Filed 3/16/18 P. v. Vargas 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. DIAMOND VARGAS, Defendant and Appellant.	B278939 (Los Angeles County Super. Ct. No. BA432470)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed and remanded for further proceedings.

Karyn H. Bucur, 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, Stephanie A. Miyoshi and Tita Nguyen, Deputies Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Diamond Vargas (defendant) of one count of assault with a semiautomatic weapon as to victim Al Dawoud (Pen. Code, § 245, subd. (b)[1] (count 3)), but deadlocked as to the charged offenses against five other victims.[2] The jury also found true the allegation that she personally used a semiautomatic firearm to commit the offense. We reject defendant's claim of instructional error, but remand for the limited purpose of allowing the trial court to consider whether to exercise its discretion under section 12022.5, subdivision (c), to strike or dismiss the firearm enhancement in furtherance of justice (§ 1385).

FACTUAL AND PROCEDURAL BACKGROUND

By December 25, 2014, defendant and Heather Mulkey, an on-again, off-again couple for more than 10 years, had been separated for several months. That evening, Mulkey came to defendant's apartment and said she was moving to Oregon, but did not want defendant to come with her. Defendant cried, the couple was intimate, and then they left together on Mulkey's scooter to get something to eat. They started arguing at the restaurant. Mulkey left alone and returned to the parking structure to get her scooter. A now-angry defendant followed in a taxi, and their argument escalated.

---

[1] All statutory citations are to the Penal Code.

[2] Three counts named Dawoud's co-workers as victims (§ 245, subd. (b)). In the other two counts, defendant was charged with assault with a semiautomatic weapon against peace officers engaged in the performance of their duties (§ 245, subd. (d)(2)).

At approximately 1:30 a.m., parking structure personnel were told two women were fighting on level P3. The first parking lot employee to arrive on P3 saw defendant attempting to hit Mulkey with a baseball bat. Mulkey screamed for help. Defendant then started bashing the scooter with the bat. The employee radioed the office for assistance.

In short order, Dawoud and another employee arrived. Mulkey repeatedly screamed, "'Help me, please. Help me. She['s] gonna kill me.'" Dawoud approached defendant, who was still striking the scooter and asked, "'Can I help you? What's going on? What happened?'" According to Dawoud, defendant dropped the bat, grabbed a silver gun, and pointed it at him as he stood about six feet from her. Defendant said, "'Step back, step back.'" Dawoud put his hands up and froze. Then he ran.

The security supervisor for the parking structure also arrived. He saw defendant "waving [the gun] around, pointing it at [Mulkey], pointing it at just random directions."

By the time of trial, Mulkey and defendant were engaged to be married. Mulkey testified defendant put the gun to her own head, but did not point it at anyone else.

Defendant also testified: "Like, I was beating the scooter. When I looked up, I [saw] people running toward me. They were, like, almost already on top of me. And I — I didn't know who they were, so I reached in . . . my left pocket and pulled out a peashooter.[3] I said, 'Back the [expletive] up.' That's — I — waved the gun and told everybody, 'Back the [expletive] up.'" When asked what happened next, defendant replied, "They backed the [expletive] up right back where they came from."

---

3 The "peashooter" was defendant's Jennings .22 semiautomatic firearm.

Defendant held the gun to her head and continued to argue with Mulkey. When the police arrived, she was still holding the gun to her own head. One officer, his weapon holstered, tried to calm defendant down. She kept the gun pointed at her head, expecting the police would shoot. Defendant testified, "I was pacing back and forth with the gun to my head. And I had decided that I needed to smoke a cigarette." She ducked behind a car to smoke a cigarette "[b]ecause [she] saw in the movies[,] stand behind the tire, [the police] won't shoot at an angle." The police did shoot, however, with one bullet going past defendant; and the gun flew out of her hand. Defendant retrieved the weapon, finished her cigarette, stood up with the gun still pointed at her temple, and was shot in the left knee. She was then arrested.

