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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARCOS MURRILLO HERNANDEZ, Defendant and Appellant.	E031875 (Super.Ct.No. INF038783) **OPINION**

APPEAL from the Superior Court of Riverside County. Thomas N. Douglass, Jr., Judge. Affirmed.

Marleigh A. Kopas, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry J. T. Carlton and Gary W. Brozio, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Marcos Murrillo Hernandez was found guilty of assault with a deadly weapon and/or by force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).) An enhancement allegation that defendant personally inflicted great bodily injury

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II, III, IV and VI.

(Pen. Code, § 12022.7, subd. (a)) was found true. As a result, defendant was sentenced to six years in prison.

Defendant contends the trial court erred by:

1. Excluding evidence of the victim's propensity to violence, which defendant offered to support his claim of self-defense.

2. Excluding evidence of the victim's prior drug offenses, which defendant offered to contradict the victim's testimony.

3. Remarking, during defense counsel's closing argument, that one of his statements was not supported by the evidence.

4. Misinstructing on what an original aggressor or mutual combatant must do in order to claim self-defense.

We agree that the jury instructions that stated that an original aggressor or mutual combatant must "clearly inform" an adversary of his or her withdrawal in order to claim self-defense were erroneous. Although these instructions were ambiguous, there was at least a reasonable likelihood that the jurors would have misunderstood them to mean that an act of withdrawal itself, no matter how obvious and unequivocal, would be insufficient. Defense counsel, however, invited the error; moreover, the error was harmless, because there was absolutely no evidence that defendant did attempt to withdraw before the assault.

We find no other error. Hence, we will affirm.

I

FACTUAL BACKGROUND

Victim Randy Rodriguez was staying with his father, Frank Rodriguez, at Frank's apartment. The apartment had a single bedroom and a single bathroom, which opened off the bedroom. Randy's nephew, Anthony Rodriguez, had a key to the apartment and stayed there occasionally. Randy's niece, Shelina Herrera, also stayed there occasionally. Defendant was Shelina's boyfriend.

About two days before the assault, Randy got upset because defendant had "disrespected" Randy's sister. He said to defendant, "Why do you act like a pussy?"

Also about two days before the assault, defendant and Anthony came to the apartment late at night. Randy told them to leave because "they were making all kinds of noise and being really obnoxious."

On the day of the assault, some time after 4:00 p.m., defendant came to the apartment. Randy was asleep in the bedroom. Defendant said to Frank, "Wake [Randy] up. I want to fight with him outside." Frank refused; he told defendant to get out and never to come back. Defendant left. Shelina and Anthony left with him. As Frank was escorting them down the stairs, defendant once again told Frank to have Randy come outside so they could fight. Frank once again refused. Frank then left on an errand.

Randy was awakened by an object hitting him near the left eye. He saw defendant and Shelina standing at the foot of the bed. He got to his knees and backed away from them.

Defendant seemed to look for an object on the floor, then pick it up. He held a brick up over his head, said, "Get up[,] you motherfucker," and threw the brick at

Randy's face. Randy raised his left hand; the brick hit his elbow. Defendant and Shelina then left. As Randy went out to the living room, he ran into Anthony, who was just coming into the bedroom.

Later that night, Frank told Anthony to leave and not to come back. Neither Frank nor Randy had seen Anthony since then. Because Frank could not tell them where Anthony was, the police had not been able to interview him.

Randy was left with a gash about four inches long over his left eye and "marks" on his left elbow. His left eye socket was fractured. As a result of the attack, he was hospitalized for 18 days. As of the time of trial, he still had double vision.

Defendant was arrested later that night. He told the arresting officer, "He's the one that fucked up first. He disrespected my lady." When the police interviewed him, he said he had heard that Randy wanted to fight him. He also said Randy had been demanding that Shelina give him a VCR she had.

