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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAMEON LEWIS MILLER,

Defendant and Appellant.

B250578

(Los Angeles County  
Super. Ct. No. BA383636)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Ronald H. Rose, Judge. Reversed in part and remanded for resentencing; otherwise  
affirmed.

Christopher Nalls, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael C.  
Keller, Deputy Attorneys General, for Plaintiff and Respondent.

## **INTRODUCTION**

A jury found defendant and appellant Dameon Lewis Miller guilty of two counts of driving under the influence causing injury. Over defendant's objection, the trial court imposed a five-year sentence under Penal Code section 667, subdivision (a)(1) (hereafter section 667(a)(1)). Because defendant was entitled to a jury trial on that enhancement, the five-year sentence must be reversed and this matter remanded.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I. Factual background.**

On January 24, 2010, Luz Eneida Lebron was driving a car in which Oscar Granados was a passenger. While Lebron was making a left turn onto Martin Luther King Boulevard, defendant crashed into Lebron's car, killing Granados and injuring Lebron. Defendant was driving 60 to 70 miles per hour in a 35-mile-per-hour zone. Officers observed that defendant's eyes were glassy, and he smelled of alcohol. His blood alcohol content was 0.12.

### **II. Procedural background.**

An amended information was filed on May 7, 2013 alleging five counts against defendant: count 1, gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)); count 2, driving while under the influence, causing injury (Veh. Code, § 23153, subd. (a)); count 3, driving while having a blood alcohol content of 0.08 percent or more, causing injury (Veh. Code, § 23153, subd. (b)); count 4, leaving the scene of an accident (Veh. Code, § 20001, subd. (a)); and count 5, driving with a license suspended for a prior driving under the influence conviction (Veh. Code, § 14601.2, subd. (a)).<sup>1</sup>

On June 4, 2013, a jury found defendant guilty of counts 2 and 3. As to both counts, the jury found true allegations that defendant proximately caused bodily injury and death to Granados (Veh. Code, § 23558). The jury found defendant not guilty of count 1, gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)) and of the lesser offense of gross vehicular manslaughter without intoxication (Pen. Code, § 192, subd. (c)(1)). The jury was unable to reach a verdict on the lesser included

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<sup>1</sup> Before trial, defendant pled guilty to count 5.

offenses of vehicular manslaughter with ordinary negligence as to count 1 and on count 4. The trial court therefore declared a mistrial on counts 1 and 4.

At defendant's sentencing hearing on August 5, 2013, over defense counsel's objection, the trial court found that defendant had waived a jury trial on a five-year enhancement alleged under section 667(a)(1) and found that defendant personally inflicted great bodily injury on Lebron and Granados. The court then sentenced defendant to a total of 14 years in prison as follows: on count 2, three years in prison, doubled to six years due to the prior strike allegations found true by the court; one year under Vehicle Code section 23558 (one-year enhancement for proximately causing great bodily injury or death to more than one victim); two years for his prior prison terms (Pen. Code, § 667.5); and five years under section 667(a)(1). The court stayed the sentence on count 3 and imposed a concurrent six-month term on count 5.

## **DISCUSSION**

### **I. The five-year sentence imposed under section 667(a)(1) must be reversed.**

Over defendant's objection, the trial court imposed a sentence on the enhancement under section 667(a)(1), without affording him a jury trial on the enhancement. Because defendant's Sixth Amendment right to a jury was violated, the sentence on the enhancement must be reversed.

Section 667(a)(1) provides a five-year sentencing enhancement for a person convicted of a serious felony who has a prior serious felony conviction, as defined in Penal Code section 1192.7, subdivision (c). (*People v. Equarte* (1986) 42 Cal.3d 456, 461; *People v. Arnett* (2006) 139 Cal.App.4th 1609, 1613.) If the current offense is not in Penal Code section 1192.7, subdivision (c), then whether the current offense is a serious felony is an issue for the trier of fact. (*Arnett*, at p. 1613; *People v. Bautista* (2005) 125 Cal.App.4th 646, 655; *People v. Taylor* (2004) 118 Cal.App.4th 11, 27.) A felony not otherwise enumerated in Penal Code section 1192.7, subdivision (c), is a serious felony if the defendant personally inflicts great bodily injury on any person other than an accomplice. (*Id.*, subd. (c)(8); *Arnett*, at p. 1613.)

