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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERNEST GERALD BENEFIEL, Defendant and Appellant.	G040429 (Super. Ct. No. 05NF0030) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Reversed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Kristine A Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Ernest Gerald Benefiel was charged but acquitted of four counts of assaulting a police officer with a firearm.[1] (Pen. Code, § 245, subd. (d)(1).)[2] The jury convicted him of four counts of the lesser included offense of assault with a firearm. (§ 245, subd. (a)(2).) The jury found true the allegations defendant personally used a firearm during commission of the lesser included assaults in counts one and two. (§ 12022.5, subd. (a).) As to the lesser included assaults in counts three and four, the jury found *untrue* the allegations defendant personally discharged a firearm during commission of the assaults. (§ 12022.53, subd. (c).) The judge sentenced defendant to an aggregate term of 17 years and four months in prison.

On appeal defendant contends: (1) He acted in self-defense as a matter of law, and the evidence was insufficient to show he did not act in self-defense; (2) The court improperly admitted evidence of other firearms in his possession; (3) The court abused its discretion by sentencing him to consecutive terms on all four counts; and (4) The court abused its discretion by sentencing him to the upper term on the firearm enhancement attached to count one. We hold the evidence was insufficient to prove beyond a reasonable doubt defendant did not act in self-defense. The judgment must therefore be reversed. As a result, we do not address defendant's remaining contentions.

FACTS

On December 30, 2004, defendant lived with his father in a two-bedroom apartment. The father was in his 80's at the time. Defendant had been taking pain medication for knee and back injuries while living with his father.

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[1] This case comes to us after retrial following our reversal of defendant's first conviction. (*People v. Benefiel* (May 15, 2007, G036952) [nonpub. opn.].)

[2] All statutory references are to the Penal Code.

When defendant arrived home that afternoon, he was slurring his words and not walking straight. Defendant spoke on the telephone with his daughter, Amber, and his mother. He then went to his bedroom and lay down in his bed.

When the father looked into defendant's bedroom, he saw a silver-plated pistol and three or four pills on the floor. The father also found a "goodbye" note written by defendant. Defendant "was sound asleep and he wouldn't wake up." Defendant's "cell phone was in his room."

The father "told [defendant] to get out of there [because the father wanted] to talk to [him]." After the father tried to get defendant to come out of his room, he heard defendant nailing his bedroom door shut.

The father then received a phone call from his ex-wife, an unusual event since she had not contacted him in "several years." She asked him to "call 911 and have [defendant] sent to the hospital and have his stomach pumped." Concerned about defendant's safety, the father phoned 911 and asked for an ambulance to come get defendant, "take him to the hospital[, and] pump his stomach."

A fire truck responded. The father told the paramedics "about the pills and the gun." The paramedics would not talk with the father, but instead "backed their rig up and called the police."

Officer Michael McDonald was dispatched to the scene shortly after 7:00 p.m. He spoke with defendant's father, who said defendant "was inside one of the bedrooms and had [talked] about harming himself." The father told the officer about the pills and the gun, and said defendant was suicidal and he (the father) was concerned for his son's safety. According to McDonald, he and the father spoke for about 10 minutes. But according to the father, McDonald "was not cooperative at all," and their "very brief" and "limited" conversation lasted about "three minutes," "enough for [McDonald] to tell [the father] to go sit down some place." McDonald asked no questions about defendant. "All he wanted to know [was] where the gun was."

McDonald "became concerned that we had someone inside the apartment who may either be attempting to harm himself or harm others." He "requested several additional officers [to] respond to [the scene] and coordinate with stopping traffic in the area and evacuating surrounding apartments." At least four more officers arrived and began evacuating apartments and restricting the flow of traffic.

McDonald moved his vehicle to face defendant's apartment and shined the spotlights on the side of his car as well as the bright white take-down lights on top of his vehicle into defendant's window. About 25 to 30 minutes after his arrival, McDonald and another officer began to make public address announcements about every eight to 10 minutes for the next several hours, initially from inside the car and then from a remote, safer position away from the vehicle. In these announcements, McDonald and the other officer identified themselves as police and told defendant to come outside with his hands in the air so that they could attempt to resolve the situation peacefully; that they would not hurt him; that he was surrounded; and that his family loved him.

Defendant's bedroom was lighted. The window "appeared to be closed." The window blinds "were closed entirely."

