Filed 5/14/13 P. v. Glaser CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>HARRY LEE GLASER,<br><br>Defendant and Appellant. | B241735<br><br>(Los Angeles County<br>Super. Ct. No. KA092240) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven D. Blades, Judge. Affirmed.

Richard D. Miggins, 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, Steven D. Matthews and Connie H. Kan, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Harry Lee Glaser appeals from the judgment of conviction following a jury trial in which he was convicted of second degree murder (Pen. Code, § 187)[1] with the personal use of a deadly weapon, a knife (§ 12022, subd. (b)(1)). He admitted having prior serious or violent felonies and serving prior prison terms. He was sentenced to state prison for a total of 36 years to life.

Appellant contends the judgment should be reversed because (1) there was insufficient evidence to support his conviction of second degree murder, and (2) he presented sufficient evidence that he acted in self defense. We disagree and affirm the judgment.

## FACTS

### Prosecution Case

#### The Murder

On October 11, 2010, around 11:15 p.m., appellant and his girlfriend, codefendant Shannon King (King), were at a strip mall in Pomona. King was trying to fall asleep in the driver's seat of her car, in which she and appellant were living, and appellant was behind the car feeding a stray dog. The victim, Alfred Burton (Burton), came from across the street and laid down on the hood of the car. A few minutes later, Burton sat down on the passenger seat with one foot in the car and one foot out, and asked King to give him a ride to get drugs. Burton then started to touch King's inner thigh. King could smell alcohol on Burton and could tell that he was drunk. She did not yell out for help and was not scared of being raped because she had been living on the street for about three years and had seen worse. Businesses were open at that time, there were people around, and she felt safe where she had parked.

Appellant came from around the back of the car and told Burton to get out of the car. Burton replied, "I'm not doing you, I'm doing her." Appellant then punched Burton in the face, pulled him out of the car, told him to get down on the ground, and continued

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

hitting Burton with his right fist. Burton was not fighting back, but tried to hold appellant back so he would not get hit.

Two witnesses who lived near the parking lot heard appellant shouting. Appellant yelled at Burton, "You mother fucker . . . where the fuck is your money?" The witnesses saw appellant punch Burton several times in the face as Burton lay on the ground, repeatedly lifting Burton's head to punch him and dropping him back to the ground. Appellant also hit Burton with what appeared to be a flashlight two or three times on top of the head. At some point during the beating, King saw appellant pull his knife out of his pocket and stab Burton twice in the right leg. Appellant kicked Burton multiple times while Burton was on the ground. One of the witnesses described Burton as "little."

King told appellant to stop beating Burton. He would not stop until she started crying and pulled appellant by the shirt, saying "Let's go." King testified that the starter on her car was broken and had to be operated with a screwdriver. Both witnesses saw appellant open the car's hood, heard the car start, and saw appellant push the car out of the parking spot. King drove to a different part of the same parking lot. Appellant stayed behind and threw the stray dog at Burton as he laid on the ground. The dog did not bite Burton. After searching Burton's pockets, appellant pulled out something that appeared to be a wallet, put it in his own pocket, and joined King at the car.

Burton suffered multiple traumatic, blunt-force injuries and contusions to his head and face, two fractured ribs, and two stab wounds to his posterior right thigh. One stab wound was a little over three inches deep. The other stab wound was approximately five to six inches deep and lacerated Burton's deep femoral vein, causing his death. No defensive wounds were found on Burton, and there were no signs that he hit appellant. The medical examiner opined that, based on the nature of the wounds and their location on Burton's body, it was unlikely that the wounds were caused by appellant slamming Burton's hand down onto his knees while Burton gripped the knife.

**Leaving the Scene**

Appellant joined King at her car and they drove away. Appellant repeatedly instructed King to tell others that Burton had the knife and that she was scared that

Burton was going to rape her because she had been raped before. They drove to a Denny's restaurant, but appellant told her to leave because there were too many people around. They then drove to a car wash where appellant took off his bloody clothes, threw them away, and cleaned the passenger seat where there was more blood.