At the apartment, defendant told police, he spoke to Frank and asked for Randy. He also asked Frank about "threats" Randy had been making. Defendant admitted that Frank asked him to leave. However, he returned to the apartment. On the way upstairs, he picked up a brick to use to defend himself from Randy. He indicated that it was either a small brick or just a piece of a brick. Defendant went into Randy's bedroom to use the bathroom. As he went in, Randy got up and "jumped" at him, as if to hit him. Randy was yelling and using profanity. Defendant then threw the brick at Randy. He explained, "I'm not going to let anybody slap my ass around for no stupid reason."

Defendant testified at trial that Randy had threatened him on "different occasions for no reason." Shelina told defendant that Randy had asked for a VCR she had and that,

when she refused, Randy got angry. Twice, Randy had asked to use defendant's car; when defendant refused, Randy was angry. If defendant called the apartment, and if Randy answered, Randy hung up on him. Defendant had seen Randy toying with a buck knife. Anthony and Shelina each told defendant two or three times that Randy had threatened to "kick [his] ass." A couple of days before the assault, Randy called defendant a "pussy" and told him, "Get the hell out of the house before I kick your ass."

The night before the assault, defendant and Shelina slept at the apartment. At 5:30 a.m., Randy arrived and said, "What the fuck were you doing in my room?" Defendant ignored him and left for work.

That day, Anthony and Shelina warned defendant that Randy had been threatening "all day long" to "kick [his] ass" and that "[h]e was serious this time." Between 4:00 and 5:00 p.m., defendant returned to the apartment. He told Frank that Randy had been threatening him. Frank responded, "[D]on't sweat it. Just leave . . . ." Frank then left. Defendant, however, urgently needed to go to the bathroom. Anthony offered to let him in. He was afraid to go in the apartment with Randy there, but Anthony reassured him. At Anthony's suggestion, he picked up a piece of brick to protect himself.

Randy seemed to be asleep. Defendant duly used the bathroom. As he came out, however, Randy "jumped at [him]" and said, "What the fuck are you doing?" Defendant was scared. He saw an object in Randy's right hand; he thought it could be the buck knife. Randy raised his left arm. Defendant thought Randy was going to hit him. He "reacted" by hitting Randy in the left arm with the brick. (At the preliminary hearing, however, defendant had admitting hitting Randy in the face.) Anthony came in and told defendant, "[G]et the fuck out of here," so he and Shelina left.

Defendant had not seen either Shelina or Anthony since the assault and did not know where they were.

II

EVIDENCE OF THE VICTIM'S PROPENSITY TO VIOLENCE

Defendant contends the trial court erred by excluding evidence of the victim's propensity to violence, namely evidence that (1) the victim became aggressive when using methamphetamine, and (2) the victim had been convicted of violating a domestic violence restraining order.

A. *Evidence of the Victim's Methamphetamine Use*.

1. *Additional Factual and Procedural Background*.

Before trial, defense counsel advised the trial court that defendant would testify that Randy was "constantly under the influence of methamphetamine"; when under the influence of methamphetamine, he became aggressive, he would stay awake all night and sleep all day, and "[h]e became violent if his sleep was interrupted . . . ." Defense counsel also indicated that he intended to ask Randy whether he used methamphetamine.

The prosecutor objected to this evidence as hearsay, irrelevant, and "inflammatory . . . ."

The trial court excluded the evidence. It explained: "[T]he evidence is too time-consuming and prejudicial and when weighed against the minimal probative value it may have given there is ample other reason for [defendant] to believe himself in danger."

2. *Analysis*.

Self-defense is a defense to an assault charge. (Civ. Code, § 50; Pen. Code, §§ 692, subd. 1, 693, subd. 1; *People v. Adrian* (1982) 135 Cal.App.3d 335, 340.) "'To

justify an act of self-defense for [an assault charge under Penal Code section 245], the defendant must have an honest and reasonable belief that bodily injury is about to be inflicted on him. [Citation.]' [Citation.] The threat of bodily injury must be imminent [citation], and ' . . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances. [Citation.]' [Citations.]" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065, first brackets in original, italics omitted, quoting *People v. Goins* (1991) 228 Cal.App.3d 511, 516, and *People v. Pinholster* (1992) 1 Cal.4th 865, 966.)