In an effort "to make contact with" defendant, McDonald assigned Anthony Diaz, an officer with "specialized S.W.A.T. training," to deploy a flash-bang grenade around 8:30 p.m. While Diaz deployed the grenade, Officer Jeff Stuart provided cover with a Glock 22 semi-automatic. Diaz deployed the device directly beneath defendant's window, creating an intense light and generating a sound so loud that it set off car alarms on the street. The father described the flash bomb as a big puff of fire and smoke that was loud enough to wake him up. Diaz went behind the apartment with his AR-15 rifle to "hold a rear containment position."

Officers did not detect any noises or response coming from the bedroom window and continued to make announcements every couple of minutes over the public

address system. Officers also used an air horn and continuously contacted defendant by telephone in attempts to get defendant's attention.

The police asked the father for the address of defendant's wife and that of defendant's mother, which the father gave them. The father was then taken to a police station lobby and kept there throughout the incident.

Across from defendant's apartment was a driveway to another apartment complex flanked on both sides by concrete block walls. Stuart took a surveillance position behind a pillar of one wall, knocked out the light bulb "to give [himself] a little more concealment," and put his weapon on top of the wall so he "could train it toward that window." Richard Cook, a S.W.A.T. team member, positioned himself behind the retaining wall on the driveway's other side with his Bushmaster M-4 machine gun. He also disabled the light on top of the pillar to better conceal himself.

Samuel Contino, a S.W.A.T. sniper, arrived at the scene at approximately 10:00 p.m. Lieutenant Baldwin, the tactical commander, assigned Contino the mission of breaking defendant's bedroom window so that a throw phone could be tossed into the room to communicate with defendant. Contino was protected by Timothy Smith and another officer who both carried "semi-automatic 223 carbine rifles." The three men deployed to a position behind a parked minivan directly in front of defendant's window. Contino had a Remington 870 shotgun loaded with seven "super sock bean bags," and had eight more bean bags in his pocket.

Bean bag rounds look and feel like standard shotgun shells, except they are transparent, revealing a sock inside made of Kevlar and nylon and filled with 40 grams of number nine lead shot. Bean bag rounds, also called "less lethal rounds," are "less likely to cause serious injury or death," although they can kill a person who is hit in "a vital location." When shot through glass, a super sock can be "compromised," i.e., it can break open and become more lethal and more likely to cause human injury. Contino had

no information about defendant's location in the apartment other than being "advised by the tactical commander that [defendant] was mobile in that bedroom."

The tactical commander advised all units that Contino would be deploying bean bag rounds, since "the sound of a bean bag is similar to normal shotgun rounds." Contino fired seven rounds into the window in seven seconds without pausing. Between the first and third round, Contino observed a hand throw some objects out of a broken hole in the lower corner of the window. Cook saw a head appear at the window through the mini blinds, look "up and down in both directions, and disappear[] back into the window." "The head again appeared very briefly into the window and then retreated . . . again." Contino loaded another five bean bag rounds and fired them toward the window. He fired these additional rounds because he "was asked to take out all of the glass." He saw a "revolver being pointed out of the . . . right side of the window through the blinds." Contino broadcasted over the radio that a weapon was "being displayed."

About 30 to 45 seconds later, Contino "saw the revolver fire"; he saw a flash, smoke and a recoil. Cook heard the sound of something breaking behind him; looking back, he saw a directory sign across the driveway, about 15 to 20 feet away from him, with a large piece at the top that "appeared to be missing." (Stuart later saw a "bullet strike" on the sign.)

Contino then "saw the firearm point in a different direction" and "discharge again." Stuart and Cook saw no muzzle flash from this second shot; Cook saw smoke, but Stuart did not.

Officers returned fire, with Smith firing one shot and Stuart and Cook each firing two shots into defendant's window. After these shots had been fired into the window, Contino saw defendant "walking back and forth inside the room," moaning and saying, "Why did you shoot me? Why did you shoot me?" Contino heard the sound of another shot being fired *inside* the bedroom. No announcement was made over the public address system at this time. Contino tried "to give verbal commands to" defendant,

identifying himself as North County S.W.A.T. and telling him to come to the window with his hands up, and that he had paramedics on scene who could help him. Defendant said, "I've been shot, I can't hear," and made "moaning noises." Concluding that defendant could not hear him, Contino requested that announcements be made on the public address system instructing defendant to come out unarmed.

About five minutes later, defendant climbed out the bedroom window and was taken into custody. Defendant was in apparent pain and had cuts, blood, and bruising on his chest, possibly caused by bean bag shots or broken glass. As defendant was being carried away on a stretcher, a witness heard him asking why they had shot at him when he had not done anything, and why they would not let him sleep and leave him alone.

