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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY RODRIGUEZ, Defendant and Appellant.	B278884 (Los Angeles County Super. Ct. No. BA440246)

APPEAL from a judgment of the Superior Court for Los Angeles County, Curtis B. Rappe, Judge. Affirmed.

Jeffrey J. Gale, 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, Assistant Attorney General, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Anthony Rodriguez appeals from a judgment sentencing him to 40 years to life in prison after a jury convicted him of attempted murder (Pen. Code,[1] §§ 664/187, subd. (a)) and assault with a firearm (§ 245, subd. (a)(2)) and found to be true allegations that he personally discharged a firearm and inflicted great bodily injury (§§ 12022.53, subd. (d); 12022.5, subd. (a); 12022.7, subd. (a)), and the trial court found to be true prior conviction and prior prison term allegations (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i); 667.5, subd. (b)).[2] Defendant's only contention on appeal is that the trial court erred in failing to instruct the jury on imperfect self-defense. We conclude the evidence presented did not support such an instruction. Therefore, we affirm the judgment.

BACKGROUND

On August 31, 2015, at around 2:00 a.m., defendant shot John Garcia, in the stomach and shoulder, seriously injuring him. Two versions of the events leading up to the shooting were presented at trial.[3]

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[1] Further undesignated statutory references are to the Penal Code.

[2] Defendant also was charged with attempted robbery (§ 213, subd. (b)), but the jury was unable to reach a verdict on that count, and it was dismissed.

[3] Our discussion of the evidence presented at trial is limited to evidence relevant to the issue on appeal, namely whether the jury should have been instructed on imperfect self-defense.

A. *The Prosecution's Version of Events*

Garcia testified that he had been hanging out with a friend, Joey Tovar, in front of a school, drinking beer for about two hours before he was shot. At around 2:00 a.m., he and Tovar started walking through an alley, toward Garcia's sister's house a block away. While they were walking, they heard two gunshots. Garcia turned around and saw two men running toward him and Tovar. He and Tovar ran in the opposite direction down the alley. By the time they reached the end of the alley, the two men, one of whom Garcia subsequently identified as defendant, caught up with them. Garcia had not seen defendant before that night.

Defendant was shaking and seemed panicked. He demanded Garcia's shirt and hat. When Garcia hesitated, defendant tried to force Garcia's shirt off, so Garcia took it off and gave it to him. Garcia had been carrying a backpack on his shoulder, and he had to take that off and put it on the ground in order to take off his shirt. When he picked up the backpack after taking off his shirt, defendant demanded it and tried to grab it. Garcia did not want to hand it over because he had a Bose speaker worth $200 in it. Garcia also had pellet gun that looked like a real gun in the front pocket of the backpack; the zipper on that pocket was broken.

There was a struggle between defendant and Garcia for the backpack. During the struggle, the backpack fell to the ground and the pellet gun fell out, landing about two feet from Garcia. Garcia looked up at defendant, and saw him pointing a gun at him. Defendant shot him twice, and then ran out of the alley and down the street.

Garcia grabbed his pellet gun and tried to hide. He thought he was going to die, so he tried to run to his sister's house. He collapsed about one house before reaching his sister's house and called 911. He dropped the gun when he fell to his knees; the gun ended up in the middle of the street.[4]

The first police officer to respond to the scene found Garcia lying on the grass by the curb holding his stomach; Garcia was not wearing a shirt. Garcia was taken by ambulance to the hospital. He was in the hospital for about two weeks and had two surgeries.

B. *Defendant's Version of the Events*

Defendant testified at trial, and admitted that he shot Garcia. He said that during the early morning hours on August 31, 2015, he received a call from a man named Banfilo. He knew Banfilo because Banfilo bought drugs from defendant a few times. Banfilo told him there were a couple of guys who wanted to buy some methamphetamine. Defendant met up with Banfilo, who took defendant to an alley where the men were waiting.

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[4] During Garcia's cross-examination, defense counsel pointed out several discrepancies between Garcia's trial testimony and his testimony at the preliminary hearing regarding certain details, such as whether he was drunk at the time of the shooting, whether he saw a gun on defendant when defendant approached him, and the fact that he had a $200 Bose speaker in his backpack. Garcia explained that at the time of the preliminary hearing he was traumatized and did not want to think about the shooting, but since then he had been able to take the time to really think about what happened that night.

