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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER JULIAN CASTRO, Defendant and Appellant.	B285595 (Los Angeles County Super. Ct. No. BA448507)

APPEAL from the judgment of the Superior Court of Los Angeles County. James R. Dabney, Judge. Affirmed.

Christine Dubois, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Christopher Julian Castro appeals from his conviction by jury of assault by means of force likely to produce great bodily injury. He contends it was error for the trial court to instruct on mutual combat because there was no evidence supporting it, and that the court failed to discharge its duty to clarify the law regarding mutual combat when the jury requested an explanation.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by information with one count of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)). It was also alleged defendant personally inflicted great bodily injury in the commission of the offense within the meaning of section 12022.7, subdivision (a).

The charge arose from an incident that took place in July 2016. The evidence and testimony received at trial revealed the following facts.

On Saturday evening, July 16, 2016, Michael Lum and some friends went to a nightclub in Hollywood. Mr. Lum's friend, Dominic Jones, worked as a promoter at the club. Several mutual friends of theirs, including Senna Notter and Mr. Jones's roommate Julian, were also there, as was defendant. After a few hours, they went to an after party at someone's house, and then Mr. Lum invited people over to his home in Los Angeles. By the time people started arriving at Mr. Lum's home, it was early Sunday morning.

Everyone had been drinking throughout the night. Some people had used cocaine, including Mr. Jones, Ms. Notter, and defendant. Initially, both defendant and Mr. Jones seemed to be in a good mood and having a good time, along with everyone else.

However, at some point, defendant started acting belligerent and out of control. He was banging on a drum set. He was harassing Julian and trying to drag him out of bed where he had passed out drunk. He slid down the stair railing and broke an expensive piece of art. Mr. Jones could tell that Mr. Lum was upset about defendant's behavior, so he told Mr. Lum that he would ask defendant to leave.

When Mr. Jones approached defendant in the kitchen and asked him to go, he got very angry for being singled out. Mr. Jones told defendant he was the only one acting crazy and breaking things in Mr. Lum's house. Defendant paced around and then went to look for his cell phone. He came back into the kitchen still angry at Mr. Jones. Mr. Jones said, "Come on, man, just leave." Defendant, who was taller than Mr. Jones, stepped right up to him, face to face, and said, "F—k you. You're a bitch. You're a pussy." He then pushed Mr. Jones, and Mr. Jones pushed back. Defendant pushed Mr. Jones again, much harder. Mr. Jones stumbled and fell to the ground.

Defendant jumped on Mr. Jones and punched him hard in the face. Mr. Jones was in and out of consciousness and could not remember everything that happened. Mr. Jones recalled wrestling with defendant on the ground for a bit and trying to throw punches at defendant. Defendant continued to punch him. Mr. Jones tried to put defendant in a "headlock" to stop him but was unable to do so. He recalled hearing Mr. Lum yelling and trying to stop the fight. Defendant stood up and started kicking Mr. Jones. Mr. Jones tried to defend himself and cover his face. He saw one of defendant's boots coming toward his face. The blow landed on his jaw and he lost consciousness. When he regained consciousness, he coughed up blood.

Ms. Notter testified she did not see the fight start, but she saw or heard portions of what happened. She heard the sound of glass breaking after defendant had come in from outside. Mr. Jones told defendant to stop disrespecting his friend's home, which made defendant mad. Ms. Notter did not see who acted first, but she saw defendant and Mr. Jones pushing each other, and then it escalated to punching. Mr. Jones fell to the floor. Mr. Lum eventually came downstairs and told them to stop, but defendant "was just kicking [Mr. Jones] in the head and the body." Defendant kept kicking Mr. Jones, even though it was obvious he could not fight back. Mr. Jones looked "dead on the floor." Defendant kicked him eight to 10 times. Ms. Notter yelled at defendant to stop. Defendant acted like he was going to kick Mr. Jones again, and then Mr. Lum cut him on the arm with a sword, which finally made him stop.

According to Mr. Lum, defendant and Mr. Jones argued verbally "for a long time." It was clear by the way they were staring at each other, their body language and the tone of their voices ("very aggressive"), that they were not getting along. Mr. Lum told them to both "chill out," that he did not want anyone fighting in his house. They both stopped, but eventually started verbally sparring again.

