Filed 12/10/03

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

SOKNOEUN NEM,

Defendant and Appellant.

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A100212

(Contra Costa County Super. Ct. No. 0001040)

Soknoeun Nem appeals from a judgment entered after a jury convicted him of first degree murder and other offenses. He contends (1) the trial court instructed the jury incorrectly on the law of self-defense when it used the standard version of CALJIC No. 5.54, (2) the court failed to provide an adequate response to a question posed by the jury, (3) the evidence was insufficient to support the jury's conclusion that he was guilty of attempted robbery, and (4) the court committed several sentencing errors. In the published portion of this opinion we consider the first issue and conclude the court did not mislead the jury. In the unpublished portion, we conclude the court made one minor sentencing error and will order the judgment modified accordingly. We will affirm the judgment in all other respects.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant's confederate, Mesa Kasem, worked as a deliveryman for Somerset Auction House. As part of his job, Kasem made deliveries to and thus had been inside

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.B., C., and D.

many of the Bay Area's most expensive homes. In November 1999, Kasem made a delivery to the Alamo home of retired surgeon Dr. Kim Fang and his wife, Dr. Winnie Fang.

On January 4, 2000, Kasem and appellant set out to rob the Fang home. Armed with two handguns, dressed in black and carrying black ski masks, Kasem and appellant arrived at the home shortly before 6:00 p.m.

The entire Fang family was home that evening. Dr. Kim Fang, an avid gun collector who always kept a loaded weapon on hand, was in his upstairs office. Dr. Winnie Fang was moving between the kitchen, where the family nanny Mee Yung Lee was fixing dinner, and the living room, where her brother Richard Law was sitting. Law was living with the Fangs temporarily while he recovered from back surgery. The Fang's school aged children, Alexander and Liane, were waiting for dinner. Alexander was downstairs working on a computer. Liane was in the kitchen doing homework.

Dr. Winnie Fang heard a knock at the door. When she opened the door, Kasem and appellant shoved her back into the entry hall. The first to enter (Kasem) pressed a gun to her head and started beating her; the second man (appellant) followed, punching her all over her body. Hearing Winnie's screams, family members started to react. Dr. Kim Fang grabbed a loaded .38 caliber revolver and started down the stairs. Richard Law came to his sister's aid. When appellant saw Law, he put a gun to Law's head and pushed him down two stairs back into the sunken living room. Mee Lee screamed and tried to flee, but appellant caught her and hit her on the head with his gun.

Dr. Kim Fang came downstairs. Kasem saw Dr. Kim Fang and fired a shot at him. He missed. Dr. Fang returned the fire killing Kasem instantly. But as Dr. Fang turned toward Kasem, he apparently turned his back to appellant who was behind him. Appellant seized the advantage and he shot Dr. Fang twice in the back. Both shots passed through Dr. Fang's body. One of them struck Dr. Winnie Fang and lodged in her chest.

Appellant and the now wounded Dr. Kim Fang started to fight. Dr. Winnie Fang and her brother joined in the struggle. While on the floor, Dr. Kim Fang tried to hold

appellant down, and called for a rope to tie appellant. Eventually the three subdued appellant, striking him on the head with cooking pans and tying him up with a Christmas tree extension cord.

Dr. Kim Fang died from the gunshot wounds he sustained. Dr. Winnie Fang was transferred to a hospital by helicopter where she underwent surgery.

Based on these facts, an indictment was filed charging appellant with 10 counts: (1) first degree murder of Dr. Kim Fang (Pen. Code, §§ 187, 189)[1] with special circumstances of attempted robbery and burglary (§ 190.2, subd. (a)(17)), enhanced by an allegation that appellant personally discharged a firearm and caused great bodily injury or death (§ 12022.53, subd. (d)), (2) attempted first degree residential robbery of Dr. Kim Fang (§§ 211, 212.5, subd. (a), 664), enhanced by an allegation that appellant personally discharged a firearm and caused great bodily injury or death (§ 12022.53, subd. (d)), (3) attempted first degree residential robbery of Dr. Winnie Fang (§§ 211, 212.5, subd. (a), 664) enhanced by an allegation that appellant personally discharged a firearm and caused great bodily injury or death (§ 12022.53, subd. (d)), (4) attempted first degree residential robbery of Mee Yung Lee (§§ 211, 212.5, subd. (a), 664), enhanced by personal firearm use (§ 12022.5, subd. (a)(1)), (5) attempted first degree residential robbery of Richard Law (§§ 211, 212.5, subd. (a), 664), enhanced by personal firearm use (§ 12022.5, subd. (a)(1)), (6) assault with a firearm against Dr. Winnie Fang (§ 245, subd. (a)(2)), enhanced by personal firearm use (§ 12022.5, subd. (a)(1)), (7) assault with a firearm against Mee Yung Lee (§ 245, subd. (a)(2)), enhanced by personal firearm use (§ 12022.5, subd. (a)(1)), (8) assault with a firearm against Richard Law (§ 245, subd. (a)(2)), enhanced by personal firearm use (§ 12022.5, subd. (a)(1)), (9) first degree residential burglary (§§ 459, 460, subd. (a)), and (10) being a felon in possession of a firearm (§ 12021).

