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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JULIO ISRAEL RODRIGUEZ, Defendant and Appellant.	F034083 (Super. Ct. No. 625290-2) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Mark D. Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Matthew A. Chan and Alison Elle Alemán, Deputy Attorneys General, for Plaintiff and Respondent.

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PROCEDURAL SUMMARY

On February 3, 1999, an information was filed in the Fresno County Superior Court charging appellant with murder (Pen. Code, § 187;[1] count one) and attempted murder (§§ 664 and 187; count two.) As to both counts, it was alleged that appellant used a deadly and dangerous weapon and suffered a prior strike (§§ 667, subds. (a) through (i), 1170.12, and 1192.7, subd. (a).) As to count two, it was alleged appellant inflicted great bodily injury.

On June 28, 1999, jury trial commenced.

On July 7, 1999, appellant admitted the prior conviction allegation.

On July 9, 1999, the jury convicted appellant on both counts and found true the remaining allegations.

On September 2, 1999, the trial court sentenced appellant to state prison for an indeterminate term of 30 years and a consecutive determinate term of 24 years.

Appellant has filed a timely appeal.

FACTUAL SUMMARY

On the evening of December 1, 1998, three acquaintances -- appellant, Alfred Mejia (also known as Pelon), and Magdiel Hernandez (also known as Guero) -- met at 3323 East Clay, Apartment C, in Fresno. Mejia and appellant previously had spoken about their respective connection with the Sureños street gang. At trial, Mejia testified that all three were smoking marijuana and drinking alcohol. Appellant admitted he drank two and a half bottles of 40-ounze malt liquor between midday and nighttime.[2]

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

[2] An expert witness testified that appellant's blood alcohol level was approximately 12 percent to 16 percent, which likely impaired appellant's thought and judgment.

The principal witnesses disagreed about what happened next. Mejia testified that appellant "started to get drunk and he started getting stupid." Appellant asked Mejia to lend him some money, which Mejia did. Appellant then left. Shortly afterwards, appellant "came like crazier. He came back crazier," and insisted Mejia lend appellant more money. Appellant was still drinking, and wanted to fight with some young men who lived in the apartments. According to Mejia, he tried to calm appellant down, but appellant, unprovoked, stabbed Mejia in the chest. Mejia then hid inside a bedroom because appellant wanted to stab him again. Mejia saw appellant stab Hernandez with two knives. About 10 minutes later, appellant, carrying two knives in his hands, forced his way into Mejia's hiding place. Mejia stuck out his feet and grabbed appellant's hands, causing appellant to fall. Mejia managed to run away.

Another witness, Melissa Rodriguez (Melissa) testified at trial that, on the evening of the stabbings when she came home to the apartments, a belligerent appellant accosted her. Melissa testified appellant "was like hyper. He wasn't -- you could tell he was on some kind of drug or something. It was not normal. I had seen him two or three times before this and he wasn't the same way." Later that evening, when someone alerted Melissa that a fight had occurred, she went outside her apartment and saw appellant, with an unidentified object in his hand, running behind three men. Melissa next saw Mejia leaning against a car and holding his bleeding chest. Mejia urged Melissa to take him to the hospital, and she did. Mejia underwent emergency surgery for life-threatening injuries to his liver and arteries.

A forensic pathologist testified that Hernandez died of stab wounds to the chest and abdomen. Hernandez also had sustained several defensive wounds to his arms.

Appellant's contrasting trial testimony was that he came upon Hernandez and Mejia while they were hiding something inside a garage door behind the apartment. Sometime later, appellant investigated; inside the garage he found cocaine, which he took and sold. That night, Hernandez and Mejia, both bearing guns, met appellant and

questioned him about the missing cocaine. Hernandez pointed a gun to appellant's head, forced appellant into the apartment, and gave him the ultimatum to return the cocaine or "they were going to take [appellant] out." Appellant wrestled with Hernandez, moved the gun away from appellant's head, and stabbed Hernandez with a kitchen knife at least three times. In that instant, Mejia approached appellant, who became scared and stabbed Mejia. No gun was found at the crime scene or on Mejia's person.