**The Arrest, Interview and Investigation**

On October 13, 2010, appellant and King were arrested, and neither appeared to be injured. During an interview that same day with Homicide Detective Andrew Bebon of the Pomona Police Department, King related the version of the story appellant had instructed her to tell, which Detective Bebon did not believe, "it was full of holes." After Detective Bebon informed King that Burton had died and the investigation was now being treated as a murder investigation, she told him that appellant had stabbed Burton twice in the leg.

King testified that she had initially told Detective Bebon what appellant wanted her to say because she was scared appellant would hurt her. She had restraining orders against appellant, including one to keep him away from her parent's house. King was scared of appellant from the time of the incident until their arrest because of what he had done to Burton, and also because he had been abusive towards her during their relationship. She was so scared of being hurt by appellant that she purposely swerved the car as she drove to Denny's in the hope of getting stopped by a police officer. After the interview concluded, King was charged with accessory after the fact to murder.

In February 2011, King spoke with District Attorney Joan Chrostek and Detective Bebon, and entered into a proffer agreement to testify truthfully at both the preliminary hearing and trial in return for a possibly more lenient sentence. As part of the agreement, King pled guilty to the felony charge of accessory after the fact to murder. King was released from custody and testified at the preliminary hearing that appellant stabbed Burton twice in the leg.

Detective Bebon recovered the knife used in the murder in some bushes near the scene of the crime. The DNA profile from a sample taken from the blade was consistent with both Burton and appellant. The DNA profile from a sample taken from the knife's

handle was consistent with at least three contributors, with the major contributor being appellant and one of the two minor contributors being Burton.

**Defense Case**

Appellant testified that on the night of the murder he used his blue knife to open cans of dog food for a stray dog he had found earlier that day. He placed the knife on the passenger seat of the car and went behind the car to give the dog some water. He looked up, saw Burton inside the car with King, and heard Burton tell King, "I'm going to do you." Appellant thought Burton intended to rape King because he knew King had been raped before. Appellant wanted to "whoop [Burton's] behind in the parking lot." Appellant ran to the front passenger door screaming at Burton to get out of the car and saw the top of a knife in Burton's hand.

Appellant grabbed Burton, whom he described as "big and strong," and punched him in the head. He then immediately put Burton in an "arm bar" maneuver to try to retrieve the knife, repeatedly hitting Burton's hand and arm down against Burton's leg to disarm him. At some point, Burton let go of the knife. Appellant pulled Burton out of the car and hit him in the ribs. Burton tried to hit back as appellant punched him in the face twice. Appellant testified that he could smell alcohol on Burton, who was "very drunk."

Appellant then noticed King had pushed her car back from its original position, and heard her yell that Burton had taken their money. Appellant asked Burton where the money was. Appellant asked King to give him a flashlight. After she gave it to him, she took off in her car. Appellant turned on the flashlight, saw his knife on the ground and picked it up. He looked for the money, and when he did not find it, he threw the knife towards the bushes and searched Burton's jacket pockets. He denied taking Burton's wallet. Upon realizing that King had left, appellant looked for her car, spotted it and walked over to it.

Appellant did not see the knife go into Burton's leg, did not see any blood on the ground or in the car because it was pitch dark, and did not intend to stab or kill Burton. If

he had wanted to kill Burton, he would have slashed his throat or stabbed him in the heart.

Appellant admitted that stabbing someone with a knife could be potentially lethal. He had trained as a boxer since he was eight years old and did strength training as well. He had also been trained in identifying certain weak points on the human body that, if attacked, could kill a person, and he was aware that a stab in the leg could potentially kill someone.

Appellant told King they should make a police report, but she told him not to because she was afraid appellant would be sent to jail for violating a restraining order she had against him. Until the time of his arrest, appellant never called the police.