The case was tried to a jury as a death penalty case. After considering the evidence presented, the jurors returned verdicts convicting appellant on all counts and

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[1] Unless otherwise indicated, all further section references will be to the Penal Code.

enhancements except the use allegation made in connection with count 7. The jurors found that particular allegation to be not true.

Following a penalty phase, the jurors returned a verdict of life without the possibility of parole.

In August 2002, the court sentenced appellant to prison for life without the possibility of parole. In addition, the court imposed but stayed sentences totaling 54 years on the remaining counts. This appeal followed.

II. DISCUSSION

A. Instructions

The trial court instructed the jury on law of self-defense using the standard version of CALJIC No. 5.54 as follows: "The right of self-defense is only available to a person who initiated an assault if he has done all the following: [¶] 1. He has actually tried, in good faith, to refuse to continue fighting; [¶] 2. He has clearly informed his opponent that he wants to stop fighting; and [¶] 3. He has clearly informed his opponent that he has stopped fighting. [¶] After he has done these three things, he has the right to self-defense if his opponent continues to fight."

Appellant now contends that CALJIC No. 5.54 is incorrect and misleading because it told the jurors that he was obligated *verbally* to inform his opponent, in this case Dr. Kim Fang, that he wanted to and had stopped fighting in order to reinstate his right of self-defense.

Appellant's contention requires us to determine whether it is reasonably likely the jurors understood the instruction as appellant suggests. (See *People v. Kelly* (1992) 1 Cal.4th 495, 525.) In making that determination, we must consider several factors including the language of the instruction in question (*ibid.*), the record of the trial (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and the arguments of counsel. (*Kelly, supra,* 1 Cal.4th at p. 526.)

Nothing in the wording of the instruction itself supports the interpretation appellant has advanced. The instruction only requires that a defendant "inform" his opponent that he wants to and has stopped fighting. The usual definition of the word

"inform" is "to impart information or knowledge." (Webster's Collegiate Dict. (10th ed. 2001) p. 598.) There is no verbal component to this definition. Indeed, it is commonly understood that information can be imparted verbally (e.g., "I give up"), or nonverbally (e.g., dropping one's weapon and raising one's hands).

Neither does the trial record or the argument of counsel support appellant's interpretation. As to the former, while there was testimony that indicated appellant may have been frightened by the violent situation he helped create and by Dr. Kim Fang's aggressive response, appellant has not cited any evidence that suggests this defendant was required to communicate verbally his intent to stop fighting. As to the latter, the prosecutor simply reiterated the elements of the defense and argued they had not been satisfied.[2] Again, there was no suggestion that verbal communication was required.

Based on this record, we conclude it is not reasonably likely the jurors understood CALJIC No. 5.54 to require that he communicate verbally that he wanted to and had stopped fighting. There was no error.

We acknowledge our decision on this point is inconsistent with a recent case, *People v. Hernandez* (2003) 111 Cal.App.4th 582; but we find the reasoning of that case unpersuasive.

