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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DONATHAN NICHOLAS KIRK,

Defendant and Appellant.

2d Crim. No. B232181  
(Super. Ct. No. MA049831)  
(Los Angeles County)

Donathan Nicholas Kirk appeals his conviction by jury of two counts of aggravated assault (Pen. Code., § 245, subd. (a)(1))<sup>1</sup> with special findings that he inflicted great bodily injury (GBI) on one of the victims (§ 12022.7, subd. (a)). The trial court sentenced appellant to six years state prison<sup>2</sup> We affirm.

*Facts and Procedural History*

On the evening of July 23, 2010, Jose Avalos and Carlos Delgado carpooled home from work and stopped outside Avalos' house. Appellant approached and shouted, "What are you gonna do? The cops are coming." Delgado did not speak

<sup>1</sup> All statutory references are to the Penal Code.

<sup>2</sup> The trial court imposed a two-year low term on count 1 (assault of Carlos Delgado) plus three years on the GBI enhancement. On count 2 (assault of Jose Avalos), appellant received a one-year sentence (one-third the midterm), to run consecutive to the five-year sentence on count 1.

English and turned to leave. Appellant yelled "Get out here, fuckin' Mexican" and punched Delgado in the face and chest. A witness saw appellant hit Delgado seven times. Delgado fell to the ground choking on his blood. Appellant kicked Delgado as he went into seizures and convulsions before he became unconscious. Avalos tried to help Delgado but was punched in the face and fell and hit his head.

Appellant ran down the street. A sheriff's helicopter spotted appellant hiding in a neighbor's backyard. Residents took appellant to the ground and held him until he was arrested.

Delgado was hospitalized for a concussion, a head trauma and contusion, and abrasions.

At trial, appellant claimed that he acted in self defense when four African-American men confronted him outside a party. Two men attacked Delgado, as appellant fought the other men off. Appellant tried to help Delgado but Avalos ran up and hit him. Appellant punched Avalos and ran.

Los Angeles County Sheriff's Detective Shawn Horning testified that appellant was crying and sobbing after he was taken into custody. Appellant repeatedly said, "Sorry. I didn't mean to hurt him. Tell me he is going to be okay."

Waiving his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]), appellant said that he tried to break up a fight between two Mexican men and punched them in the face. When Detective Steve Owen said that he was lying, appellant admitted starting the fight and punching Delgado twice in the face. Appellant did not say that anyone else hit Delgado.

#### *GBI Enhancement*

Appellant argues that the evidence does not support the finding that he inflicted great bodily injury on Delgado within the meaning of section 12022.7, subdivision (a). The jury was instructed that " 'Great bodily injury' . . . means a significant or substantial physical injury. Minor, trivial or moderate injuries do not constitute great bodily injury." (CALJIC 17.20.) As in any substantial evidence case, we review the evidence and draw all reasonable inferences in favor of the judgment to

determine whether a rational trier of fact could find the GBI enhancement to be true. (*People v. Escobar* (1992) 3 Cal.4th 740, 750.)

Our courts have long held that determining whether a victim suffered great bodily harm is not a question of law for the court but a factual inquiry to be resolved by the jury. (*People v. Cross* (2008) 45 Cal.4th 58, 64.) " ' "A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description." ' " [Citations.] Where to draw that line is for the jury to decide." (*Ibid.*) Although there must be a "substantial injury *beyond* that inherent in the offense itself," section 12022.7 does not require that the victim suffer permanent, prolonged, or protracted disfigurement, impairment or loss of bodily function. (*People v. Escobar, supra*, 3 Cal.4th at pp. 746-747.)

Delgado was knocked unconscious and suffered brain trauma with a contusion to the back of the head. Appellant kicked Delgado as he choked on his blood and went into seizures and convulsions. Paramedics ranked Delgado a 9 on a Glasgow Coma Scale of 3 to 15, just one point above brain dysfunction requiring life support. At the hospital, Delgado had to be intubated by Doctor Travis Deuson. Although Delgado was released the next day, Doctor Deuson stated that Delgado's long-term symptoms would include headaches, dizziness, nausea, a feeling of detachment, cognitive impairment such as loss of short-term memory and loss of brain feed, loss of impulse control, personality changes, and difficulty with multitasking.

Appellant argues that Delgado's injuries were short lived. While Doctor Deuson described possible long-term complications, there was no evidence that Delgado suffered long-term medical problems. Delgado, however, missed a week of work. The injuries were so severe that it felt as if his brain was moving around in his head, causing Delgado to lose his balance and suffer headaches and dizzy spells for five weeks.

Appellant asserts that Delgado's injuries are less serious than *People v. Jamarillo* (1979) 98 Cal.App.3d 83 which were considered borderline for purposes of a GBI enhancement. There, the defendant beat her six-year old daughter with a stick,

causing the daughter to suffer multiple contusions with swelling and severe discoloration on parts of her body. (*Id.*, at p. 836.)

Like the victim in *People v. Jaramillo*, *supra*, Delgado suffered contusions and lacerations that left him convulsing in his own blood. The blows and kicks resulted in head trauma with loss of consciousness, seizures, and vomiting. Loss of consciousness is sufficient to support a finding of great bodily injury (See *People v. Kent* (1979) 96 Cal.App.3d 130, 136-137; *People v. Wells* (1971) 14 Cal.App.3d 348, 357-359 [victim knocked unconscious and suffered cuts and intense headaches for several days]; *People v. Muniz* (1989) 213 Cal.App.3d 1508, 1520 [defendant beat victim about the face with such force that she lost consciousness].)

The evidence clearly supports the finding that appellant inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). " ' "Whether the harm resulting to the victim . . . constitutes great bodily injury is a question of fact for the jury. [Citation.] If there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding" ' [Citations.]" (*People v. Escobar*, *supra*, 3 Cal.4th at p. 750.)

#### *Pitchess Motion*

Before trial, appellant filed a *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) seeking discovery of complaints and allegations against Detectives Owen and Horning regarding, among other things, fabrication of evidence and dishonesty. The trial court conducted an in camera hearing and found two complaints in Detective Owen's file which were turned over to defense counsel.

At appellant's request, we have reviewed the sealed transcript of the proceeding and conclude that the trial court did not abuse its discretion by refusing to disclose other information produced in response to the discovery motion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Mooc* (2001) 26 Cal.4th 1216, 1232.)

The judgment is affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Charles A. Chung, Judge  
Superior Court County of Los Angeles

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