Defendant told Banfilo to wait for him on the corner, and then entered the alley. Garcia was there with someone else. Garcia asked defendant if he had an eight ball (3.5 grams of methamphetamine); defendant asked Garcia if he had the money ($60). Garcia put his backpack on the ground and unzipped it. He told defendant that he had his money in there; defendant could see that Garcia was digging through the clothes in his backpack.

Defendant looked away to see where Banfilo was, and as he turned back Garcia pulled a gun out; it looked like a real gun. As Garcia pointed the gun at him, defendant ducked and started to run down the alley, but he tripped and fell onto his stomach. Defendant rolled over, and Garcia got on top of him, pointed the gun at his head, and tried to search his pockets for the drugs. When defendant tried to kick to get Garcia off of him, Garcia started pulling the trigger on his gun, but the gun did not go off. Defendant then pulled out the gun he was carrying for protection and shot Garcia twice.

After he shot Garcia, defendant told him he was sorry and ran off. He saw Garcia take off running.

C. *Discussion of Jury Instructions*

After the prosecution had presented its case-in-chief, but before defendant had presented his case, the court held a discussion on the jury instructions defense had submitted. The court noted that defense counsel had submitted self-defense and imperfect self-defense instructions, but it observed that it could not make a final decision about whether to give those instructions until it heard defendant's case,

particularly if defendant were to testify. The court asked defense counsel, however, if it was her position that defendant was entitled to either or both of the instructions based upon the prosecution's case, and counsel answered in the affirmative.

Counsel explained that Garcia testified that he had a pellet gun that looked real, that defendant looked scared when the pellet gun fell out of Garcia's backpack, and that it was only after the pellet gun fell out that defendant shot Garcia. The court concluded that neither self-defense instruction was appropriate based on the evidence that had been presented thus far because (1) defendant was committing a crime -- robbery -- and the revealing of the pellet gun was caused by the attempted robbery, and (2) Garcia testified that the pellet gun landed some distance away from him and he made no effort to reach for it before defendant shot him. The court instructed both counsel, however, to be prepared after the defense rested to offer any instructions they believed were warranted based upon the evidence presented by defendant.

After the defense rested, the court presented both counsel with the final jury instructions -- which included an instruction on self-defense,[5]

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[5] The jury was instructed with CALCRIM No. 505 as follows:

"The defendant is not guilty of Attempted Murder, if he was justified in killing and/or attempting to kill someone in self-defense. The defendant acted in lawful self-defense if:

"1. The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury;

"2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;

"AND

but not on imperfect self-defense -- and asked if there was "anything in the jury instructions that needs to be corrected." Both counsel answered in the negative.

D. *Closing Arguments and Verdict*

In their closing arguments, both counsel told the jurors that if they believed defendant's testimony, there would be no doubt that he acted in self-defense; neither counsel raised any issue regarding the reasonableness of defendant's belief that his life was in danger under his version of the events.

"3. The defendant used no more force than was reasonably necessary to defend against that danger.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to himself. Defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the attempted killing was not justified.

"When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

"The defendant's belief that he was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.

"[¶] . . . [¶]

"The People have the burden of proving beyond a reasonable doubt that the attempted killing was not justified. If the People have not met this burden, you must find the defendant not guilty of Attempted Murder."

The prosecutor told the jury: "if you believe the defendant, he acted in righteous self-defense. I'm telling you right there. If you believe him, he is entitled to a not guilty. He is entitled to walk out [the] door. [¶] If you don't believe him and you believe [Garcia], then the defendant had no right to self-defense. He gave that right up when he decided to commit a robbery."

In her closing argument, defense counsel told the jury there was only one issue in the case, and that was "did [defendant] act in self-defense? Because, as [the prosecutor] said, if you find that [defendant] acted in self-defense, he's not guilty of all the charges." Counsel noted that "[t]here is no question that this pellet gun . . . looked real. Even Mr. Garcia admitted that to you. . . . And it's not up to [defendant] to say, 'Wait a minute. Wait a minute. Is that real? . . . [Defendant] thought it was real. Mr. Garcia was using it as if it was real. So he shot so he could get away."

The jury returned guilty verdicts on the attempted murder and assault with a firearm counts, finding all special allegations to be true, and hung on the attempted robbery count. The trial court declared a mistrial on the attempted robbery count, and conducted a court trial on the prior conviction and prior prison term allegations, finding those allegations to be true. The court then sentenced defendant to 40 years to life in prison on the attempted murder count computed as follows: the mid-term of seven years, doubled under the Three Strikes law (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i)), plus 25 years to life for the gun enhancement (§ 12022.53, subd. (d)), plus one year for the prior prison term (§ 667.5, subd. (b)). The court imposed, and stayed under

section 654, a concurrent 15-year sentence on the assault with a firearm count. Finally, the court dismissed the attempted robbery count in accordance with a plea negotiation.