The *Hernandez* court said CALJIC No. 5.54 was ambiguous; however, it did not explain why it reached that conclusion other than to state, "[a]rguably, a requirement that an attacker 'inform' an opponent of his or her withdrawal could be met by either a verbal or a nonverbal communication. It would *not* seem, however, to be met by actions that simply *constitute* withdrawal." (*Hernandez*, *supra*, 111 Cal.App.4th at p. 589, italics in

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2 The pertinent portion of the prosecutor's final argument is as follows:

"[S]elf-defense is only available to an assailant, which Sok Nem clearly was in this case, where they: One tried in good faith to refuse to continue fighting. [¶] When did that happen? Oh, about the time Roger Thomas showed up with the Contra Costa County Sheriff's Office. Up till that time, there was still fight in him. He kept trying to get up. He never abandoned the attempt to become the assailant in this case. It doesn't apply to him for that reason alone. But it goes on: He has to clearly inform his opponent that he wants to stop fighting. That didn't happen. [¶] And he has to clearly inform his opponent that he has stopped fighting. That also did not happen. [¶] The law of self-defense, I'm sure you understand, does not apply to Soknoeun Nem."

original.) From this passage it appears the *Hernandez* court concluded it was reasonably likely the jurors would interpret CALJIC No. 5.54 as requiring a verbal statement because a particular type of conduct, withdrawal, is insufficient to communicate an intent to stop fighting.

On this subject of when a deadly counter attack in self-defense is justified, we are mindful of the admonition of our Supreme Court in *People v. Hecker* (1895) 109 Cal. 451, 463-464, over a century ago: "if the circumstances are such, arising either from the condition of his adversary, caused by the aggressor's acts during the affray or from the suddenness of the counter attack, that he cannot so notify him, it is the first assailant's fault and he must take the consequences. [Citations.] For, as the deceased, acting upon the appearances created by the wrongful acts of the aggressor, would have been justified in killing him, he whose fault created these appearances cannot make the natural and legal acts of the deceased looking to his own defense a justification for the homicide. Before doing so he must have destroyed these appearances and removed, to the other's knowledge, his necessity, actual or apparent, for self-preservation."

In our view, the challenged language in CALJIC No. 5.54 encompasses communication by words or by nonverbal conduct, including the simple act of informing the opponent that the accused has stopped fighting by acts attendant to stopping or withdrawing. While the *Hernandez* court suggests that withdrawal is never sufficient to communicate an intent to stop fighting, we take a more nuanced stance. Withdrawal might be sufficient in some situations and not in others. We view this as a factual question for the trier of fact. There are undoubtedly many types of conduct that would not communicate an intent to stop fighting and some that would. However, that is beside the point. The critical inquiry is not whether a particular type of nonverbal communication is inadequate, but whether CALJIC No. 5.54 suggests a defendant is *required* to communicate verbally. Since we find nothing in the instruction or the evidence or argument in the course of appellant's trial which would suggest a defendant is required to communicate his intentions verbally, we find no reasonable likelihood of confusion.

Furthermore, even if we were to assume arguendo, that the jurors would have interpreted CALJIC No. 5.54 as appellant suggests, any possible error was harmless. The *Hernandez* court addressed this same issue. After concluding CALJIC No. 5.54 was ambiguous and potentially misleading, the court declined to reverse the defendant's conviction because "There was simply no evidence that [the] defendant ever attempted to withdraw before committing [his offense.]" (*Hernandez*, *supra*, 111 Cal.App.4th at p. 589.) We reach the same conclusion here. There is no evidence that appellant attempted to withdraw before he shot Dr. Kim Fang. Indeed, when Dr. Fang appeared on the scene, appellant responded by shooting him twice the back. "In light of this lack of evidence, the trial court could have refused to give CALJIC No. 5.54 . . . at all. Giving [it], however, could not possibly have prejudiced [appellant]." (*Hernandez,* at p. 590.)

B. Whether the Court Responded Correctly to a Question from the Jury

The indictment charged appellant with first degree murder and included special circumstance allegations that appellant committed the crime in the course of an attempted robbery and burglary. At the conclusion of the guilt phase of trial, the court instructed the jurors on the special circumstance allegations using CALJIC No. 8.81.17.[3]

Shortly after the jurors retired to deliberate, they sent the court the following note: "Can self-preservation play a role when considering special circumstances?"

After conferring with the prosecutor and defense counsel, the court told the jurors the answer to their question was "yes."

