made at 6:48 a.m., shows that Ricketts stated: "The problem is this guy named Donald is beating on my side door. My girlfriend came back down to me. In the process, she fell. She has a broken foot now, and I just found out she can't even talk. He's beating on the door. I told him to go away. I told him he wasn't going to hurt her anymore, and he's still out there beating and yelling for her." Ricketts told the 911 operator that defendant held Robertson hostage in Sacramento and that Ricketts had sent her tickets to bring her back to Los Angeles. He claimed he could not go outside because "I've got ADW's now, registered my hands, I can't touch it or I go to jail." Defendant left during the call.

Clark returned home from work the same day, at about 9:40 in the evening. He observed defendant pacing back and forth outside the warehouse. Defendant stared at Clark as he approached.

To access Ricketts's residence, one had to enter the warehouse through a locked metal door with screening, go down a long hallway, and then go through a second wooden door, which was kept closed. Clark had a key to the metal door, but did not take it out because he did not know defendant. Defendant made a "bee-line" for Clark, said he knew who Clark was, and that he wanted to talk to Clark's roommate. Clark suggested he call Ricketts, but defendant responded that he had been calling all day and no one had answered the phone. Defendant appeared calm as they spoke. Clark offered to bang on the door to see if anyone would hear him. Clark banged on the door until he heard Ricketts, and then yelled that someone outside wanted to talk to Ricketts.

When Ricketts saw defendant and Clark at the door, he said, "Craig, you can come in, but you Donald, hell no." At that point, defendant attacked Clark, who was six feet tall and 285 pounds, and began stabbing him. He made stabbing motions in the area of Clark's upper torso, face, and neck. Ricketts testified that he heard Clark scream, "Is that a knife?" at which point Ricketts grabbed a shovel and went outside. Ricketts struck defendant across the back with the flat of the shovel. He then dropped the shovel in the

belief defendant would run away. Instead, defendant charged at Ricketts and began to stab him in the chest with a steak knife. At some point, defendant also slashed Ricketts's jaw and arm. Ricketts yelled to Clark to call for help. During the commotion, Robertson had come out of the residence and was hobbling down the hallway on crutches. Ricketts yelled at her to "take her ass back inside."

Defendant tried to go around Ricketts and get inside the warehouse. Ricketts attempted to get defendant in a choke hold but was unable to because he had lost the strength in his arm. Ricketts picked up the shovel and hit defendant in the lower back with the sharp edge. Defendant fell into the street and was knocked unconscious for about 45 seconds. When he came to, he got up and fled down an alley.

Clark testified that he did not speak after defendant began stabbing him. His vision was obscured by blood pouring down his face. He saw Ricketts holding the shovel but did not see him strike defendant with it. On cross-examination, Clark agreed the fight between the two men could be described as "mutual combat." Clark never saw defendant holding a knife, but he did hear something clatter to the ground and observe defendant pick up an object as he was fleeing the scene.

Clark and Ricketts called 911 together. Ricketts stated that he would not have gone outside, but defendant had attacked Clark, and Clark needed his help. Both Ricketts and Clark were taken to the hospital. Clark's injuries required numerous stitches. Ricketts suffered severe injuries, including a gash in his heart, damage to his lungs, and other knife wounds. His heart stopped beating during surgery. The doctors were able to revive him, and he eventually recovered.

The parties stipulated defendant and Ricketts were both included as major contributors to the DNA found in blood on a black plastic knife handle, which police found at the scene. Clark's DNA was excluded as a contributor to the blood on the handle. Ricketts's DNA was found on two broken knife blade parts, also found at the scene, in a different location.

Los Angeles Police Officer Enrique Atilano conducted a phone interview with Robertson on March 18, 2011. Robertson said she had not seen the incident but

witnessed defendant running from the scene. She said defendant called her after the attacks to tell her he had been arrested. Defendant told her he attacked Ricketts and Clark out of jealousy. He did not mention self-defense. Both Ricketts and Clark identified defendant as the perpetrator from a photographic lineup.

At trial, Robertson stated she was groggy from taking prescription drugs on the day of the incident and did not see or hear the commotion until it was over. She reiterated what Officer Atilano testified that she said in the phone interview. She testified that she wanted defendant to be set free, and that she was called to the stand by the prosecutor so that she could be impeached by the statements she made to the police.

Defendant did not present any witnesses.

DISCUSSION

Lack of Instruction on Heat of Passion for Attempted Voluntary Manslaughter

Defendant's sole contention is that the trial court erred in refusing to instruct on attempted voluntary manslaughter based on heat of passion as to the charges involving Ricketts. This contention is without merit.

The Constitution requires the jury to determine every material issue presented by the evidence. (*People v. Lewis* (2001) 25 Cal.4th 610, 645 (*Lewis*).) Accordingly, "[a] court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial." (*People v. Lopez* (1998) 19 Cal.4th 282, 287.) "[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present." (*Lewis, supra*, at p. 645.) "[S]ubstantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself." (*People v. Breverman* (1998) 19 Cal.4th 142, 162-163 (*Breverman*).) "Conversely, even on request, a trial judge has no duty to instruct on any lesser offense *unless* there is substantial evidence to support such

instruction." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense . . . ." (*Breverman, supra*, at p. 162.) Evidence is substantial for this purpose if it could cause a jury composed of reasonable persons to conclude that the defendant committed the lesser but not the greater offense. (*Ibid*.)

Attempted voluntary manslaughter is a lesser included offense of attempted murder. (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708 (*Gutierrez*).) Either imperfect self-defense or heat of passion will reduce an attempted killing from attempted murder to attempted voluntary manslaughter by negating the element of malice. (*Ibid*.)