The case was tried to a jury over a nine-day period. Besides Mulkey and defendant, the four parking lot employees who were named as victims in the information (counts 1, 2, 3, 6) testified, as did the two police officers identified as victims in counts 4 and 5. The trial court read the jury instructions before counsel gave closing arguments. In reading CALCRIM No. 875 ("Assault with Deadly Weapon or Force Likely to Produce Great Bodily Injury"), the judge advised the jurors the prosecution had the burden to prove defendant did not act in self-defense. The trial court did not repeat the self-defense language in the companion CALCRIM No. 860 ("Assault on . . . Peace Officer with Deadly Weapon or Force Likely to Produce Great Bodily Injury").

In closing argument, the prosecutor stated, "self-defense does not apply here, not one bit. When [defendant] was in a parking lot beating on a motorcycle, . . . [one person] asked her a question, 'What's going on? Can I help?' [No one made a] threat

to [defendant], did nothing threatening toward [defendant]. Self-defense does not apply here."

Defense counsel unequivocally agreed: "My client was not acting in self-defense." She urged the jury to convict her client of brandishing a firearm and explained that crime may be committed so long as a defendant is not acting in self defense.

The jury began deliberations on Friday afternoon. Monday morning, they submitted the following question to the trial court: "'May a definition be provided by the court of self-defense so the jury may determine if the defendant acted in 'self-defense.'" At that point, the trial judge advised counsel on the record that he noticed the mistake in mentioning self-defense as soon as he read CALCRIM No. 875, but "didn't think anybody would get caught up on an issue of self-defense. So it seemed to me, and I did mention it to both counsel–but it seems to me that certainly was not harmful. And, you know, if they come back not guilty, no harm. If they come back guilty, I don't think there would be any harm. It seems to me it would be more confusing to try to address the issue—more confusing for the record for the jurors." The trial court then proposed that counsel stipulate defendant did not raise a claim of self-defense and self-defense is not an issue in this case. The parties did not so stipulate.

The trial court added it could think of no facts that would support a self-defense instruction or theory or "any possible way the jury should consider self-defense." The trial court concluded, "[t]he defense is . . . that she simply didn't do it. So it's not a matter of did she do it in self-defense."

The trial court proposed answering the jurors' question by advising the "instruction regarding self-defense as to the charge of assault with a semiautomatic firearm was given in error. You

are not to consider self-defense in this case as to any charge or allegation or each count and allegation. You must determine whether all of the acts and intent necessary to prove the element of the charges or allegation have been proven beyond a reasonable doubt. If for any count or allegation you conclude it has been proven beyond a reasonable doubt, you are not then to consider whether the defendant acted in self-defense. I am now reinstructing you as to assault with a semiautomatic firearm . . . ."

The prosecution concurred, but defense counsel objected: "I don't think that the court should say anything other than 'it was given in error;' that the court should not say, 'you are not to consider [self-defense].'" During the extended colloquy on the issue, the trial court asked defense counsel for a plausible interpretation of the evidence that would justify a self-defense instruction. Defendant's counsel responded by stating the jury could find defendant was pointing the gun to avoid the individuals from touching her. The trial court was not persuaded. Defense counsel added, "I think when you say, 'it was given in error,' that means the same thing. I don't think there's a reason to bang—beat them on the head with it." The trial judge thereafter instructed the jury as he had earlier proposed.

After the jury returned the guilty verdict as to Dawoud on count 3 and found the allegation of personal use of a firearm to be true, defendant admitted two prior serious or violent felony convictions. The trial court struck one of the priors and sentenced defendant to 21 years in prison: the six-year midterm on count 3, doubled for the prior strike; five years for a prior serious felony conviction; and the midterm of four years for the

section 12022.5 firearm use enhancement. Defendant filed a timely notice of appeal.

DISCUSSION

No Instructional Error

Defendant proffers several arguments for reversal based on instructional error. In the first, she maintains the trial court was required to give a self-defense instruction because substantial evidence in the record supported it. In the second, relying on *People v. Valerio* (1970) 13 Cal.App.3d 912 (*Valerio*), she asserts "[t]he trial court's instruction to the jury not to consider self-defense, after specifically instructing the jury that self-defense is a defense to the crime charged, invaded the province of the jury with respect to the determination of [defendant's] guilt or innocence." Finally, she claims the instruction in response to the jurors' question violated section 1138.[4] We evaluate defendant's claims only insofar as they relate to Dawoud and find no error.[5]

A trial court has a duty to instruct the jury "'sua sponte on general principles which are closely and openly connected with the facts before the court.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 517.) Despite the insistence by defendant's trial counsel that

---

[4] Section 1138 provides, "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

[5] As the trial court aptly noted, any claimed error is not relevant as to those counts where defendant was not convicted.

she was not relying on self-defense and her agreement that it was error to have given the instruction as part of CALCRIM No. 875 in the first place, the trial court was required to give a self-defense instruction sua sponte "if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1148, internal quotation marks omitted.)