"'A person claiming self-defense is required to "prove his own frame of mind," and in so doing is "entitled to corroborate his testimony that he was in fear for his life by proving the reasonableness of such fear." [Citation.] The defendant's perceptions are at issue . . . .'" (*People v. Minifie*, *supra*, 13 Cal.4th at p. 1065, quoting *People v. Davis* (1965) 63 Cal.2d 648, 656.)

Here, the trial court recognized that the proffered evidence was relevant. It excluded the evidence, however, under Evidence Code section 352, as more prejudicial than probative. "'On appeal, a trial court's resolution of these issues is reviewed for abuse of discretion. [Citation.] A court abuses its discretion when its ruling "falls outside the bounds of reason."' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 122, quoting *People v. Kipp* (1998) 18 Cal.4th 349, 371, quoting *People v. De Santis* (1992) 2 Cal.4th 1198, 1226.)

The case most closely on point is *People v. Wright* (1985) 39 Cal.3d 576. There, the defendant testified that he shot the victim in self-defense. (*Id*. at p. 582.) He also testified that the victim was acting irrationally "and might have been under the influence

of some drug." (*Ibid*.) He sought to introduce medical evidence that the victim had in fact been under the influence of heroin. (*Ibid*.) The trial court excluded this evidence under Evidence Code section 352. (*Wright* at pp. 582-583.)

The Supreme Court held that this was an abuse of discretion: "[T]he probative value of the evidence here was significant, while its prejudicial effect was minimal at best. Defendant's sole theory to support an acquittal was that he acted in self-defense in response to the victim's irrational behavior. No evidence was presented to corroborate defendant's version of the incident. Defendant therefore attempted to support his perception of the victim's irrational state of mind by introducing evidence from which the jury could infer the victim was under the influence of a narcotic." (*People v. Wright*, *supra*, 39 Cal.3d at p. 583.) The court added: "The only possible prejudice to the prosecution was that the jury might have improperly used the excluded evidence to infer that the victim was a heroin addict. The fact of victim's past heroin use was, however, already before the jury." (*Id*. at p. 584.) It concluded: "In light of the evidence already before the jury, it is difficult to see how the admission of the [heroin] evidence would have further prejudiced them against the victim or the prosecution." (*Id*. at p. 585.)

Here, by contrast, the probative value of the evidence was less, and the potential for prejudice greater, than in *Wright*. On the probative side of the ledger, there was ample other evidence to support defendant's claim that he had a reasonable fear of Randy. According to defendant, he had been told more than once that Randy had threatened to "kick [his] ass." Just a few days earlier, Randy had called him a "pussy" and told him, "Get the hell out of the house before I kick your ass." (At trial, Randy even admitted having called defendant a "pussy.") In the morning before the assault,

defendant testified, Randy had asked him, "What the fuck were you doing in my room?" Later that day, Anthony and Shelina told defendant that Randy had been threatening "all day long" to "kick [his] ass" and that these threats were "serious."

The trial court commented that it was not precluding defendant from presenting evidence of the victim's violent or threatening conduct; "[a]ll I am prohibiting is reference to the cause of that violent or threatening conduct being methamphetamine use . . . ." The victim's aggressive conduct, along with defendant's knowledge of that conduct, was what was most significant to prove that defendant's claimed fear was reasonable. The fact that the victim engaged in such conduct because he used methamphetamine -- rather than, say, because he was just a jerk -- had relatively little probative value.

On the other side of the ledger, with respect to prejudice, here, unlike in *Wright*, there was no other evidence that the victim used drugs. Moreover, *Wright* was a murder case, so there, the victim was dead; here, Randy was very much alive and able to testify at trial. Apparently he had two prior misdemeanor convictions for simple possession of a controlled substance. (Health & Saf. Code, § 11377.) Defense counsel conceded, however, that this is not a crime of moral turpitude, and hence these convictions were inadmissible to show dishonesty. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 295-296; *People v. Castro* (1985) 38 Cal.3d 301, 317.) The proffered evidence therefore would have operated as "back door" impeachment.