To establish attempted voluntary manslaughter under a heat of passion theory, the defendant must demonstrate both provocation and heat of passion. (*Gutierrez*, *supra*, 112 Cal.App.4th at pp. 708-709.) "'First, the provocation which incites the [perpetrator] to act in the heat of passion case must be caused by the victim or reasonably believed by the accused to have been engaged in by the [victim]. [Citations.] Second, . . . the provocation must be such as to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.' (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411-1412.)" (*Gutierrez, supra*, at pp. 708-709.) "The test of adequate provocation is an objective one . . . . The provocation must be such that an average . . . person would be so inflamed that he or she would lose reason and judgment. Adequate provocation and heat of passion must be affirmatively demonstrated." (*People v. Lee* (1999) 20 Cal.4th 47, 60, citing *People v. Sedeno* (1974) 10 Cal.3d 703, 719; *People v. Williams* (1969) 71 Cal.2d 614, 624.) "'"[N]o specific type of provocation [is] required . . . ."' [Citations.] Moreover, the passion aroused need not be anger or rage, but can be any '"'[v]iolent, intense, high-wrought or enthusiastic emotion'"' [citations] other than revenge [citation]. 'However, if sufficient time has elapsed between the provocation and the [crime] for passion to subside and reason to return, the [attempted] killing is not [attempted] voluntary manslaughter . . . .' [Citation.]" (*Breverman, supra*, 19 Cal.4th at p. 163.)

Defendant argues he was provoked when Clark asked if defendant could enter the residence and Ricketts responded "Hell, no" and then rudely prevented Robertson, who was hobbling toward the door on crutches, from leaving the residence, yelling at her to "take her ass back inside." These facts do not constitute substantial evidence of provocation. Although "[t]he provocative conduct by the victim may be physical or verbal" (*People v. Moye* (2009) 47 Cal.4th 537, 550), California courts have repeatedly held that mere rudeness and insults are insufficient to cause the average person to become so inflamed as to lose reason and judgment. (See *People v. Najera* (2006) 138 Cal.App.4th 212, 226 (*Najera*) [calling defendant a "faggot" insufficient provocation]; *People v. Manriquez* (2005) 37 Cal.4th 547, 586 [calling defendant a "'mother fucker'" and repeatedly taunting him that if he had a weapon, he "should take it out and use it" insufficient provocation].) The average person would not lose reason and judgment under the circumstances presented here. (See *Najera*, *supra*, at p. 226 [""'A provocation of slight and trifling character, such as words of reproach, however grievous they may be, or gestures, or an assault, or even a blow, is not recognized as sufficient to arouse, in a reasonable man, such passion as reduces an unlawful killing with a deadly weapon to manslaughter."'"], quoting *People v. Wells* (1938) 10 Cal.2d 610, 623.)

Defendant asserts that in addition to the events that transpired just before the attack, the culmination of the tumultuous relationships over time between himself and Robertson, and Ricketts and Robertson, combined with Ricketts's repeated refusals to allow him to see or speak to Robertson, caused him to attack Ricketts in a heat of passion. Defendant ignores the undisputed evidence that 14 hours elapsed between the first time he came to the residence and was refused admittance, and the second time he came to the residence and attacked Clark and Ricketts. The time between the encounters was more than sufficient to constitute a "cooling off" period that would negate any provocation due to the earlier events. (See *Breverman*, *supra*, 19 Cal.4th at pp. 162-163.) That defendant had in fact "cooled off" is buttressed by Clark's undisputed testimony that defendant appeared completely calm when the two first encountered one another outside the residence.

Finally, defendant overlooks the fundamental principle that "[a] defendant may not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, [attempt to] kill an adversary and expect to reduce the crime to [attempted voluntary] manslaughter by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion. The claim of provocation cannot be based on events for which the defendant is culpably responsible. (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1312-1313; *People v. Hoover* (1930) 107 Cal.App. 635.)" (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.) In this case, defendant harassed Ricketts by repeatedly banging on the warehouse door early in the morning and insisting to speak to Robertson, despite being told that he could not speak with her for medical reasons and because she did not wish to speak with him. He continued to bang on the door until Ricketts called the police to avoid a confrontation with him. Defendant returned to the residence later that night and again banged on the door repeatedly. When Ricketts opened the door for Clark, defendant attacked Clark and began stabbing him. The volatile situation was of defendant's own making, and he cannot now claim to have been provoked in the midst of a fight that he started. We conclude the trial court did not err in refusing to instruct on attempted voluntary manslaughter, as there is insufficient evidence to support the theory that defendant acted in the heat of passion.[2]

---

[2] In his supplemental brief, defendant argues that, following the opinion in *People v. Thomas* (2013) 218 Cal.App.4th 630, the federal standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 should be applied to the instructional error alleged. Having determined the trial court did not err, we do not address that argument here.

DISPOSITION

The trial court is instructed to correct the abstract of judgment filed January 28, 2013, to properly reflect that:

1) in count 2 (§ 245, subd. (a)(1)), the trial court imposed the upper term of four years, plus three years for the great bodily injury enhancement (§ 12022.7, subd. (a)), and stayed the entire term pursuant to section 654;

2) in count 4 (§ 245, subd. (a)(1)), the trial court imposed a term of one year (one-third the midterm), stayed pursuant to section 654; and

3) also in count 4, no sentence was imposed pursuant to section 12022.7, subdivision (a).

The clerk of the superior court shall send a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. As amended, the judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.