The defense presented testimony from two expert witnesses.

Charles Duke is a former S.W.A.T. officer, supervisor of a crisis negotiation team, and a training supervisor who helped develop current S.W.A.T. tactics. Duke testified that S.W.A.T. "is a life-saving organization" whose mission is to "rescue the hostage and take the suspect in[to] custody [or] prevent a suicide." The purpose of a flash bang device "is to distract, disorient, and confuse"; it is primarily used "for hostage rescue and high-risk warrants," not as an "alarm clock." The purpose of bean bags is to subdue a "noncompliant" person wielding a knife, baton, bat, or bottle. Duke testified that he would never instruct anyone to fire a super sock through a window when a human being was inside the room. The window's glass can tear the bag, releasing number nine shot and making the weapon lethal. "[B]lindly shooting is generally against policy." A super sock can be lethal if it hits someone's eye or "direct sternum." Also, firing through a window can cause "spalding," where glass flying at high velocity can cause fatal injuries.

Jimmy Trahin, a retired detective who specialized in "scientific analysis of all firearms-related evidence," reviewed "the police reports regarding the ballistics evidence" and concluded that defendant's gun was fired twice.

In rebuttal, Dawn Scruggs, a police forensic specialist, described her investigation of the crime scene, both exterior and interior. Outside, under defendant's bedroom window, were a cigarette lighter, a music compact disk, and a hammer. A few feet away from the directory sign was a piece of the broken sign. Inside defendant's bedroom, the bathroom had a bullet hole in the ceiling. Loud music was playing. Many super sock bean bags lay in various locations in the room. A Smith & Wesson revolver contained "five live rounds and two spent rounds" and had blood on the trigger. Scruggs found three additional firearms in defendant's room. Two of these three guns were in a closet (one loaded and one unloaded) and the third was in a dresser drawer (loaded). An indoor shooting range membership card and ammunition were also found. Atop a television were a note and a cell phone. Scruggs also found a pill bottle, five pills, and a "partially consumed" bottle of tequila.

An information charged defendant in counts one and two with assault with a firearm on a peace officer (Contino and Smith, respectively), under section 245, subdivision (d)(1). With respect to these counts, the People alleged defendant personally used a firearm under section 12022.5, subdivision (a). Counts three and four charged defendant of assaulting a peace officer (Stuart and Cook, respectively) with a firearm under section 245, subdivision (d)(1). As to these counts, the People alleged defendant intentionally and personally discharged a firearm under section 12022.53, subdivision (c).

The jury found defendant *not* guilty of all four counts of assault with a firearm on a peace officer. The jury found him guilty of the lesser included offenses of assault with a firearm as to all four counts. With respect to counts one and two, the jury found true the allegation defendant personally used a firearm against Contino and Smith.

With respect to counts three and four, the jury found *not* true the allegation defendant personally discharged a firearm against Stuart and Cook.[3]

DISCUSSION

The Evidence was Insufficient to Show Defendant Did Not Act in Self-Defense

Defendant argues the evidence shows, as a matter of law, he acted in self-defense when he fired his gun in response to the super socks fired into his bedroom — one of which (if not more) struck and injured him. He asserts the evidence is susceptible of but one interpretation: he used reasonable force in repelling the officer's attack upon him and acted in self-defense as a matter of law. Alternatively, and relatedly, defendant emphasizes that the People bore the burden to prove beyond a reasonable doubt that he did *not* act in self-defense during the assaults. (*People v. Adrian* (1982) 135 Cal.App.3d 335, 340-341; *People v. Banks* (1976) 67 Cal.App.3d 379, 384.) He argues the evidence is insufficient to support the People's burden of proof on this issue. (*In re Winship* (1970) 397 U.S. 358, 364 [due process requires "proof beyond a reasonable doubt of every fact necessary to constitute the" charged crime].)

