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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. DAVID JUAREZ, Defendant and Appellant.	B275211 (Los Angeles County Super. Ct. No. YA089864)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan B. Honeycutt, Judge. Affirmed.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant David Juarez appeals from a judgment of conviction of first degree murder of Marie Smith. (Pen. Code, § 187.)[1] The jury found that he personally and intentionally discharged a firearm that resulted in the death of Ms. Smith (§ 12022.53, subd. (d)), and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).[2]

The trial court instructed the jury on first and second degree murder with malice aforethought, and the lesser included offense of voluntary manslaughter based on provocation. Defendant argues the trial court erred in denying his request to instruct on the lesser included offense of voluntary manslaughter based on perfect or imperfect self-defense. We conclude the facts do not support either theory, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because the sole issue on appeal is instructional error, our discussion focuses on the facts relevant to the theory of imperfect self-defense, the only theory argued on appeal.

On the evening of March 22, 2014, Rafael Diaz, an O.G. (original gangster) member of the South Los gang, hosted a meeting of the gang at his home at 104th Street and Normandie Avenue. Defendant, a member of that gang, attended the meeting. Also present were Gabriel Gonzalez[3] and Fernando

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

[2] Defendant admitted prior serious felony and prison term allegations. (§§ 667, subd. (a), 667.5, subd. (b).)

[3] Gonzalez is a former South Los member who moved to the San Fernando Valley in 1997 but continued to socialize with

Cervantes.[4] Gonzalez and Cervantes drove to the meeting in Gonzalez's Toyota Tundra truck.

Gonzalez brought several cases of beer to the meeting. During the meeting, Gonzalez alternated between drinking beer and snorting lines of powder cocaine. When they ran out of cocaine, Gonzalez asked for more, and someone else said, "let's go buy some."

Gonzalez and another South Los member (Creeper) contributed money for the cocaine.[5] Creeper invited defendant, who was related to him by marriage,[6] to go with them. With Gonzalez driving, the three men went in the Tundra to an area controlled by the Broadway Crips, near 109th and 110th Streets and Broadway. When they did not see any drug dealers there, Creeper directed Gonzalez to a mini-market at Vermont Avenue and 120th Street. There they found Chiles, a member of the

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members of the gang. As a former codefendant, he entered into an agreement to testify for the prosecution, and, in return for his cooperation, received a 13-year sentence for voluntary manslaughter.

[4] Cervantes remained in contact with the South Los gang after moving to Pasadena when his son was born. He was arrested but not charged in this case, and testified under a grant of immunity at the preliminary hearing and trial.

[5] Gonzalez was 41 years old when the shooting occurred. He said he was "showing off that I made it, . . . I was buying the beer [and] ordering everything."

[6] Creeper, whose given name is not shown in the record before us, is related by marriage to the brother-in-law of defendant, Arnold Lara, also a South Los member.

Denver Lanes Crips, and Ms. Smith. Chiles had a gun in his lap, and was driving a Charger.

Defendant testified to the following events: Creeper asked Chiles if he could get them some powder cocaine. Chiles said he could, and to follow him.[7] They drove their vehicles to a nearby apartment building at Figueroa Street and 120th Street. When they arrived at that location, Gonzalez handed defendant $50 to purchase the cocaine. Defendant exited the Tundra and followed Chiles, who was with Smith, to the end of the driveway of the apartment building. Upon reaching "a blind spot in the back of the apartments," Chiles asked for the money. When defendant gave him the money, Chiles pulled out a gun. Defendant, upset at being robbed, ran back to the Tundra and told Gonzalez and Creeper, "'He just robbed me for the money.'"[8] Gonzalez said, "'Well, we going to go back to Raffa's [Diaz] house, and we gonna go get a gun, and we gonna go get our money.'"

Defendant testified that after they drove back to Diaz's residence, he went inside and obtained a chrome nine-millimeter handgun from Cervantes. Defendant stated that "[t]he purpose

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[7] According to Gonzalez, Creeper did not get out of the Tundra at the mini-market. Gonzalez testified that he got out of the truck with defendant and spoke with Chiles at the mini-market. Gonzalez assumed from the manner in which defendant and Chiles "spoke to each other as friends" that they knew each other. Chiles and Ms. Smith said they were from Denver Lane Bloods, which at that time was on friendly terms with South Los.

[8] In his testimony, Gonzalez recounted defendant's statement that Chiles pulled out a gun and Ms. Smith "burned him" (took his money).

of getting the gun was to get the money back or the dope, the cocaine."

After defendant returned to the Tundra, the three men proceeded to the apartment building at Figueroa and 120th Streets to look for Chiles and Ms. Smith. When they could not find them there, they drove to a liquor store (Liquor Land) for more beer. As they entered the parking lot at that location, they saw a dark gray Charger, but were not sure whether it was the same color as the one Chiles had been driving. Gonzalez pulled into the space next to the Charger, backed out, and reversed into the same space. The Charger was parked with the front end first, while the Tundra was parked with the rear end first. Defendant, who was seated in the rear passenger seat of the Tundra, was positioned next to the passenger side of the Charger.