At some point it became physical, but Mr. Lum did not see who started it. He heard some of the female guests yelling and some sort of scuffling. Mr. Lum went into the living room and saw defendant and Mr. Jones "wrestling" on the floor, "trying to fight on the ground." He and a few other people told them to stop. They stood up and were about six feet apart, still yelling "fighting words" at each other. They both looked very angry.

Mr. Lum told everyone to go home. Defendant went to get his shoes and his cell phone. Mr. Lum went to the kitchen, along with Mr. Jones. At some point, defendant appeared and he and Mr. Jones started "provoking each other verbally" again. Mr. Lum told them, again, to not fight in his house. The verbal taunting escalated again into a physical altercation, but Mr. Lum did not see how it started. Defendant and Mr. Jones crashed into some glass vases and broke them, and once again ended up wrestling on the ground. Mr. Lum went upstairs to his room to get a weapon. He felt he had to try to control the situation.

Mr. Lum owned a type of sword used for defense. He had been trained in how to use it properly. When he came downstairs with the sword, he yelled again at defendant and Mr. Jones to stop fighting. They stopped for a moment and got up from the ground. They both still looked very angry. Mr. Lum again told everyone to leave. Defendant and Mr. Jones started up again and Mr. Jones ended up on the floor. Defendant, who was wearing boots, kicked him.

Mr. Lum yelled at defendant to stop but he kept kicking Mr. Jones. Mr. Lum could not recall whether Mr. Jones seemed unconscious, but he was not fighting back. Mr. Jones's face was bloody, particularly his mouth. Mr. Lum did not see any injuries to defendant. Mr. Lum struck defendant in the arm with the sword, cutting him, which caused defendant to finally stop fighting. Within a couple of minutes, several police officers arrived.

Officer Sean Anthony, along with his partner, had reported to the scene in response to an assault in progress call. They called for backup units. As they approached the front door to Mr. Lum's home, they could hear the sound of a commotion

inside. After knocking and announcing their presence, Mr. Lum answered the door with his hands up, and identified himself as the homeowner. He was told to stand by the garage. Everyone inside the house was ordered to come out.

Through the open front door, Officer Anthony saw defendant standing inside, "seeming very angry, agitated" and yelling at him and the other officers. He had a bloody nose and a cut on his arm. Defendant was wearing black, Timberland boots. The officers spoke with defendant for awhile to calm him down and then defendant was taken into custody. He was transported to the hospital for medical treatment.

Upon entering the home, Officer Anthony saw Mr. Jones lying on the ground, motionless. There was blood and vomit all around him. Officer Anthony thought Mr. Jones "was dead." Ms. Notter was sitting next to him, crying. She was ordered outside. Officer Anthony then determined Mr. Jones had "a faint pulse" and was unconscious. Mr. Jones was taken to the hospital by ambulance. The doctors determined Mr. Jones's jaw was broken. He spent over a week in the hospital and his mouth was wired shut for six weeks.

Defendant did not testify and did not present any witnesses. He introduced photographs of the injuries he sustained in the fight.

The jury instructions included four instructions related to self-defense: CALCRIM No. 3470 (Right to Self-Defense or Defense of Another – Non-Homicide), No. 3471 (Right to Self-Defense: Mutual Combat or Initial Aggressor), No. 3472 (Right to Self-Defense: May Not Be Contrived) and No. 3474 (Danger No Longer Exists or Attacker Disabled).

On April 24, 2017, the first full day of deliberations, the jury sent out a written question in the afternoon stating as follows: "clarification of when mutual combat ends."

After an unreported conference with counsel, the court provided the following response to the jury: "I guess the short answer is when it's no longer mutual. [¶] But I would say that drawing your attention specifically to instructions 3471 and 3474, okay, and it's basically just the common meanings of the words 'mutual' and 'combat.' So, you know, mutual implies common meaning of mutual, and combat, common meaning of combat. So either when the combat ceases or when it's no longer mutual. Okay. But look at those two instructions, okay, because those really do specifically address these kind [*sic*] of issues."