The court instructed the jury with CALCRIM No. 3470 as follows: "Self-defense is a defense to Penal Code 245(d)(1) (Assault with a firearm on a police officer) or the lesser offense of Penal Code 245(a)(2) (Assault with a firearm). The defendant is not guilty of those crimes if he used force against the other person in lawful self-defense. The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury; [¶] 2. The defendant

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[3] The court ordered the jury findings of *not* true on the enhancements to counts three and four, to be entered into the record with respect to their lesser included offenses as well. The prosecutor agreed this was appropriate and stated he had no objection to the court's order.

reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger. [¶] . . . [¶] 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. [¶] A defendant is not required to retreat. . . . [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. If the People have not met this burden, you must find the defendant not guilty."[4]

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[4] CALCRIM No. 3470 faithfully states the law on self-defense. Under section 692, a "party about to be injured" may lawfully resist "the commission of a public offense." "Resistance sufficient to prevent the offense may be made by the party about to be injured" to "prevent an offense against his person." (§ 693.) Relatedly, with respect to self-defense as a defense to homicide, our Supreme Court has stated: A jury "must consider what 'would appear to be necessary to a reasonable person in a similar situation and with similar knowledge. . . .' [Citation.] It judges reasonableness 'from the point of view of a reasonable person in the position of defendant . . . .' [Citation.] To do this, it must consider all the '"'facts and circumstances . . . in determining whether the defendant acted in a manner in which a *reasonable man* would act in protecting his own life or bodily safety.'"'" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083.) "Justification does not depend on the existence of actual danger but on appearances. [Citations.] In order that a person avail himself of his right of self-defense, it is sufficient that appearances on the part of his assailant were such as to arouse in his mind, as a reasonable man, that his assailant was about to commit a felony." (*People v. Collins* (1961) 189 Cal.App.2d 575, 588.) "Where from the nature of the attack a person, as a reasonable man, is justified in believing that his assailant intends to commit a felony upon him, he has a right in defense of his person to use all force necessary to repel the assault; he is not bound to retreat but may stand his ground." (*Ibid*.) As for the burden of proof, "the prosecution must prove beyond a reasonable doubt the absence of justification, herein self-defense, when the issue is properly presented in a homicide case." (*People v. Banks, supra*, 67 Cal.App.3d at p. 384.) This burden of proof applies equally to nonhomicidal assault cases. (*People v. Adrian, supra,*135 Cal.App.3d at p. 340.)

The jury convicted defendant of four counts of assault with a firearm, impliedly finding he did *not* act in lawful self-defense. On appeal we consider whether the jury's conclusion is supported by substantial evidence, "not whether guilt is established beyond a reasonable doubt." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) We review the whole record "in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) But the "evidence that we view is the evidence *in its entirety*." (*People v. Thomas* (1992) 2 Cal.4th 489, 544 (conc. & dis. opn. of Mosk, J.).) "'[W]e must resolve the issue in the light of the *whole record* — i.e., the entire picture of the defendant put before the jury — and may not limit our appraisal to isolated bits of evidence selected by' the People on appeal."[5] (*Id.* at p. 545.) To be substantial, evidence must be "reasonable, credible, and of solid value." (*Johnson*, at p. 578.) It must """reasonably inspire[] confidence""" and may not be based on "mere speculation." (*Thomas*, at p. 545.)

Defendant acknowledges that a claim of self-defense normally raises questions of fact for the jury to resolve. (*People v. Davis* (1965) 63 Cal.2d 648, 655.) But he argues the "question in this case is . . . whether there is substantial and solid evidence from which a reasonable trier of fact could have found that [defendant] did not act in self-defense." He further argues our Supreme Court has recognized, "[a]s an abstract proposition," that evidence of self-defense may be uncontradicted, susceptible of only one interpretation, and sufficient as a matter of law. (*Jackson v. Superior Court*

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[5] "Occasionally, an appellate court affirms the trier of fact on isolated evidence torn from the context of the whole record. Such a court leaps from an acceptable premise, that a trier of fact could reasonably believe the isolated evidence, to the dubious conclusion that the trier of fact reasonably rejected everything that controverted the isolated evidence." (Traynor, The Riddle of Harmless Error (1969) p. 27.)

(1965) 62 Cal.2d 521, 528.) For self-defense to apply as a matter of law, "it must appear from the evidence that no reasonable trier of fact could have found otherwise beyond a reasonable doubt." (*People v. Clark* (1982) 130 Cal.App.3d 371, 377, disapproved on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 92.) Thus, the same standard applies in determining (1) whether substantial evidence supports the jury's implied finding (and the People's burden to prove) that defendant did *not* act in self-defense, and (2) whether the uncontroverted evidence shows as a matter of law that he did act in self-defense. For both inquiries, we must decide whether a reasonable trier of fact could have found, from the evidence, that defendant did *not* act in self-defense.