Defendant said they waited in the Tundra until Chiles, Ms. Smith, and another woman exited the liquor store. When Ms. Smith was about 2 or 3 feet from the passenger side door of the Charger, defendant got out of the Tundra with a gun in his hand. He pointed his gun "right away" at Chiles, who was near the hood of the Charger, on the driver's side. Defendant said, "What's going on with the money?" Chiles replied, "Fuck you. I ain't got shit."[9] As Chiles walked toward the driver's door of the Charger, Chiles reached in his front waistband for a gun. Defendant saw a gun in Chiles's hand, but it was not pointed at him. Defendant aimed at Chiles, but shot Ms. Smith. Defendant testified that he

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[9] Defendant testified that Gonzalez had lied in several aspects of his testimony. Contrary to what Gonzalez testified, defendant did not say, "Where's my money, Bitch?" Ms. Smith did not say anything, and Gonzalez was lying when he said that Ms. Smith said, "Fuck you."

thought he was going to get shot. He explained that he was not trying to kill Chiles, but to shoot at him through the car window. Defendant tried to fire the gun a second time, but it jammed, and he did not try to fire a third time. As they drove away, they saw a police vehicle and defendant tossed the gun out the window.

Police searched the crime scene and recovered the gun and a shell casing, which was matched to the gun. The deputy medical examiner, Yulai Wang, M.D., testified that the bullet entered Ms. Smith's upper right back and exited her left breast in a horizontal line, and her back was essentially even with the gun. In his testimony, defendant claimed he did not realize at the time that Ms. Smith had been shot. She was directly in front of him. Defendant testified that he did not know until he was interviewed by police that he had shot a woman. Defendant denied telling his homies, "I shot her. I shot the female."[10]

The trial court instructed the jury on first and second degree murder with malice aforethought, first degree murder by shooting a firearm from a motor vehicle,[11] and the lesser included offense of voluntary manslaughter based on provocation (sudden quarrel or heat of passion). However, the court denied defendant's request to instruct on the lesser included offense of voluntary manslaughter based on perfect and imperfect self-defense. In denying the requested instructions, the trial court

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[10] Gonzalez testified that after the shooting, defendant told everyone at Diaz's residence "that he shot the bitch and that he threw the gun out and that he knew where it landed."

[11] There was conflicting testimony as to whether defendant committed the shooting from inside the truck, which Gonzalez testified was the case, or outside the truck, as defendant testified.

stated it had reviewed several authorities, including *People v. Booker* (2011) 51 Cal.4th 141 and *People v. Enraca* (2012) 53 Cal.4th 735. The court concluded that defendant, by his own testimony, went back to find "Mr. Chiles and Miss Smith, in order to recover his money or the drugs," and to commit, in essence, a robbery. As the victim of an armed robbery, Chiles was justified to respond with deadly force, and, therefore, neither the doctrine of self-defense nor imperfect self-defense may be invoked by defendant.

Defense counsel objected, arguing that the requested instructions on perfect and imperfect self-defense were supported by the evidence because defendant, who was the victim of a violent felony—he had been robbed by Chiles at gunpoint some 20 minutes before—was authorized to conduct a citizen's arrest and shoot Chiles if necessary (citing CALCRIM No. 508). But defendant did not testify that he was trying to make a citizen's arrest of Chiles or Ms. Smith, and the trial court rejected counsel's theory, stating there was no evidence or testimony by defendant that he was "trying to effectuate a citizen's arrest within the meaning of the law."

The jury found defendant guilty of first degree murder. It also found the firearm and criminal street gang allegations to be true. After the jury returned its verdict, defendant admitted the prior serious felony and prior prison term allegations charged in the information. (§§ 667, subd. (a), 667.5, subd. (b).) The trial court imposed a sentence of 25 years to life for first degree murder, doubled to 50 years to life under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). It imposed a 5-year prior serious felony enhancement (§ 667, subd. (a)(1)), and a

firearm enhancement of 25 years to life (§ 12022.53, subd. (d)), resulting in a total sentence of 80 years to life.[12]

DISCUSSION

Murder is "the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) The mental state required for murder is malice. Malice may be express or implied (§ 188),[13] and "requires an intent to kill that is 'unlawful' because the law deems it so. ""The adverb 'unlawfully' in the express malice definition means simply that there is no justification, excuse, or mitigation for the killing recognized by the law.'" (*People v. Saille* (1991) 54 Cal.3d 1103, 1115.)" (*People v. Elmore* (2014) 59 Cal.4th 121, 133 (*Elmore*), italics omitted.) "Malice is implied when an unlawful killing results from a willful act, the natural and probable consequences of which are dangerous to human life, performed with conscious disregard for

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[12] The court dismissed the prior prison term allegation (§ 667.5, subd. (b)) and stayed the criminal street gang allegation (§ 186.22, subd. (b)(1)(C)).

