NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

FILED
OCT 28 1985
Court of Appeal - First Dist.
RON D. BARROW, Clerk
By _____ DEPUTY

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

P. F. LAZOR,

Defendant and Appellant.

A024654

(Super. Ct. No. 87874
County of Santa Clara)

In re

P. F. LAZOR,

On Habeas Corpus.

A028765

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Defendant and appellant P. F. Lazor was convicted by a jury of second degree murder (Pen. Code, § 187).1/ Additionally, an allegation that appellant used a firearm in the commission of said offense within the meaning of sections 12022.5 and 1203.06 was found to be true. Appellant appeals from the judgment [illegible] titions the court for a [illegible] aid petition has been con[illegible]

THE "APPEAL" DECISION, COVER PAGE

In A[illegible] owner of property locat[illegible] at 16935 Roberts Road in Los Gatos. The half

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1. All statutory references are to the Penal Code unless otherwise specified.

EXHIBIT U
tabbies
5 PAGES

shoulder where it was recovered. The wound would have produced a moderate amount of blood, with knockdown power which would have produced unconsciousness. The wound in and of itself would not have been fatal.

A second bullet entered the back of the head. The wound was .4 inches in diameter and also consistent with a .45 caliber bullet. The entry was probably made at a slight angle. The location of the wound was very close to the top of the head and traveled down from there ending up just beneath the dura or outer covering of the brain in the left prominence of the head. The bullet also was not considered fatal in and of itself as it did not hit any vital structures.

A third bullet entered the upper left back area of the victim. The diameter of the entrance was .4 inches and again consistent with a .45 caliber bullet. The angle of entry was to the right of 45 degrees and created a rather superficial wound to the soft tissues of the back without entering the chest cavity. The bullet was recovered from the mid-portion of the spine.

The fourth bullet entered the back lower than the third bullet

ADDED COMMENTARY

COURT OF APPEAL OPINION DENYING APPEAL RELIEF:

THESE PAGES FROM THE ERROR-FILLED APPEAL DECISION (CONTAINING OVER 240 ERRORS OF FACTS IN ITS SHORT, SLOPPY 35 PAGES), SHOW THE APPEAL JUDGES BELIEVED MR. LAZOR SHOT ALLRED IN THE BACK AND BACK-OF-THE-HEAD REPEATEDLY-(COMPARE EXHIBIT S, WHICH THEY NEVER SAW NOR HEARD ABOUT). THEY THEREFORE ERRONEOUSLY RULED THAT THIS WAS OBVIOUSLY NOT A SELF-DEFENSE CASE. THEY CONSIDERED ONLY THE PROSECUTOR'S FABRICATED "FACTS," WHICH IS ALL THAT MR. SCHROEDER WOULD ALLOW "ON THE RECORD"

have time to take a very good aim in my opinion, I know that. There was no point at which I actually thought I could take an aim and shoot."

Nor does appellant in his testimony anywhere state or otherwise indicate that he didn't intend to kill Allred. Based on these facts, it was not error for the trial court not to give instructions on involuntary manslaughter sua sponte.

Appellant's reliance on People v. Welch, supra, 137 Cal.App.3d 834 is misplaced. In Welch, defendant who suffered from a disability, was playing pool with friends at a bar. A man who had been drinking and who was a stranger to defendant began arguing with him for no apparent reason. The man threatened to beat up defendant. He then rushed at defendant and defendant shot and killed him. Defendant testified that he shot the assailant to "stop" the attack and because he was afraid that the man would kill him. He stated that he was thinking about his physical condition when he pulled the trigger and believed that his life was threatened. The defendant further testified that he just raised the gun and fired, that he did not point the gun, and that his sole intention was to "stop" the attacker.

The trial court in that case instructed the jury on murder and voluntary manslaughter but refused to give an instruction on involuntary manslaughter. The defendant was then convicted of voluntary manslaughter but his conviction was later overturned by the Supreme Court which said:

ADDED COMMENTARY

HERE, THE APPEAL JUDGES COMPARE OTHER SELF-DEFENSE CASES WHERE APPEAL RELIEF WAS GRANTED, RULING THAT LAZOR'S CASE IS DIFFERENT. THE ONLY DIFFERENCE WAS, LAZOR WAS NEVER ALLOWED TO PRESENT HIS CASE IN TRIAL AT ALL; AND THEREFORE THE APPEAL JUDGES NEVER KNEW HIS SIDE OF THE STORY NOR ABOUT ANY OF HIS EVIDENCE PROVING IT WAS SELF-DEFENSE

instruction. The high court said: "[Here,] . . . there is substantial evidence from which a jury could conclude that the defendant did not intend to kill [the victim] when he discharged his weapon. The evidence was uncontradicted that [the victim] was the aggressor at all times prior to being shot by the defendant. Defendant testified that he did not point the gun and that he just raised the gun and fired to "stop" [the assailant]. The defendant stated that he was afraid that [the attacker] would cause his death by "beating up" on him and knocking him down. The jury could reasonably believe that defendant's actions were taken in self-defense compelled by fear of great bodily harm or death. If such were the case, a conviction for involuntary manslaughter would be appropriate where the jury finds that the nature of the attack did not justify the resort to deadly force in self-defense or that the force used in self-defense exceeded that which was reasonably necessary to repel the attack. [Citations.]" (People v. Welch, supra, 137 Cal.App.3d at p. 840.)

The instant case is readily distinguishable from Welch. In the case at bar, evidence was conflicting as to whether Allred or appellant was the principle aggressor in that relationship. And as indicated above, nowhere in his testimony did appellant state that on the day of the shooting, he did not intend to kill his victim. Additionally, whose

ADDED COMMENTARY

MORE COMPARISONS WITH OTHER CASES, DISTINGUISHING LAZOR'S CASE AS DIFFERENT, SOLELY DUE TO LAZOR NEVER BEING ALLOWED TO PRESENT ANY OF HIS DEFENSE CASE AT ALL...

against self-incrimination were violated by [illegible]

ADDED COMMENTARY

...AND HERE, PRONOUNCING THAT THE ABOVE FACTORS SHOW THAT LAZOR'S CLAIM OF SELF-DEFENSE WAS NOT SUBSTANTIAL -- BECAUSE MR. LAZOR NEVER GOT TO PRESENT ANY DEFENSE AGAINST THE FABRICATED PROSECUTOR'S MURDER CASE; WHICH IS ALL THAT THE APPEAL JUDGES EVER SAW OR KNEW ABOUT

[illegible] counsel and constituted prosecutorial misconduct.

The court said: "The only issue at trial was defendant's intent and mental capacity at the time of the commission of the offense. The defense evidence was substantial. The rebuttal evidence directly attacked her defense, and the prosecutor's argument that the evidence showed she was fabricating her 'panic' state was most prejudicial. Furthermore, the fact that the jury deliberated 22 hours before reaching a verdict underscores the closeness of the case and the crucial nature of the constitutional violations." (People v. Schindler, supra, 114 Cal.App.3d at p. 190.)

In the instant case, defense evidence of self-defense was not substantial. At the same time, evidence defeating that claim, outside of the evidence of appellant's call to his attorney, was substantial. Such evidence included that pertaining to the "brandishing" incident and appellant's confiscation of Scherschel's BB gun. Unlike Schindler, this does not appear to have been a "close" case. After 14 days of trial, the jury here deliberated only five hours before