This is not a case in which the proffered evidence would have bolstered defendant's credibility. Admittedly, most, if not all, of the evidence that Randy acted aggressively came from defendant's own mouth. Defense counsel, however, also offered

to prove that Randy was aggressive when he used methamphetamine exclusively through defendant's testimony. The jury was not likely to be impressed that defendant was corroborating himself.

Defense counsel did also offer to ask Randy whether he used methamphetamine. This fact, by itself, however, had no probative value whatsoever. Defense counsel never offered to call an expert to testify that methamphetamine users in general are violent. He only suggested that a police officer or an expert could testify that methamphetamine is a "central nervous system stimulant. It causes certain reactions in the body." This fell far short of showing a propensity toward violence.

In his reply brief, defendant also suggests that he could have introduced Randy's prior drug offenses (see part III, *post*), plus evidence that a syringe had been found in his house. These matters, however, were not part of defense counsel's offer of proof below. And, again, the mere fact that Randy used methamphetamine was irrelevant and purely prejudicial.

We conclude that the trial court did not err by excluding evidence that the victim became aggressive when using methamphetamine.

B. *Evidence of the Victim's History of Domestic Violence*.

1. *Additional Factual and Procedural Background*.

Defense counsel advised the trial court that he also intended to introduce evidence that -- as defendant knew -- Randy's wife had obtained a restraining order against him, and he had been convicted of violating the restraining order. Defense counsel conceded, however, that, as far as defendant knew, the violation involved a telephone call.

The trial court excluded this evidence as more prejudicial than probative under Evidence Code section 352.

2. *Analysis*.

Once again, the probative value of the evidence was relatively weak, and the potential for prejudice considerable. Defense counsel did not offer to prove what, if anything, the victim had done to give rise to the restraining order. He did offer to prove that the victim had made a telephone call in violation of the restraining order, but he did not offer to prove that this telephone call featured any threats. Defendant's knowledge of this telephone call was not likely to make him significantly more fearful of the victim. This is particularly true in light of the ample other evidence that the victim had made direct threats to harm defendant.

Given that other evidence, the proffered evidence was cumulative. Moreover, it could have led to a "mini-trial" into the circumstances that gave rise to the restraining order, as well as of the victim's alleged violation of it. (Cf. *People v. Von Villas* (1992) 10 Cal.App.4th 201, 268 [admitting details of crimes for which witness had been arrested but not prosecuted would lead to "an inevitable time-consuming and confusing determination of the veracity of the charges"].)

In his reply brief, defendant argues that the violation of the restraining order involved moral turpitude and hence was admissible to impeach the victim. (See *People v. Wheeler*, *supra*, 4 Cal.4th at pp. 295-296.) Even assuming this evidence was admissible for impeachment (but see *People v. Cloyd* (1997) 54 Cal.App.4th 1402, 1408), "the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad." (*Wheeler* at p. 296.) "In general, a misdemeanor

-- or any other conduct not amounting to a felony -- is a less forceful indicator of immoral character or dishonesty than is a felony." (*Ibid*.) Here, the making of a telephone call in violation of a restraining order, without more, is not particularly probative of willingness to lie. At the same time, as already noted, this evidence was likely to lead to a "mini-trial." Thus, the trial court properly used Evidence Code section 352 "to prevent [a] criminal trial[] from degenerating into [a] nitpicking war[] of attrition over collateral credibility issues." (*Wheeler* at p. 296.)

We conclude that the trial court did not err by excluding evidence that the victim had violated a restraining order.

III

EVIDENCE OF THE VICTIM'S PRIOR DRUG OFFENSES

Defendant contends the trial court erred by refusing to let him introduce evidence of the victim's prior drug offenses for the purpose of contradicting the victim's testimony.