[13] "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

"When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice." (§ 188.)

that danger. (§ 188; *People v. Gonzalez* (2012) 54 Cal.4th 643, 653; *People v. Knoller* (2007) 41 Cal.4th 139, 151–152.)" (*Ibid.*)

First degree murder is the unlawful, premeditated, and deliberate killing of a human being with malice. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) "'Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. (§§ 187, subd. (a), 189; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.)'" (*Ibid.*, citing *People v. Hansen* (1994) 9 Cal.4th 300, 307, overruled on another ground in *Chun*, at p. 1199.)

"Manslaughter, a lesser included offense of murder, is an unlawful killing without malice. (§ 192; *People v. Thomas* (2012) 53 Cal.4th 771, 813.)" (*Elmore*, *supra*, 59 Cal.4th at p. 133; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [where unlawful killing is committed without malice, "'level of guilt must decline'"].) Of the three types of manslaughter—voluntary, involuntary, and vehicular (§ 192)—we are concerned only with voluntary manslaughter.

The law treats voluntary manslaughter less harshly than murder because of the mitigating factors that preclude the formation of malice. These factors include "heat of passion and unreasonable self-defense. (*People v. Beltran* [(2013)] 56 Cal.4th [935], 942, 951; *People v. Blakeley* (2000) 23 Cal.4th 82, 87–88.)" (*Elmore*, *supra*, 59 Cal.4th at p. 133.) Heat of passion, which was considered and rejected by the jury in this case, "is recognized by statute as a mitigating factor. (§ 192, subd. (a).)" (*Ibid.*) The trial court declined to instruct on unreasonable self-defense.

As our Supreme Court stated: "It is well established that the ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified. [Citations.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances. For example, the imperfect self-defense doctrine would not permit a fleeing felon who shoots a pursuing police officer to escape a murder conviction even if the felon killed his pursuer with an actual belief in the need for self-defense." (*In re Christian S.*, *supra*, 7 Cal.4th at p. 773, fn. 1; see *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1363–1364; cf. *People v. Barton* (1995) 12 Cal.4th 186, 201.)

"'[S]elf-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance, or fault, to create a real or apparent necessity for making a felonious assault.'" (*People v. Hinshaw* (1924) 194 Cal. 1, 26.) Defendant testified that after being robbed by Chiles at gunpoint, he armed himself with a gun and set out to recover the money or the cocaine: "The purpose of getting the gun was to get the money back or the dope, the cocaine." By his testimony, defendant showed that he was the initial aggressor. He admitted that upon seeing Chiles and Ms. Smith coming out of the liquor store, he exited the Tundra and pointed his gun at Chiles "right away." Chiles reached into his waistband and pulled out a gun, but did not point it at him. Defendant fired his gun toward the driver's side of the Charger.

On these facts, Chiles was justified in responding to the assault with a firearm by pulling out his own gun. Accordingly, because he was the initial aggressor, defendant was not entitled to instructions on perfect self-defense or imperfect self-defense. (See *People v. Enraca, supra,* 53 Cal.4th at p. 761.) Just as the ordinary self-defense doctrine is not available to a defendant who assaults a victim and is met with resistance, the imperfect self-defense doctrine also is not available to a defendant who assaults a victim and forms an unreasonable belief that the victim was assaulting him.

Moreover, even if defendant were entitled to assert a claim of imperfect self-defense, any error in failing to instruct on this theory would be harmless beyond a reasonable doubt. The evidence, viewed in the light most favorable to defendant, showed that after arming himself for the express purpose of regaining either the money or the cocaine by force, defendant carried out his intention by immediately pointing his gun at Chiles and demanding the return of the money. Because a claim of ordinary or perfect self-defense was not available under these facts, no reasonable jury would have ruled that the shooting was manslaughter under the doctrine of imperfect self-defense.

The contention that defendant was precluded from presenting a complete defense because instructions on imperfect self-defense were not given is unavailing. As we have explained, the issue is not whether defendant actually believed he was going to be shot—we have assumed for purposes of discussion that he held that belief—but whether, as the initial aggressor when he pointed a gun at Chiles, the theory of imperfect self-defense was available to him. It was not.

In light of our legal determination that defendant was not entitled to assert a claim of unreasonable self-defense, we conclude he did not suffer a violation of his federal constitutional rights on that point. (Cf. *People v. Breverman* (1998) 19 Cal.4th 142, 165 [holding that "the failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone"].) Where, as here, there is no evidence to support an instruction on reasonable or unreasonable self-defense, the alleged error is harmless under either *People v. Watson* (1956) 46 Cal.2d 818, 836 or *Chapman v. California* (1967) 386 U.S. 18, 24.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.