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[3] The court instructed with CALJIC No. 8.81.17 as follows: "To find that the special circumstance, referred to in these instructions as murder in the commission of [b]urglary or [a]ttempted [r]obbery, is true, it must be proved: [¶] 1a. The murder was committed while the defendant was engaged in or was an accomplice in the commission or attempted commission of a [b]urglary or [a]ttempted [r]obbery; or [¶] 1b. The murder was committed during the immediate flight after the commission or attempted commission of a [b]urglary or [a]ttempted [r]obbery by the defendant to which the defendant was an accomplice; and [¶] 2. The murder was committed in order to carry out or advance the commission of the crime of [b]urglary or [a]ttempted [r]obbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [a]ttempted [r]obbery or [b]urglary was merely incidental to the commission of the murder."

Later that same day, the jurors sent the court a second note posing the following question: "Can the fear of self-preservation of Mr. Nem excuse special circumstances?" [Sic.] Again, the court conferred with the prosecutor and defense counsel. They could not agree on precisely what the jury was asking or how the court should respond. Therefore, the court answered the question as follows: "I respectfully suggest that you carefully consider all of the evidence that has been presented that relates to the special circumstances. The weight to which you give that evidence is a matter for the jury to determine. [¶] If this answer does not satisfactorily respond to your latest inquiry, please send me another note and would you try to be as precise and specific as possible."

Appellant now contends his conviction must be reversed because the trial court responded to the jury's second question inadequately.

Section 1138 states that if the jurors "desire to be informed on any point of law arising in the case. . . the information required must be given . . . ." Our Supreme Court has interpreted this language to mean that the trial court "has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.] . . . [The trial court] must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97, italics in original.)

Here, the second question posed by the jury was not clear. While it is possible to speculate about what the jurors meant, as both counsel did when discussing the matter with the court, it would have been risky to provide a response based on speculation because if the court guessed incorrectly, its response might have been wrong. The court resolved this dilemma in an entirely reasonable way. It referred the jurors to the instructions that had been provided previously, and told the jurors that if that was not

adequate, they should ask a more precise question. We conclude the court did not abuse its discretion when it responded to the juror's second question.

C. Sufficiency of the Evidence

The jurors convicted appellant of the attempted first degree residential robbery of Richard Law. Appellant now contends his conviction on this count must be reversed because it is not supported by substantial evidence.

To convict a defendant of an attempt, two elements must be satisfied. There must be (1) proof of specific intent to commit the target crime, and (2) a direct, but ineffectual act done toward its commission. (*People v. Swain* (1996) 12 Cal.4th 593, 604.)

Here, appellant's counsel *stipulated* that appellant entered the Fang's home intending to commit a robbery therein. While counsel did not stipulate that appellant intended to rob Law specifically, the jurors reasonably could infer that since appellant entered the home intending to commit a robbery, he intended to rob whomever he found inside.

The second element is satisfied by evidence that appellant entered the Fang's home armed with a weapon and a mask. The jurors logically could interpret this as a direct but ineffectual act done toward committing the robbery. We conclude the evidence was sufficient to support appellant's conviction.

Appellant contends the evidence in this case was insufficient under *People v. Nguyen* (2000) 24 Cal.4th 756, where our Supreme Court ruled that a defendant who robs a business cannot be convicted of robbing a visitor to that business because the visitor does not have actual or constructive possession of the business's property. *Nguyen* is not controlling here for two reasons. First, appellant committed his crime in a residence, not a commercial business. As another court has recognized, "there remains a heightened vulnerability created by the dwelling environment, and the guest is just as vulnerable as the resident." (*People v. McCullough* (1992) 9 Cal.App.4th 1298, 1300.) Second, while Law technically may have been a visitor in the Fang's home, he had been *living* there for a significant period of time. As a long-term, live-in visitor, Law had a significant personal interest in the residence that a visitor to a commercial business does not possess.

We conclude *Nguyen* is not controlling under the very different factual situation presented here.

Appellant also contends the evidence was lacking because "[t]here was insufficient evidence that Richard Law was in possession of the Fang[']s property, because he was merely a visitor . . . ." This argument presumes that in order to convict appellant of attempted robbery there had to be evidence that Law was in possession of the Fang's property. As we have explained, that is not one of the elements of the crime.

D. Sentencing

The trial court sentenced appellant to life without the possibility of parole for his conviction of first degree murder as alleged in count 1. The court also imposed but stayed sentences totaling 54 years on the nine remaining counts. As is relevant here, on count 2, attempted first degree residential robbery of Dr. Kim Fang, the court sentenced appellant to two years (one-half the mid-term) plus 25 years to life for personally discharging a firearm and causing death; while on count 3, attempted first degree residential robbery of Dr. Winnie Fang, the court sentenced appellant to a consecutive term of two years, (one-half the mid-term) plus 25 years to life for personally discharging a firearm and causing great bodily injury.