Defendant timely filed a notice of appeal from the judgment.

DISCUSSION

Defendant contends the trial court committed reversible error by failing to instruct the jury on imperfect self-defense because certain evidence -- defendant's testimony that Garcia pointed a gun at defendant's head and pulled the trigger several times, Garcia's admission that his pellet gun looked real and came from his backpack, and defendant's testimony that he did not intend to kill Garcia and felt bad about what happened -- if believed, "was sufficient for a reasonable jury to find a reasonable doubt as to [defendant's] guilt," and therefore the court had a sua sponte duty to instruct on attempted voluntary manslaughter based on imperfect self-defense. We disagree.

"[A] trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence. [Citation.] It is error for a trial court not to instruct on a lesser included offense when the evidence raises a question whether all of the elements of the charged offense were present, and the question is substantial enough to merit consideration by the jury. [Citation.] When there is no evidence the offense committed was less than that charged, the trial court is not required to instruct on the lesser included offense. [Citation.] Voluntary manslaughter is a lesser included offense of murder. [Citation.] [¶] On appeal, we review independently whether

the trial court erred in failing to instruct on a lesser included offense." (*People v. Booker* (2011) 51 Cal.4th 141, 181.)

"Imperfect self-defense is the killing of another human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury. [Citation.] Such a killing is deemed to be without malice and thus cannot be murder. [Citation.] The doctrine of imperfect self-defense cannot be invoked, however, by a defendant whose own wrongful conduct (for example, a physical assault or commission of a felony) created the circumstances in which the adversary's attack is legally justified. [Citations.]" (*People v. Booker*, *supra*, 51 Cal.4th at p. 182, fn. omitted.)

In the present case, the doctrine of imperfect self-defense could not be invoked under Garcia's version of the events, because in that version the pellet gun fell out of Garcia's backpack while defendant was attempting to rob him. (*People v. Booker*, *supra*, 51 Cal.4th at p. 182.) Therefore, the only possible basis for imperfect self-defense was defendant's version of the events. But given the undisputed evidence that the pellet gun looked realistic, if the jury believed defendant's testimony that Garcia was on top of him, pointed the gun at his head, and pulled the trigger several times, there would be no basis for the jury to conclude that defendant's purported belief that he was in imminent danger of great bodily injury or death was unreasonable. Indeed, neither the prosecutor nor defense counsel ever suggested to the jury that defendant's belief, if his version of the events were accepted, might have been unreasonable. Thus, the jury could find only that

defendant acted in perfect, rather than imperfect, self-defense if it believed defendant's testimony.

The Supreme Court's opinion in *People v. Duff* (2014) 58 Cal.4th 527 (*Duff*) is instructive in this regard. Like this case, there were two versions of the events leading up to the shooting in *Duff*: the prosecution's version, in which the defendant shot the two victims to settle a grudge, and the defendant's version, in which he shot and killed the victims only after they pulled guns on him and opened fire. (*Id.* at p. 534.) And like this case, the defendant in *Duff* argued on appeal that the trial court erred by failing to instruct on imperfect self-defense. (*Id.* at p. 561.)

The Supreme Court rejected the defendant's argument, explaining that "the problem, at least for finding an obligation to instruct on voluntary manslaughter, is that if believed, [the defendant's] version could lead only to a finding of justifiable homicide and a total acquittal on the murder charges. The use of lethal force in response to being shot at repeatedly is perfect self-defense and no crime. [Citations.] While [the defendant] argues the jury could have concluded he unreasonably misperceived the situation, the circumstances described by [the defendant] leave no room for such shades of gray. Either he was attacked, in which case he committed no crime, or he was not, in which case he committed murder. [¶] Accordingly, it was not state law error to refuse an instruction on voluntary manslaughter." (*Duff*, *supra*, 58 Cal.4th at p. 562.)

In this case, there similarly was no room for shades of gray in the version put forth by defendant. Either Garcia pointed a gun at defendant's head and pulled the trigger, in which case defendant did not commit a crime by shooting Garcia, or defendant tried to rob Garcia and shot him when Garcia's pellet gun fell out of Garcia's backpack, in which case self-defense does not apply and defendant committed attempted murder. There is no other possibility presented by the evidence. Therefore, as in *Duff*, the trial court in this case did not err by failing instruct on voluntary manslaughter based upon imperfect self-defense.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.