The People argue substantial evidence supported a conclusion that defendant's use of force was unjustified or excessive, and therefore he did not act in self-defense. The People argue "the jury could have reasonably concluded [from the evidence] that [defendant] knew the police were outside his apartment, that he knew they were trying to get him to come outside, and that he could have simply surrendered and come out of his apartment or responded in some other less lethal manner than shooting at the officers." As we shall discuss, these conclusions do not negate the reasonableness of defendant's belief in his need for self-defense or the reasonableness of the force he used to defend himself (given that he was not required to retreat).

We summarize the undisputed facts. The evidence showed the police used potentially deadly force against defendant. Although the super sock bean bags were not normal shotgun shells, the evidence was uncontroverted the super socks could seriously harm or even kill a person, and were particularly dangerous when shot through glass.[6] As

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[6] The People point out defendant possessed other firearms and ammunition and thus was familiar with guns. But that does not support a finding that defendant was familiar with super sock bean bags shells, devices useful only to peace officers. In any case, even if defendant realized that super sock bean bags (not standard shotgun shells) were being fired into his room, the super socks were potentially lethal.

to the "appearance" of danger, the super sock shots sounded like a shotgun firing. The evidence was also uncontroverted that Contino fired numerous rounds of super sock bean bags into the window in rapid succession, blindly, with no idea of defendant's location within the bedroom. The undisputed evidence further showed that at some point during the shooting of the super socks (and before defendant pointed his gun out the window), defendant threw out a hammer, a compact disk and a cigarette lighter — affirmative acts that demonstrated he was awake and attentive. Contino's response to this contact with defendant was to fire five to nine more super socks into the window instead of simply announcing the presence of police. Defendant was bruised and bloodied by his encounter with the police.

At oral argument, the Deputy Attorney General, when asked to identify *all* the evidence showing defendant did *not* act in self-defense, simply stated that (1) defendant looked twice out his window and surveyed his surroundings, and (2) after a lapse of about 45 seconds, fired a shot out the window. But this evidence cannot be viewed in an isolated vacuum that fails to include the whole record and all countervailing evidence. That defendant looked out the window prior to shooting is insufficient evidence to show he knew his assailants were peace officers there to "rescue" him. According to the undisputed evidence, the police had illuminated the window with spotlights and the white take-down lights on top of a police vehicle. Thus, when defendant looked out the window, he would have been looking directly into the police spotlights. Assuming the spotlights did not impair his vision of the surroundings, he would either have seen numerous people arrayed against him or he would have observed no one (given the officers' defensive positions behind vehicles, pillars and other covering objects). In any event, such knowledge alone would be insufficient to show defendant did not act in self-defense. The jury, by acquitting defendant on all counts of the charge of assaulting a peace officer with a deadly weapon, found he did *not* know the people outside were police officers and/or the police acted with unreasonable or excessive force.

Either way, whether or not defendant knew the people outside were police officers and S.W.A.T. team members, there is no evidence to suggest that a reasonable person, facing a barrage of 12 shotgun blasts, shattering the window in the person's bedroom, and awakening the person from a deep sleep, (1) would not believe he or she was in imminent danger of suffering bodily injury; (2) would not believe the immediate use of force was necessary to defend against that danger (especially given the police response to his initial contact of throwing out a hammer and other objects); (3) would not have used the force available at the moment (the gun); or (4) would not have concluded that the force used was no more than was reasonably necessary to defend against that danger (answering Contino's numerous volleys of deadly force with at most a single shot of lethal force).[7] The law is clear defendant was not required to retreat or to acquiesce to the police use of excessive and deadly force. (*People v. Curtis* (1969) 70 Cal.2d 347, 356-357 [defendant may use "reasonable force to defend life and limb against excessive force" used by arresting officer], disapproved on another ground in *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222.)

The judgment must be reversed. The evidence was insufficient to show defendant did not act in self-defense. Because we conclude defendant's convictions must be reversed for insufficiency of the evidence, the double jeopardy clause prohibits the People from retrying defendant. (*Burks v. United States* (1978) 437 U.S. 1, 11, *People v. Belton* (1979) 23 Cal.3d 516, 527 & fn. 13.) Given this disposition, we need not address defendant's other contentions on appeal.

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[7] The jury found the firearm discharge enhancement not true as to the assaults against officers Stuart and Cook.

DISPOSITION

The judgment is reversed. The trial court is directed to enter a judgment of acquittal. (*People v. Belton, supra*, 23 Cal.3d at p. 527.)

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

ARONSON, J.