During an in limine hearing held before Melissa testified, the trial court granted a defense request that Melissa not refer to appellant's nickname, "Psycho." The prosecution agreed to instruct Melissa accordingly. However, the prosecutor forgot to so instruct Melissa. On direct examination, when the prosecutor asked Melissa whether the police investigators previously had asked her to identify appellant, Melissa replied, "Um, I don't remember if it was by photograph, but I remember they used the nickname Psycho." Appellant instantly objected and moved to strike Melissa's mention of the nickname. The trial court reacted by admonishing the jury "not to consider that reference to a nickname which has been mentioned by the witness."

At the conclusion of Melissa's testimony, appellant moved for a mistrial because Melissa had disclosed his nickname to the jury. The prosecutor apologized for his acknowledged failure to warn Melissa and expressed his willingness to accept any court imposed sanction. Appellant rejected the imposition of sanctions because he felt the prosecutor's lapse had not been intentional. The court concluded:

> "I'm inclined to agree with [defense counsel] that nothing about how this took place suggests that [the prosecutor] in any way acted intentionally. It is my assumption that it was the fact that [Melissa] had been released from custody and they were unable to relocate her yesterday when she was anticipated to testify that has led to her coming onto the stand without having had an adequate opportunity to talk with you, [prosecutor], so you could appropriately instruct her."

In explaining the remedial actions it had already taken and further possible action, the trial court stated,

> [I] have already told the jury, of course, they're not to consider [the nickname]. I did not give them an instruction which would be more typical of an admonition, which I still can do, along the lines that they're not to consider it for any purpose in this case on the issue of [appellant's] guilt or otherwise something more elaborate than I have already done. That is a possibility here."[3]

The trial court denied appellant's request for a mistrial for substantially the same reasons, but without prejudice to appellant's briefing the matter and renewing the motion at the close of trial.

At the close of trial, at appellant's request, the jury was instructed with an adaptation of CALJIC No. 1.02 which stated, "Do not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken by the court, *such as any alleged nickname of the defendant*; *you should* treat it as though you had never heard it." (Italics represent the adaptation.)[4]

DISCUSSION

I.

Appellant first contends the trial court erred in denying his motion for a mistrial. Specifically, he argues the inadvertent mention of his "Psycho" moniker "rendered incurable prejudice, substituting for probative facts a terrifying epithet that the jurors simply could not ignore in evaluating the prosecution's case."

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[3] Given the trial court's expressed willingness to deliver a curative instruction, we reject appellant's suggestion the trial court's repeat of appellant's nickname during sentencing was a commentary on the merits of appellant's case or a demonstration of the weight the jury must have given to the nickname. The trial court mentioned the nickname after the close of evidence, and as one among multiple factors it considered in exercising its discretion not to strike one of appellant's priors.

[4] On appeal, the People maintain that appellant did not request a stronger admonition, and appellant appears to acquiesce in this misapprehension. However, appellant's specific request for a modified version of CALJIC 1.02 served to reinforce the trial court's initial admonition.

It is impossible to conclude that the trial court's decision exceeded the bounds of reason or was arbitrary, capricious, or whimsical. (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659 [abuse of discretion test puts the burden on the appellant to "demonstrate that the trial court's decision was 'irrational or arbitrary,' or that it was not '"grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue"'"].) Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. (*People v. Hines* (1997) 15 Cal.4th 997, 1038 [admonition found sufficient to dispel any harm].)

There is no abuse of discretion shown on this record. The trial court could rationally have determined that the disclosure of the moniker was no more, and perhaps less, harmful to appellant than Mejia's characterization of appellant's behavior as drunk and "crazy" and Melissa's description of appellant's demeanor as "hyper," abnormal, untypical for appellant, and possibly drug induced.

Appellant nowhere mentions these unchallenged aspects of the testimony of Mejia and Melissa but nonetheless implicitly affirms that this testimony supports the trial court's decision. As we understand appellant's position, the disclosure of the nickname undercut the "coherent" defense case by providing an explanation for appellant's actions during the evening in question, an explanation which was absent from Mejia's "incoherent," disjointed testimony and therefore from the prosecution's case. As appellant puts it,

> "The overall impression [of Mejia's testimony] was either that Mejia was evasive or -- and this is the key point -- appellant was "*crazy*." In other words, appellant's nickname 'Psycho' conferred a false coherence on Mejia's otherwise obscure description of the events. Appellant became drunk, belligerent, and 'psycho,' suddenly stabbing and killing for no commensurate reason." (Emphasis added.)