A. *Additional Factual and Procedural Background*.

Before trial, defense counsel noted that, at the preliminary hearing, Randy had testified that he had not used drugs within 12 hours before the assault. Defense counsel argued: "I think that . . . based on the witness testifying . . . that he did not use methamphetamine I should be allowed to ask him, 'Isn't it true, sir, that you were using methamphetamine the night before?'" The prosecutor objected, arguing, in part, that the result would be "a minitrial on methamphetamine use . . . ." Defense counsel responded, "If he says no, that ends the dialogue because I have no evidence that corroborates that he was using it."

The trial court ruled, "I think the question should be permitted."

B. *Analysis*.

As already noted (see part II, *ante*), Randy apparently had two prior misdemeanor convictions for simple possession of a controlled substance. (Health & Saf. Code, § 11377.) Defendant now contends he was erroneously precluded from impeaching Randy with these prior drug offenses. The trial court, however, made no such ruling. Defense counsel had previously conceded that the priors were inadmissible to show a general character for dishonesty. After the colloquy quoted above, in which the trial court *allowed* defense counsel to ask if Randy had used methamphetamine before the assault, defense counsel affirmatively stated that, if Randy denied using methamphetamine, he would *not* attempt to disprove that denial. He did not seek leave to contradict the denial by introducing evidence of Randy's priors.

In the end, neither the prosecution nor the defense ever actually asked Randy if he had used drugs before the assault. A fortiori, defense counsel never asked, nor sought leave to ask, about Randy's prior drug offenses. Thus, the trial court simply never ruled on the admissibility of the priors for this purpose. "'[T]he absence of an adverse ruling precludes any appellate challenge.' [Citations.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 837, fn. omitted, quoting *People v. McPeters* (1992) 2 Cal.4th 1148, 1179.)

Alternatively, however, if the trial court had excluded this evidence, it would not have erred. Assume Randy was asked whether he used drugs within 12 hours before the assault, and assume he said no. The fact that he had committed two prior drug offenses would be in no way inconsistent with this particular denial. Thus, the priors were irrelevant for this purpose.

IV

COMMENT DURING DEFENSE COUNSEL'S CLOSING ARGUMENT

Defendant contends that, during closing argument, the trial court erroneously accused defense counsel of making a statement that was not supported by the evidence.

A. *Additional Factual and Procedural Background*.

During closing argument, there was this exchange:

"[DEFENSE COUNSEL:] And where is Sh[e]lina? Got all these databases. They interview her. There's no secret about my client, [he] has been sitting in custody. He doesn't know where these people are.

"THE COURT: [Defense counsel], there's no evidence of that, sir. You're arguing outside the evidence."

B. *Analysis*.

Defendant presumes the trial court was referring to defense counsel's statement that defendant did not know where Anthony and Shelina were. Noting that there was indeed evidence that he did not know where they were, he argues that the trial court committed judicial misconduct which violated his constitutional rights to the assistance of counsel and to a fair trial.

Preliminarily, defense counsel waived the error by failing to object to the asserted judicial misconduct when it occurred. (*People v. Boyette* (2002) 29 Cal.4th 381, 459; *People v. Tyler* (1991) 233 Cal.App.3d 1456, 1460.) Defendant argues that an objection would have been futile. We disagree. If indeed defense counsel's argument was supported by evidence, he could have cited that evidence to the trial court. (See *Tyler* at p. 1460.)

In any event, there was no misconduct. Defendant's restrictive interpretation of the trial court's remarks is unreasonable. Defense counsel was arguing, essentially, that Shelina and Anthony were logical witnesses; that the prosecution had access to them; and hence, that the jury should draw an adverse inference from the prosecution's failure to call them. (See, e.g., *People v. Wash* (1993) 6 Cal.4th 215, 262-263; *People v. Szeto* (1981) 29 Cal.3d 20, 34.) At the same time, to avoid the corollary inference that the jury should draw an adverse inference from *defendant's* failure to call them, he was arguing that defendant did *not* have access to these same witnesses.

There was no evidence, however, that the prosecution actually had access to these witnesses. Admittedly, the arresting officer did at least imply that he had interviewed Shelina; he testified that she had told him that Randy had demanded her VCR and that what she told him was consistent with defendant's statements. There was no evidence, however, that any such interview gave the police any particular access to Shelina or any ability to find her.