Defendant's current offenses are driving under the influence causing injury (Veh. Code, § 23153, subd. (a)) and driving under the influence with a blood alcohol content over 0.08 percent causing injury (*id.*, subd. (b)). They are not listed in Penal Code section 1192.7, subdivision (c). Defendant therefore was entitled to a jury determination on whether these current offenses constitute serious felonies for the purposes of the five-year enhancement in section 667(a)(1).

The People agree that defendant's right to a jury trial on the enhancement was violated but disagree that he was prejudiced, under the standard of review in *Chapman v. California* (1967) 386 U.S. 18. (See, e.g., *People v. Bautista, supra*, 125 Cal.App.4th at p. 656.) The People point out that the jury found defendant "proximately caused great bodily injury" to Granados. (Veh. Code, § 23558.) "Proximately causing great bodily injury" is, the People argue, the same as "personally inflicting great bodily injury," and therefore the error was not prejudicial.

Proximately causing great bodily injury to another person, however, is not the same as personally inflicting great bodily injury on another person. (*People v. Bland* (2002) 28 Cal.4th 313, 337; *People v. Valenzuela* (2010) 191 Cal.App.4th 316, 321 [" '[T]he statutory term "personally inflict" has a distinct meaning, which is something different than proximate cause' "].) "To 'personally inflict' an injury is to directly cause an injury, not just to proximately cause it." (*People v. Rodriguez* (1999) 69 Cal.App.4th 341, 347.) "[T]he actor must do more than take some direct action which proximately causes injury. The defendant must directly, personally, himself inflict the injury." (*Id.* at p. 349; see also *People v. Cole* (1982) 31 Cal.3d 568, 572 [the person must have "directly acted to cause the injury"].)

In *Rodriguez*, for example, the defendant escaped from custody, causing an officer to chase him. (*People v. Rodriguez, supra*, 69 Cal.App.4th at p. 346.) When the officer tackled the defendant, the officer hit his head on something and was knocked unconscious. (*Ibid.*) *Rodriguez* found that although there was evidence the defendant proximately caused the officer's injuries, the record did not establish he directly inflicted them. (*Id.* at p. 352.)

Similarly, here, the record does not establish beyond a reasonable doubt that defendant directly and personally inflicted serious injury. The evidence was that Lebron turned left in a possibly unsafe manner. Defendant, who was drunk and speeding, hit her. These facts distinguish this case from *People v. Guzman* (2000) 77 Cal.App.4th 761. In *Guzman*, the defendant, while drunk, made an unsafe left turn in front of the victim's vehicle, causing a collision and injury to defendant's passenger. (*Id.* at p. 763.) The defendant, by turning his vehicle into oncoming traffic, "was the direct cause of the collision and therefore was the direct cause of the injury." (*Id.* at p. 764.)

Notwithstanding that defendant was under the influence of alcohol and was speeding at the time of the collision, it was Lebron who turned her vehicle into oncoming traffic. Although a trier of fact certainly could have found that defendant personally inflicted injury on Granados (see, e.g., *People v. Modiri* (2006) 39 Cal.4th 481, 493 ["the requisite force must be one-to-one, but does not foreclose participation by others"]), the evidence does not compel that conclusion. Moreover, the record indicates that the jury may have harbored doubt on the issue. The jury, during deliberations, asked: "[I]s the defendant, under the law, guilty of the illegal act causing bodily injury if the other vehicle made an illegal/unsafe left turn? In other words, can defendant be found guilty if there were other contributing factors, such as the unsafe left turn?" The jury also acquitted defendant of gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)) and of gross vehicular manslaughter without intoxication (Pen. Code, § 192, subd. (c)(1)). The jury was unable to reach a verdict on the lesser included offense of vehicular manslaughter with ordinary negligence.

Given the evidence and the record, the trial court could not determine, as a matter of law, that defendant personally inflicted great bodily injury on a victim. The five-year sentence under section 667(a)(1) must therefore be reversed and, at the People's election, retried.

## **DISPOSITION**

The five-year enhancement imposed under Penal Code section 667, subdivision (a)(1) is reversed and remanded for a retrial. If, within 30 days after the remittitur issues, the People have not filed and served an election to retry the enhancement, the trial court shall resentence defendant. The judgment is otherwise affirmed.

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ALDRICH, J.

We concur:

KITCHING, Acting P. J.

EDMON, J.\*

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\* Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.