That appellant became "drunk, belligerent, and 'psycho' ["*crazy?*"]" was precisely the impression left by Mejia's and Melissa's testimony, without consideration of

Melissa's mistaken mention of the nickname. The trial court did not err in concluding that there was no incurable prejudice from evidence, ultimately stricken, that was essentially duplicative in tenor and impact of unquestioned evidence already before the jury.[5]

In addition, the trial court gave a timely admonition and a modified jury instruction, both of which the jury is presumed to have followed and which were sufficient to have cured whatever minor harm might have resulted -- an unlikely occurrence, in our view -- from the witness's spontaneous statement. (*People v. Hines, supra,* 15 Cal.4th at p. 1038; *People v. Morris* (1991) 53 Cal.3d 152; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1374.) Appellant's trial counsel apparently felt the admonitions and instructions sufficient, for he proposed the last instruction and did not accept the trial court's suggestion to renew the motion for mistrial at the close of the evidence.

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[5] Mejia's and Melissa's testimony means there was no "gap," as appellant asserts, in the prosecution's case. Thus, the prosecution's burden was not lightened in the manner suggested by appellant and there was no resulting federal due process violation. (*Lisenba v. California* (1941) 314 U.S. 219, 236 [No due process violation unless it is shown that the error fatally effected the fundamental fairness of the trial] *Kirkpatrick v. Blackburn* (5th Cir. 1985) 777 F.2d 272, 279 [same].) It is doubtful the erroneous admission of duplicative evidence would ever satisfy this stringent test.

In addition, conclusory allegations, accompanied by superficial or non-existent discussion, of alleged federal constitutional violations are a hallmark of appellant's briefing. With respect to all appellant's due process arguments, we reject them on the alternate procedural basis that they were inadequately presented. (*People v. Earp* (1999) 20 Cal.4th 826, 884 [Appellate courts "need not consider . . . mere contentions of error unaccompanied by legal argument."].)

II.

If the trial court erred in instructing with CALJIC Nos. 5.54, and 5.55, there was no prejudice.[6]

First, as did the trial court in *People v. Olguin, supra,* 31 Cal.App.4th at p. 1381, the trial court here gave a "packet of . . . self-defense instructions [including CALJIC Nos. 5.54 and 5.55], some of which were mutually exclusive. It was obvious that not all of those instructions could apply to the case, and the jurors were specifically told they were to 'Disregard any instruction which applies to facts determined by you not to exist.'" The jury here, as the jury in *Olguin*, "[b]y all appearances . . . understood their charge in this regard." (*Ibid.*; see also *People v. Guiton* (1993) 4 Cal.4th 1116, 1127 [An appellate court's prejudice assessment "'should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.'"].)

Second, we do not find it plausible that the jury accepted the speculative "compromise[] scenario" proposed by appellant, to the effect that "appellant somehow started [the encounter], met with unexpected force in [Hernandez's] firearm, and then came into court claiming self-defense under an exigency that he himself created." Substantially the same sort of argument was advanced by the defendant in *People v. Crandell* (1988) 46 Cal.3d 833, 872, and rejected there. We reject appellant's version here for the same reasons given by the *Crandell* court: "It is not reasonably probable that

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[6] CALJIC No. 5.54, titled "Self-Defense By An Aggressor," describes the circumstances under which an initial aggressor may exercise the right to self defense, and his duty to retreat before recoursing to self-defense. (1 Witkin and Epstein, Cal. Criminal Law, Defenses, § 68, p. 403.) CALJIC No. 5.55, titled, "Plea of Self-Defense May Not Be Contrived," explains that self-defense is not available to one who "seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense." (1 Witkin and Epstein, *supra*, Defenses, § 75, p. 409.)

the jury engaged in [the proposed] speculation . . . or that the instruction in any manner interfered with the jury's consideration of the self-defense theory on which [appellant] relied at trial, under which [Mejia and Hernandez were] the initial and sole aggressors." (*Id*. at p. 872.)[7] We are satisfied the jury would not have credited only a portion of appellant's version of the events in question and rejected the rest simply because of the presence of the two instructions. In other words, had the jury believed appellant they would have found him not guilty in spite of the two instructions, both of which were factually incompatible with appellant's testimony supporting a perfect self-defense claim, the theory actually relied upon by appellant.[8]

III.