Thus, we believe the trial court was admonishing defense counsel -- correctly -- that there was no evidence that the prosecution had "all these databases," or that it had superior access to Shelina. Moreover, precisely because there *was* evidence that defendant did not know where Shelina and Anthony were, we believe the jurors would have understood the trial court to be referring to these portions of defense counsel's argument.

As defendant concedes, the trial court can preclude counsel from making factual statements in closing argument that are not supported by the evidence. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 102.) Defendant argues, however, that the existence of

the referenced government databases is "a matter of obvious common knowledge and thus permissible . . . ." We disagree. First, counsel was at least implying that there are, in fact, government databases that would have revealed Shelina's whereabouts. This statement was unsupported by any evidence regarding the nature and scope of such databases. In our experience, even the government can have great difficulty finding people who do not want to be found. Second, counsel was also implying that the prosecution has exclusive access to databases to which the defense does not. This is simply not the case. Thus, the trial court did not abuse its discretion by precluding counsel from making this argument in the absence of evidence.

Separately and alternatively, defendant cannot show prejudice. We recognize that refusing to allow defense counsel to present any closing argument at all would violate the defendant's federal constitutional rights. (*Herring v. New York* (1975) 422 U.S. 853, 863-865 [95 S.Ct. 2550, 45 L.Ed.2d 593].) By extension, allowing defense counsel to deliver a token closing argument but refusing to allow him or her to make an essential point may also be a federal constitutional violation. (See *Com. v. Cutty* (Mass.App. 1999) 47 Mass.App.Ct. 671, 675 [715 N.E.2d 1040] [alibi].) But "[t]his is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations." (*Herring* at p. 862.) We conclude that an erroneous exercise of the court's discretion that does not prevent the defendant from arguing his theory of the case is an error of state law only, not a federal constitutional error. (Cf. *People v. Cudjo* (1993) 6 Cal.4th 585, 611 [erroneous exercise of discretion under the ordinary rules of evidence does not implicate the federal Constitution].)

Here, the point which defense counsel was prevented from making was minor and tangential. The inference that the prosecution had deliberately suppressed Anthony and Shelina's testimony because it knew they would testify in defendant's favor was extremely tenuous. There was evidence to the contrary -- the police had tried to contact Anthony, but without success. The absence of Anthony and Shelina might have tended to support a decision the jury was going to make anyway, based on the totality of the evidence in the case, but it could not possibly have swung the jury one way or the other.

As a subsidiary contention, defendant also argues that the trial court, after making this comment, erred by failing to instruct the jury with CALJIC No. 17.32 (6th ed. 1996).

CALJIC No. 17.32 would have stated: "At this time, . . . and for the purpose of assisting you in properly deciding this case, I will comment on the evidence and the testimony and believability of any witness. [¶] My comments are intended to be advisory only and are not binding on you as you must be the exclusive judges of the facts and of the believability of the witnesses. [¶] You may disregard any or all of my comments if they do not coincide with your views of the evidence and the believability of the witnesses."

The trial court, however, did give CALJIC No. 17.30, which stated: "I [ha]ve not intended by anything I have said or by any question I may have asked or by any ruling I may have made to intimate or suggest what you should find to be the facts or that I believe or disbelieve any witness. If anything I have said or done has seemed to so indicate, you will disregard it and form your own conclusion."

CALJIC No. 17.32 is self-evidently designed for a case in which the trial court comments on the evidence *while instructing the jury*. Thus, it would have been

inappropriate to give it here. In other cases, even when the court *has* commented on the evidence during the course of trial, CALJIC No. 17.30 is adequate. (*People v. Linwood* (2003) 105 Cal.App.4th 59, 74.)