The record contains no objection by defense counsel to the court's response to the jury's question.

The next day, the jury requested a readback of Ms. Notter's testimony. Later that day, the jury returned its verdict, finding defendant guilty as charged.

The court struck the great bodily injury enhancement for purposes of sentencing only. The court denied probation and sentenced defendant to the upper term of four years on the assault. The court imposed various fines and awarded defendant 112 days of custody credits.

This appeal followed.

DISCUSSION

Defendant contends the court erred in instructing on mutual combat because there was no evidence establishing that he and the victim engaged in mutual combat, and also that the court erred in failing to discharge its mandatory duty to respond

to the jury's question seeking clarification of when mutual combat ended. We disagree.

Defendant forfeited any challenge to the mutual combat language of CALCRIM No. 3471 (Right to Self-Defense: Mutual Combat or Initial Aggressor) by failing to state any objection in the trial court, and by acceding, throughout the trial, to the relevance of mutual combat as an issue for the jury to resolve.

During voir dire, when the court was discussing with counsel the questions to be asked of the prospective jurors, the court said, "I assume this is a self-defense case[?]" Defense counsel responded, "[s]elf-defense, yes. We'd ask for mutual combat, that area, yes."

Further, when the court gave counsel its proposed jury instructions that included CALCRIM No. 3471, defendant did not object. The court and counsel discussed the court's proposed jury instructions at an unreported conference. After that conference, the court stated on the record: "We've discussed the instructions that the court has pulled in this matter. There was a request to add one instruction, 225. My understanding is that with that addition there are no additional instructions that either side is requesting at this time. Is that correct?" Both counsel said yes. The court then said it understood there were no objections to the court's proposed instructions, "[i]s that correct?" Both the prosecutor and defense counsel confirmed there were no objections to those instructions.

Defense counsel never requested that the mutual combat language be deleted from the instruction, and never requested any other clarifying or supplemental language.

Moreover, during closing argument defense counsel argued the defense theory was "self-defense or mutual combat" and that

defendant did not have to prove self-defense, but rather, the prosecution had to prove defendant did not act in self-defense. Defense counsel asked the jury to look at the evidence that showed who was the "primary aggressor" in the fight, and asserted that even the prosecutor had conceded there was "some kind of mutual combat going back and forth."

Any appellate challenge to the instruction was thus forfeited. (See, e.g., *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1233 (*Valenzuela*).)

Defendant nonetheless urges us to exercise our discretion to consider his challenge to CALCRIM No. 3471 because the inclusion of the mutual combat language affected his substantial rights. The case law generally describes a defendant's substantial rights as being affected only where the error has resulted in a miscarriage of justice. (*Valenzuela*, *supra*, 199 Cal.App.4th at p. 1233.)

Defendant contends his substantial rights were violated because he was, in effect, deprived of a defense. He contends there was no substantial evidence supporting mutual combat and the inclusion of the erroneous language served only to confuse the jury about his right to self-defense. The contention is without merit.

The court instructed with CALCRIM No. 3471 as follows: "A person who engages in mutual combat or who starts a fight has a right to self-defense only if: [¶] 1. He actually and in good faith tries to stop fighting; [¶] 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 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, communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting. [¶] 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."

The record contained substantial evidence warranting the instruction. "Evidence is '[s]ubstantial' for this purpose if it is 'sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' " (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050 (*Ross*).) Mutual combat does not mean "merely a reciprocal exchange of blows." (*Id*. at p. 1045.) Rather, it "consists of fighting by mutual intention or consent, as most clearly reflected in an express or implied *agreement* to fight. . . . [T]here must be evidence from which the jury could reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose*." (*Id*. at pp. 1046-1047.)

Mr. Lum testified that defendant and Mr. Jones verbally argued and taunted each other for "a long time" before any physical contact occurred, and he had to separate them several times before the main portion of the fight occurred. He said they were each provoking the other. The jury could reasonably infer from Mr. Jones's and defendant's conduct as attested to by Mr. Lum that they both intended to engage in a mutual fight.