Self defense was inconsistent with defendant's theory of the case, which was that she was distraught over her relationship with Mulkey and "knew the cops were going to shoot [her]." In fact, defense counsel argued at trial if defendant were guilty of any crime, it was brandishing, which required a finding that defendant was not acting in self defense.[6]

In any event, there is no substantial evidence in the record to support defendant's appellate argument that "[a] reasonable jury could find that [she] pulled out a gun to defend herself from the individuals running towards her." There was no evidence that Dawoud was one of the people running up to her. The undisputed evidence was that defendant was swinging a baseball bat at Mulkey's scooter when Dawoud approached and asked if he could help. She dropped the bat, pulled out the gun, and shouted for him to retreat, which he promptly did.

Defendant's reliance on *Valerio, supra,* 13 Cal.App.3d 912 is also unavailing. In *Valerio,* the defendant asked the trial court to instruct the jurors that his codefendant was an accomplice as a matter of law. The trial court refused, and the Court of Appeal found no error—harmless or otherwise— on that score: "If the

---

[6] The record does not reflect that a brandishing instruction was requested or given. (See CALCRIM No. 983; § 417, subd. (a)(2).) This is not an issue on appeal.

trial court instructed the jury that the codefendant was an accomplice as a matter of law, he would, in effect, be instructing the jury that the codefendant was guilty of the offenses charged, thereby invading the province of the jury with respect to the determination of her guilt or innocence. Under these circumstances, the trial judge was compelled to leave the matter to the jury, and there was no error in refusing to instruct that the codefendant was an accomplice as a matter of law." (*Id.* at p. 924.) Here, by contrast, the trial court erroneously injected the concept of self-defense into the assault with a semiautomatic firearm instruction. The court corrected that error by advising the jurors, in response to their question, that self-defense had been included in the instruction by error and they were not to consider it in evaluating defendant's guilt or innocence. The jurors' province to determine guilt or innocence was not invaded; they were simply told not to consider irrelevant matter.

Defendant contends the trial court's instruction to the jury that it should not consider self-defense interfered with the jury's deliberations in violation of section 1138. We disagree.

Section 1138 requires the trial court "to clear up any instructional confusion expressed by the jury. . . . This means the trial court has a primary duty to help the jury understand the legal principles it is asked to apply. . . . The trial court [has] the further duty in the case to instruct the jury on the law relevant to the issues raised by the evidence." (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 128, internal quotation marks omitted.) Moreover, trial courts have a "'duty to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.'"

(*People v. Saddler* (1979) 24 Cal.3d 671, 681.) Self-defense was not relevant to the assault charge involving Dawoud. Accordingly, the trial court did not abuse its discretion when it informed the jury not to consider it.

Remand for Resentencing Under Section 12022.5, Subdivision (c)

Previously, trial courts had no discretion to strike or dismiss a jury's true finding as to a section 12022.5, subdivision (a) firearm use enhancement. Effective January 1, 2018, trial courts now have that discretion if the sentence reduction would be "in furtherance of justice" (§ 1385 subd. (a)). (§ 12022.5, subd. (c).) Defendant seeks a remand for the trial court to consider this option.

The Attorney General argues remand is unnecessary because at the sentencing hearing the trial court described defendant's conduct as "outrageous" and "dangerous" and imposed the middle, rather than the low, term for the firearm use allegation. Defendant has not suggested to this court how striking the enhancement would satisfy the requisites of section 1385 and be "in furtherance of justice." Nonetheless, we conclude remand is appropriate. The Legislature vested the trial court in the first instance with the discretion to strike firearm enhancements in the furtherance of justice. The trial court has not yet had the opportunity to do so, and we remand for that limited purpose. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1083.)

DISPOSITION

The matter is remanded to the trial court to consider whether to strike defendant's section 12022.5, subdivision (a) enhancement. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

---

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