But even assuming the trial court erred, defendant cannot show prejudice. Once again, the state-law standard of harmless error applies. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [state-law standard applies to erroneous instruction effectively excluding some evidence; instruction may have adversely affected the defense but did not deprive defendant of right to present one].) We may presume that the jury followed the instruction that it *was* given (*People v. Boyette*, *supra*, 29 Cal.4th at p. 453) -- to disregard any statement or ruling by the trial court that suggested what it should find the facts to be. Also, as already discussed, the trial court's comments went to a very tangential point. It is not reasonably possible that, even if the trial court had given CALJIC No. 17.32, the jury would have come to any other verdict.

V

INSTRUCTIONS ON SELF-DEFENSE BY AN ORIGINAL AGGRESSOR OR MUTUAL COMBATANT

Defendant contends the trial court gave erroneous jury instructions on the circumstances under which an original aggressor or mutual combatant can have the right of self-defense.

A. *Additional Factual and Procedural Background*.

The trial court instructed the jury on self-defense by an original aggressor using CALJIC No. 5.54 (6th ed. 1996), which, as given in this case, provides:

"The right of self-defense is only available to a person who initiated an assault if he has done all of the following:

"One, he has actually tried in good faith to refuse to continue fighting;

"Two, or [*sic*] he has *clearly informed* his opponent that he wants to stop fighting;

"And, three, 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." (Italics added.)

Similarly, the trial court instructed the jury on self-defense by a mutual combatant using CALJIC No. 5.56 (6th ed. 1996), which, as given in this case, provides:

"The right of self-defense is only available to a person who engages in mutual combat if he has done all of the following:

"One, he has actually tried in good faith to refuse to continue fighting;

"Two, he has *clearly informed* his opponent that he wants to stop fighting;

"Three, he has *clearly informed* his opponent he has stopped fighting;

"And, four, he has given his opponent the opportunity to stop fighting.

"After he's done these four things he has the right to self-defense if his opponent continues to fight." (Italics added.)

B. *Analysis*.

Defendant argues that these instructions, by using the words "clearly informed," require an attacker to give "explicit verbal notification" of withdrawal, even though California law permits the attacker to manifest withdrawal solely by conduct.

Preliminarily, we note that both the prosecutor and defense counsel requested CALJIC No. 5.56. Thus, at least as to this instruction, defense counsel invited the claimed error. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 150.)

The prosecutor requested CALJIC No. 5.54. He explained, "It's difficult to exclude [it] given the other self-defense instructions . . . ." Defense counsel did not object. Because the challenged language of CALJIC No. 5.54 and CALJIC No. 5.56 is virtually identical, we believe defense counsel also invited the claimed error with respect to CALJIC No. 5.54. "[T]he doctrine of invited error operates to estop a party from asserting an error when the party's own conduct has induced its commission [citation], and from claiming to have been denied a fair trial by circumstances of the party's own making [citation]." (*People v. Lang* (1989) 49 Cal.3d 991, 1031-1032.) Once defense counsel requested CALJIC No. 5.54, the trial court had no reason to think twice about whether CALJIC No. 5.56 correctly stated the law. Thus, defense counsel induced the claimed error as much as if he had requested the instruction.

Separately and alternatively, however, we conclude that the trial court did err, but the error was harmless.

Defendant is correct that an original aggressor may communicate withdrawal either by words or by conduct. The ultimate source of the communication requirement is *People v. Button* (1895) 106 Cal. 628. (See Com. to CALJIC No. 5.54 (6th ed. 1996) p. 202 and com. to CALJIC No. 5.56 (6th ed. 1996) p. 203, citing 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 75, at pp. 409-410, citing *Button*, *supra*, 106 Cal. 628.) In *Button*, the Supreme Court held: "In order for an assailant to justify the killing of his adversary, he must not only endeavor to really and in good faith

withdraw from the combat, but he must make known his intentions to his adversary." (*Button* at p. 632.) " . . . 'A man who assails another with a deadly weapon cannot kill his adversary in self-defense until he has fairly notified him *by his conduct* that he has abandoned the contest . . . .'" (*Id.* at p. 633, italics added, quoting *State v. Smith* (1875) 10 Nev. 106, 119.) The court also held that: "[I]n considering this question, the assailed must be deemed a man of ordinary understanding . . . . If the subsequent *acts* of the attacking party be such as to indicate to a reasonable man that he in good faith has withdrawn from the combat, they must be held to so indicate to the party attacked." (*Button*. at p. 633, italics added.)