**Rebuttal Evidence**

During the postarrest, videotaped interview that Detective Bebon conducted with appellant, appellant did not mention he had performed an "arm bar" maneuver on Burton to disarm him. Detective Bebon explained that the purpose of the arm bar is to gain control of someone's arm by keeping the elbow elevated and the arm outstretched; any downward movement of the arm gives back control and defeats the purpose of the arm bar. During the same interview, appellant said he saw Burton with the knife in his left hand, contradicting appellant's trial testimony that appellant saw it in Burton's right hand the entire time.

## DISCUSSION

Appellant contends the judgment should be reversed for two reasons. First, he argues the evidence was insufficient to support the jury's finding that he killed Burton with implied malice. Second, he argues that he presented sufficient evidence that he acted in self-defense. We disagree.

### I. Standard of Review

When determining whether the evidence is sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We review the entire record in the light most favorable to the judgment to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*Ibid*.)

We presume in support of the judgment the existence of every fact that a trier of fact could reasonably deduce from the evidence. (*Ibid*.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) "[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Even when there is a significant amount of countervailing evidence, the testimony of a single witness can be sufficient to uphold a conviction. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) So long as the circumstances reasonably justify the trier of fact's finding, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Albillar* (2010) 51 Cal.4th 47, 60; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Reversal is not warranted unless it appears "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

**II. Implied Malice**

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Such malice may be express or implied. (§ 188.) Malice is express when the defendant unlawfully intended to kill. (*Ibid*.) Malice is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart." (*Ibid*.) The prosecution agreed that express malice was not applicable.

Our Supreme Court has clarified that malice is implied when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. (*People v. Knoller* (2007) 41 Cal.4th 139, 143; *People v. Cook* (2006) 39 Cal.4th 566, 596; *People v. Phillips* (1966) 64 Cal.2d 574, 587.) The jury was so instructed. (CALCRIM No. 520.) "In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another—no more, and no less." (*People v. Knoller, supra,* 41 Cal.4th at p. 143.)

Appellant argues there was insufficient evidence that he acted with malice because he was involved in a heated struggle with a big, strong man who held a knife, appellant was trying to disarm Burton by slamming Burton's hand against his leg, and Burton was stabbed in the leg, a nonvital organ. But appellant's argument is based on his own self-serving testimony and ignores contrary evidence.

For example, King testified that she saw appellant stab Burton twice in the leg. Appellant stabbed Burton with enough force to penetrate his deep femoral vein, the natural consequences of which are dangerous to human life. Indeed, this deep stab wound caused Burton's death. The medical examiner testified that appellant's version of events that appellant was slamming Burton's hand on his leg to disarm him was unlikely in light of the nature of Burton's wounds. Detective Bebon testified that lowering a person's arm would defeat the "arm bar" maneuver that appellant testified he had used. Appellant, who was a trained boxer, admitted he knew where weak points existed on the body that, if attacked, could kill a person, and he was aware that stabbing someone in the leg could be potentially lethal. Thus, appellant had the requisite knowledge of danger to Burton.

In addition to repeatedly hitting and kicking Burton, who was not fighting back, appellant's conscious disregard for human life was further demonstrated by his actions immediately following the stabbing. (See *People v. Burden* (1977) 72 Cal.App.3d 603, 620–621 ["A defendant's lack of concern as to whether the victim lived or died, expressed or implied, has been found to be substantial evidence of an 'abandoned and malignant heart' by the appellate courts of this state"]; *People v. Ogg* (1958) 159 Cal.App.2d 38, 51 ["Defendant's failure to seek the assistance of his friends or to obtain medical aid even though he knew that his wife was seriously injured indicates a heartless attitude and callous indifference toward her"].) After repeatedly beating and kicking Burton, patting down his pockets and taking his wallet, appellant left Burton lifeless in the parking lot and did not seek help for Burton or call the police. Instead, appellant and King drove to a car wash where appellant threw his bloody clothes away and cleaned the passenger seat of the car where more blood was found.

Additionally, the fact that the jury convicted appellant of second degree murder and not the lesser crime of voluntary manslaughter, despite having been instructed as to self-defense, imperfect self-defense, and heat of passion, indicates that the jury did not believe appellant's version of events.