(See, e.g., *Valenzuela*, *supra*, 199 Cal.App.4th at pp. 1233-1234 [substantial evidence of mutual combat where the defendant and victims, who were rival gang members, engaged in a car chase for several minutes, and exchanged gunfire].)

However, even assuming, solely for the sake of argument, that it was error to instruct on mutual combat, any such error was harmless. Mr. Jones, Mr. Lum and Ms. Notter all testified that, irrespective of how the fight started, defendant kicked Mr. Jones repeatedly while he was on the ground, unable to respond, and at times, unconscious. It was undisputed that defendant assaulted Mr. Jones when he did not present any objectively reasonable threat to defendant. There was little or no evidence supporting defendant's claim of self-defense. The court properly instructed with CALCRIM No. 3474 as follows: "The right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker no longer appears capable of inflicting any injury, then the right to use force ends." Given the evidence, defendant could not have achieved a more favorable result had the mutual combat language been excluded from CALCRIM No. 3471.

We also find that defendant forfeited any challenge to the court's handling of the jury's question about mutual combat. "A defendant may forfeit an objection to the court's response to a jury inquiry through counsel's consent, or invitation or tacit approval of, that response." (*Ross*, *supra*, 155 Cal.App.4th at p. 1048; accord, *People v. Dykes* (2009) 46 Cal.4th 731, 802; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193 ["Inasmuch as defendant both suggested and consented to the responses given by the court, the claim of error has been waived."]; *People v. Roldan* (2005) 35 Cal.4th 646, 729, overruled in part on other

grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 ["When a trial court decides to respond to a jury's note, counsel's silence waives any objection under [Penal Code] section 1138."].)

The court discussed the jury's question with counsel in an unreported conference. Thereafter, the court responded to the jury's question on the record, and defense counsel stated no objection. Defendant cannot now complain the court's response was in error.

In any event, we find no error in the court's handling of the jury's question about when mutual combat ends. "The Supreme Court has held that Penal Code section 1138 imposes on the trial court a mandatory 'duty to clear up any instructional confusion expressed by the jury.' [Citation.] 'When a jury asks a question after retiring for deliberation, "[Penal Code] [s]ection 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law." [Citation.] But "[t]his does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under [Penal Code] section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." [Citation.] We review for an abuse of discretion any error under [Penal Code] section 1138.' " (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1016 (*Lua*).)

Here, the court acted well within its discretion in referring the jury to the written instructions, specifically CALCRIM No. 3471 and CALCRIM No. 3474, and pointing out that those instructions addressed the jury's question about when mutual combat ended.

Defendant takes issue with the fact the court also told the jurors they could consider the "common meaning" of the words "mutual" and "combat." Defendant cites to *Ross* which concluded the phrase mutual combat has a technical, legal meaning. But, *Ross* was concerned with the *initiation* of mutual combat and the legal requirement that prior to engaging in any hostilities, the parties must voluntarily intend or consent to engage in a fight; a concept that was not embraced by the common meaning of mutual which connotes only simple reciprocity. (*Ross*, *supra*, 155 Cal.App.4th at pp. 1044-1047.) *Ross* therefore concluded it was error for the court to have told the jury the words could be understood in their ordinary, lay sense. (*Ibid*.)

Here, the jury's question was more focused and limited than the question presented in *Ross*. The jury wanted clarification on when mutual combat ended, which is reasonable given the state of the evidence. As already explained above, the evidence was undisputed that however the fight began, it ended with Mr. Jones on the ground, defenseless and unconscious, while defendant kicked him. It was reasonable for the jury to be focused on that aspect of the evidence. The two instructions the court highlighted for the jury to re-read (Nos. 3471 and 3474) adequately addressed the law pertaining to the end of mutual combat, as well as when the right to self-defense ends.

In any event, there is no showing of prejudice. "A court's failure under Penal Code section 1138 to adequately answer a jury's question 'is subject to the prejudice standard of *People v. Watson* [(1956)] 46 Cal.2d 818, 836,' i.e., whether the error resulted in a reasonable probability of a less favorable outcome." (*Lua*, *supra*, 10 Cal.App.5th at p. 1017.) As we already explained above, there was overwhelming evidence of defendant's guilt.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

DUNNING, J.*

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