If the trial court erred in giving CALJIC No. 5.17, the error was not prejudicial because the instruction was superfluous.[9]

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[7] Appellant, though placing considerable reliance upon *Crandell*, neglects to mention the court's conclusion that the error was not prejudicial.

[8] Appellant was not denied any federal constitutional right to present a defense. The trial court's decision to give the challenged instructions was an error of law which did not remove from the jury's consideration any fact or instruction relevant to appellant's perfect self-defense theory or to any imperfect self-defense claim lurking in the evidence. (See *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

[9] CALJIC No. 5.17 reads as follows:

> "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation, seeing and knowing the same facts, would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary manslaughter
>
> "As used in this instruction, an imminent peril or danger means one that is apparent, present, immediate, and must be instantly dealt with, or must so appear at the time to the slayer.

Appellant finds objectionable the last paragraph of the instruction, which states that the principle of imperfect self defense, and therefore a conviction of voluntary manslaughter (*People v. Barton* (1995) 12 Cal.4th 186, 200-201), is "not available, and malice aforethought is not negated, if the defendant, by his wrongful conduct, created the circumstances which legally justified his adversary's use of force." According to appellant, the paragraph should not have been given because it is legally erroneous, in that it effectively eliminated an honest mistake of fact as a basis for imperfect self defense. We again refer to appellant's own words: "[E]ven if the defendant is objectively the aggressor or wrongdoer, and sets in motion a series of events that result in homicide, he may still claim imperfect self-defense if he mistakenly believed, as a matter of factual perception, that his opponent was the aggressor."

Whether or not appellant's legal critique of this portion of CALJIC No. 5.17 is correct, the instruction's legal sufficiency is beside the point because the instruction was irrelevant given the sum total of the evidence before the jury. As appellant admits in his opening brief, the paragraph was "factually inapplicable to this case" because "there was no evidence that appellant believed himself to be the aggressor, and that his actions were either actually motivated by a state of mind consistent with self-defense or he simply committed murder."

As with CALJIC Nos. 5.54 and 5.55, discussed earlier, the instruction was one of many relating to the lesser offenses and defenses, and the jury was instructed to disregard any instruction which did not apply to the facts as found by the jury. (See *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1381.) In the absence of a contrary indication, and there is none in this record, we must presume the jury understood and correlated all the

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> "However, this principle is not available, and malice aforethought is not negated, if the defendant by his wrongful conduct created the circumstances which legally justified his adversary's use of force."

instruction and followed the court's directions by disregarding the last paragraph of CALJIC No. 5.17 because it pertained to a state of facts which was not encompassed by the evidence. (*People v. Guiton, supra,* 4 Cal.4th at p. 1126-1127.)

Although uttered in a different context, the Supreme Court's observations in *People v. Guiton, supra*, 4 Cal.4th at pages 1125-1126, are apt. "'"It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance -- remote, it seems to us -- that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient."'" (*Ibid.*, quoting from *Griffin v. United States* (1991) 502 U.S. 46, 59-60.) The same principle we think governs here. Even if the paragraph in CALJIC No. 5.17 was legally wrong, by appellant's own admission there was no evidence before the jury to which it could have been related and the jurors were "well equipped to analyze the evidence" to uncover the disparity. (*Guiton, supra,* 4 Cal.4th at p. 1125.) Therefore, reversal based upon the purported legal inadequacy of the identified part of CALJIC No. 5.17 is not warranted, there being enough evidence to justify the verdict under a valid theory.[10] (*Ibid.*)

DISPOSITION

The judgment is affirmed.

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Dibiaso, J.

WE CONCUR:

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Ardaiz, P.J.

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Buckley, J.

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[10] Appellant does not claim on appeal that the verdict is not supported by substantial evidence. In fact, he acknowledges that "the bare facts derivable from Mejia's testimony, that appellant had stabbed [Mejia] and [Hernandez] suddenly and without provocation, was sufficient to establish the prosecution's case for murder."