Viewing the evidence in the light most favorable to the judgment, we find there was substantial evidence from which the jury could have inferred that appellant killed the victim with the requisite malice.

**III. Self-Defense**

Appellant argues the evidence was "overwhelming" that he acted in defense of himself and King.

A homicide is justifiable when a defendant reasonably believed he or she was in imminent danger of suffering bodily injury, reasonably believed that the immediate use of force was necessary to defend against that danger, and used no more force than was reasonably necessary to defend him or herself. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 49–50.) Such lawful resistance can be made in defense of another. (§§ 197, 692, 693, 694.) Under the doctrine of defense of another, reasonableness is tested from the point of view of the defendant, not the person being defended. (*People v. Genovese* (2008) 168 Cal.App.4th 817, 830, citing *People v. Randle* (2005) 35 Cal.4th 987, 999–1000.)

"For perfect self-defense, one must actually *and* reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury. [Citation.]" (*People v. Randle*, *supra*, 35 Cal.4th at p. 994.) The belief must also be objectively reasonable. (*Ibid.;* § 198 ["the circumstances must be sufficient to excite the fears of a reasonable person"].) A jury must 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." (CALCRIM No. 505.) For imperfect self-defense, the defendant's belief subjectively exists, but is objectively unreasonable, and the defendant can only be convicted of manslaughter, not murder. (*People v. Humphrey*, *supra*, 13 Cal.4th at p. 1082.) "Moreover, for either perfect or

imperfect self-defense, the fear must be of imminent harm. 'Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury.' [Citation.]" (*Ibid.*)

Appellant argues there was sufficient evidence for the jury to find he acted in self-defense because he beat and accidentally stabbed Burton in defense of King, whom he reasonably believed to be in imminent danger of being raped at knifepoint by Burton. Undoubtedly, appellant would have been concerned at seeing a strange man sitting in his car next to his girlfriend, and it would have been reasonable for appellant to ask the man to leave. But substantial evidence supports an inference by the jury that appellant did not have an actual or reasonable belief that King was in imminent danger of being raped.

The evidence showed that businesses were open, other people were around, Burton had left the passenger side door open with one foot outside the car, Burton was drunk, and appellant was right next to the car.

Even if appellant did have a reasonable belief that harm was imminent, he clearly used more force than was reasonably necessary. As the court stated in *People v. Hardin* (2000) 85 Cal.App.4th 625, 629–630, "'The principles of self-defense are founded in the doctrine of necessity. This foundation gives rise to two closely related rules. . . . First, only that force which is necessary to repel an attack may be used in self-defense; force which exceeds the necessity is not justified. [Citation.] Second, deadly force or force likely to cause great bodily injury may be used only to repel an attack which is in itself deadly or likely to cause great bodily injury. . . .'" (See also CALCRIM No. 505 [Defendant cannot use more force than reasonably necessary].) Appellant not only punched Burton in the car, but proceeded to punch him repeatedly after removing Burton from the car and away from King. Appellant continued to beat Burton after stabbing him, hitting him on the head with a flashlight and striking him hard enough to fracture his ribs. There was testimony from King and other witnesses that during the beating and stabbing appellant inflicted on Burton, Burton never fought back. Indeed, appellant suffered no injuries. Yet, appellant beat Burton hard enough to cause blunt force

traumatic injuries to the head, and fatally stabbed him. Appellant only stopped beating Burton after King tearfully begged him to stop. After King had driven away from the scene, appellant stayed behind to throw his stray dog at Burton in an attempt to get the dog to bite Burton. Appellant then searched Burton's pockets and took his wallet.

Moreover, appellant fled the scene without seeking police assistance or medical help for Burton, and while doing so, repeatedly instructed King to tell others that Burton was the one with the knife. Again, the fact that, despite being instructed as to self-defense, the jury convicted appellant of second degree murder indicates that it did not believe appellant acted in self-defense, and substantial evidence supports the jury's finding.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.*
FERNS

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