Appellant now challenges the sentence that was imposed in three respects.

First appellant contends the 27 years to life sentence imposed on count 2 for the attempted first degree residential robbery of Dr. Kim Fang must be reversed under section 654. This argument is premised on two assumptions. First appellant contends his first degree murder conviction must have been based on a felony murder theory. Second, appellant contends the felony upon which his felony murder conviction was based must have been the attempted robbery of Dr. Kim Fang. Therefore, citing cases that hold section 654 prohibits sentencing on the felony that underlies a felony murder (see, e.g., *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 708-709), appellant contends the court could not validly sentence him on count 2.

We reject this argument because the premises upon which it is built are faulty. While the prosecutor did argue appellant was guilty of murder under a felony murder

theory, he also urged the jury to convict appellant because he premeditated the crime. While we do not know which theory the jurors chose, it is simply not true that appellant's conviction had to be based on a felony murder theory. Furthermore, and more importantly, the jury found appellant guilty of four counts of attempted first degree residential robbery: against Dr. Kim Fang, against Dr. Winnie Fang, against Mee Lee and against Richard Law. Since there were three valid felonies upon which the court could have based its decision, we have no reason to conclude the trial court erred.

Appellant contends the court could not validly rely on the other attempted robberies when sentencing him because he had only one "motive and objective" when committing his crime. While section 654 does preclude a court from sentencing a defendant on multiple counts committed pursuant to a single intent and objective, that restriction does not apply where, as here, a defendant commits his crimes against multiple victims. (See *Neal v. State of California* (1960) 55 Cal.2d 11, 19-20.)

Next, appellant contends the clerk's minutes and abstract of judgment are incorrect because they show the court sentenced him to a term of 25 years to life for the enhancement that he personally discharged a firearm and caused great bodily injury when committing the attempted robbery alleged in count 3. According to appellant, the reporter's transcript shows no such sentence.

The pertinent portion of the reporter's transcript is as follows: "No legal cause having been shown . . . and probation having been denied, the Court is now going to proceed initially with sentencing on Counts 2, 3, 4, and 5 . . . each of which is attempted robbery, and that's [a] three, four, six offense. Since it's an attempt, it's divided by two. It results in a sentence of two years on each count. [¶] The sentence is enhanced pursuant to the provisions of Penal Code Section 12022.53(d) for a term of 25 years to life on Count 2. That's the case involving Dr. Kim Fang. [¶] The same sentence is imposed on Count 3. That's the sentence that relates to Winnie Fang."

We think this passage is reasonably clear. The court imposed a two-year term on counts 2, 3, 4, and 5. The court then imposed a 25 years to life sentence for the use enhancement on court 2, and imposed the "same sentence" i.e., 25 years to life, for the

use enhancement on count 3. The clerk's minutes and abstract of judgment accurately reflect the sentence imposed.

Finally, appellant contends the court erred when it imposed a consecutive term of two years on count 3, the attempted first degree residential robbery of Dr. Winnie Fang. The people concede the error and we agree.

Section 1170.1, subdivision (a) states, in part, "[t]he subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed . . . ." The middle term sentence for attempted first degree residential robbery is two years. (§§ 211, 211.5, 213, subd. (a)(1)(B), 664.) One-third of two years is eight months. Under section 1170.1 the court was limited to an eight-month consecutive sentence. We will order the appropriate modification.

III. DISPOSITION

The trial court is ordered to prepare and to forward to the Department of Corrections an amended abstract of judgment showing that appellant is sentenced to eight months on count 3 plus an indeterminate sentence of 25 years to life for the use enhancement. Thus the determinant portion of appellant's sentence is 52 years, 8 months to life. In all other respects, the judgment is affirmed.

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Jones, P.J.

We concur:

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Stevens, J.

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Simons, J.

Trial court:	Contra Costa County Superior Court
Trial judge:	Hon. Richard Arnason
Counsel for plaintiff and respondent:	Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Laurence K. Sullivan, Supervising Deputy Attorney General, Catherine A. Rivlin, Supervising Deputy Attorney General
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