The challenged instructions were at least ambiguous on this point. "If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. [Citations.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 963.) Arguably, 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. For example, the conduct that most obviously demonstrates withdrawal is running away. Most of us, however, would not consider running away from a fight to be "communicating" or "informing" one's opponent of anything. Thus, there is at least a reasonable likelihood that the jury misunderstood the instruction as requiring at least an intent to communicate, and perhaps even a verbal form of communication.

On these facts, however, the error was harmless under any standard. There was simply no evidence that defendant ever attempted to withdraw before committing the assault. Randy testified that he was awakened by the brick hitting his eye. He got to his

knees, backed away, and asked what was going on. Defendant then threw the brick at him a second time. In this scenario, defendant did not manifest withdrawal in any way.

On the other hand, defendant testified that Randy raised his arm as if to hit, slap, or stab him. He "reacted" by hitting Randy with the brick. He denied moving backward; he insisted, "I stood my ground." Immediately after hitting Randy, defendant left. In this scenario, defendant was neither the original aggressor nor a willing participant in mutual combat. He would have been justified in using reasonable force to defend himself; he did not have to withdraw at all in order to assert self-defense. Moreover, even in this scenario, defendant did nothing to manifest withdrawal (until after he hit Randy).

We recognize that we (like the jury) are not required to make a binary choice between the prosecution evidence and the defense evidence; if the evidence as a whole would support a third scenario, the trial court may be required to give instructions on that scenario. (See, e.g., *People v. Wickersham* (1982) 32 Cal.3d 307, 328.) In this case, however, neither the prosecution nor the defense presented any evidence of attempted withdrawal. There is no rational way to reshuffle the evidence so as to support a finding that defendant attempted to withdraw.

Defendant claims that "by *stepping back* from Randy, [he] made known to Randy by his acts and deeds that he wanted to stop fighting and had stopped any fight." (Italics added.) Apparently he is relying on the following testimony:

"Q Was [Randy] dancing or moving around you before he made the movement towards you?

"A When he came towards me, yes.

"Q And at that time what were you doing in relationship to the brick?

"A I just stayed still and put my hand in my pocket. Once he swung at me, that's when *I moved back a little bit*. When I pulled it out, I seen him and hit his arm.

[¶] . . . [¶]

"Q And at some point in time did you feel that he was going to take a swing at you?

"A Yes.

"Q And when you got to that point did you start reaching for the brick in your pocket?

"A Yes." (Italics added.)

Defendant's interpretation of this record is untenable. Defendant evidently meant that he ducked out of the way of Randy's swing. He "moved back" in an instant -- after Randy swung, but before defendant hit his arm. Even before Randy swung, defendant was already reaching for the brick. In light of defendant's other testimony -- that he "reacted" to Randy's threatening gesture by hitting him with the brick, and that he "stood his ground" -- this was insufficient evidence that defendant backed away in a manner that could suggest withdrawal.

In light of this lack of evidence, the trial court could have refused to give CALJIC No. 5.54 and No. 5.56 at all. Giving them, however, could not possibly have prejudiced defendant.

We conclude that defendant invited the error, and, moreover, the error was not prejudicial.

VI

CUMULATIVE PREJUDICE

Finally, defendant also contends that cumulative prejudice from multiple errors requires reversal. To the extent that we have held that this was the trial court's only error, cumulative prejudice is not an issue. (*People v. Cash* (2002) 28 Cal.4th 703, 741.) In part IV, *ante*, however, concerning the trial court's remarks during defense counsel's closing argument, we also held, in the alternative, that the claimed error was not prejudicial. Because those remarks were so tangential, and because there was no evidence that defendant attempted to withdraw, even assuming the trial court erred in both respects, there is no possibility of cumulative prejudice.

VII

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
J.

We concur:

RAMIREZ
P.J.

GAUT
J.