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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. AMERICO GOMEZ FIGUEROA, Defendant and Appellant.	B232590 (Los Angeles County Super. Ct. No. LA066418)

APPEAL from a judgment of the Superior Court of Los Angeles County, Huey P. Cotton, Jr., Judge. Affirmed as modified.

Renée Paradis, 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, Victoria B. Wilson and Kim Aarons, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Americo Gomez Figueroa, was convicted by a jury of battery with injury on a peace officer in violation of Penal Code,[1] section 243, subdivision (c)(2). He admitted he had served a prior prison term within the meaning of section 667.5, subdivision (b). He was sentenced to three years in state prison. We reverse the order requiring defendant to pay $8,714 in attorney fees.

II. THE EVIDENCE

On October 27, 2010, Officers Adam Fox and Robert Medina responded to a radio call of a deadly weapon assault in Van Nuys. According to the radio call, defendant was claiming someone had tried to kill him. The dispatcher said defendant was possibly under the influence of narcotics or suffering from mental illness. Tests later confirmed defendant was under the influence of methamphetamine. Defense witnesses testified defendant was in a state of drug-induced confusion with possible defective perception. Defendant said he had acquired immune deficiency syndrome but later denied he was so infected.

Officers Fox and Medina arrived in their marked black and white patrol vehicle. Defendant was in the middle of the street. The officers, who were in uniform, approached defendant, identified themselves and told him to come out of the street. Defendant was on the telephone with an emergency operator at the time. Officers Fox and Medina made repeated attempts to demonstrate they were in fact police officers. But, defendant said over and over again he needed the police. And defendant said, "You [are] not the police." Defendant, who appeared to be confused, never acknowledged Officers Fox and Medina were police officers. When the traffic began to move in defendant's direction, the officers attempted to physically escort him to the sidewalk. Defendant resisted and a struggle ensued. During the altercation, defendant bit Officer Medina's

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[1] All further statutory references are to the Penal Code unless otherwise noted.

hand and forearm. The bites broke the skin. Throughout the incident, defendant was screaming for help and calling out for someone to get the police.

Paramedics cleaned Officer Medina's wounds at the scene. The wounds were then treated at a hospital. "Blood work" was performed to determine whether, in Officer Medina's words, "[Defendant] had a disease or not." Testing the blood was standard practice in the case of a human bite that breaks the skin. Officer Medina was told defendant might have acquired immune deficiency syndrome or human immunodeficiency virus. A month later, Officer Medina learned that in fact defendant was not so infected. During that one-month period, Officer Medina suffered stress. He testified: "I wasn't sure if I had the disease. I didn't know how it would affect me, my family."

III. DISCUSSION

A. Lesser Included Offense

Misdemeanor battery on a peace officer in violation of section 243, subdivision (b) is an included offense of battery *with injury* on a peace officer in violation of section 243, subdivision (c)(2). (*People v. Hayes* (2006) 142 Cal.App.4th 175, 180 [probation officer].) Defendant contends it was prejudicial error not to instruct the jury on the included misdemeanor offense. Defendant argues a reasonable jury could have found Officer Medina did not sustain any physical injury "requir[ing] professional medical treatment," an element of the charged felony. (§ 243, subd. (f)(5).) Our Supreme Court has held a lesser included offense instruction is required: "[W]hen the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154; accord, *People v. Valdez* (2004) 32 Cal.4th 73, 115.) Our Supreme Court has explained: "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense,

but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Breverman, supra,* 19 Cal.4th at p. 162; accord, *People v. Thomas* (2012) 53 Cal.4th 771, 813; *People v. Valdez, supra,* 32 Cal.4th at p. 116.)

Section 243, subdivision (f)(5) defines "injury" for purposes of the charged offense, "'Injury' means any physical injury which requires professional medical treatment." Our colleagues in Division Seven have explained: "What the statute prescribes as a qualifying injury is an injury which '*requires* professional medical treatment.' It is the nature, extent, and seriousness of the injury—not the inclination or disinclination of the victim to seek medical treatment—which is determinative. A peace officer who obtains 'medical treatment' when none is required, has *not* sustained an 'injury' within the meaning of section 243, subdivision (c). And a peace officer who does *not* obtain 'medical treatment' when such treatment is required, *has* sustained an 'injury' within the meaning of section 243, subdivision (c). The test is objective and factual." (*People v. Longoria* (1995) 34 Cal.App.4th 12, 17, fn. omitted; accord, *People v. Hayes, supra,* 142 Cal.App.4th at p. 181; see CALJIC No. 945.) "Injury" for purposes of section 243, subdivision (f)(5) is something less than serious or great bodily injury. (*People v. Longoria, supra,* 34 Cal.App.4th at p. 18; *People v. Lara* (1994) 30 Cal.App.4th 658, 667; see § 243, subd. (f)(4).)

Here, Officer Medina was twice bitten by a drug-user. The human bites broke the skin, potentially subjecting Officer Medina to infection. His wounds were cleaned at the scene. His injuries were further treated in the hospital and blood tests were performed. It was standard practice to perform blood tests in such circumstances. The bites are visible on photographs of Officer Medina's hand and arm that were introduced into evidence. We have examined those photographs. On these facts, no reasonable jury could conclude Officer Medina did not suffer an injury requiring professional medical treatment. (See

People v. Lara, supra, 30 Cal.App.4th at pp. 667-668 ["Where, as here, it is undisputed that the officer/victim suffered injuries that were, in fact, treated by professional medical personnel at an emergency room, there is sufficient evidence to support a finding that he suffered an 'injury' within the meaning of section 243"].) Moreover, in a noncapital case, as here, error in failing to instruct on a lesser included offense is reviewed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman, supra,* 19 Cal.4th at p. 178; accord, *People v. Thomas, supra,* 53 Cal.4th at p. 814.) Even if the trial court erred, it is not reasonably probable the jury would have found defendant guilty only of the lesser offense had the instruction been given. Officer Medina suffered two bites from defendant, a drug user, who claimed to suffer from acquired immune deficiency syndrome.

B. Officer Medina's Testimony

Officer Medina testified concerning defendant's possible positive human immunodeficiency virus status. Defendant claimed he had acquired immune deficiency syndrome. Officer Medina testified he suffered stress as a result. Officer Medina testified about the effect of waiting a month to hear that defendant was not infected with the human immunodeficiency virus: "Well, in that time I was kind of stressed out. I wasn't sure if I had the disease. I didn't know how it would affect me, my family." Defendant argues this was prejudicial error because there was minimal evidence of actual injury. Defendant further argues it is reasonably probable that absent the foregoing testimony the verdict would have been more favorable to him. Evidence Officer Medina was potentially exposed to the human immunodeficiency virus was relevant to the injury element of the battery charge. That he was potentially exposed to the human immunodeficiency virus tended in reason to prove his injury required professional medical treatment. (Evid. Code, § 210; see *Roman v. Superior Court* (2003) 113 Cal.App.4th 27, 34-35.) In any event, it is not reasonably probable the jury would have found, absent the challenged evidence, that Officer Medina did not suffer the requisite

injury. Officer Medina suffered two human bites breaking the skin by a drug user who claimed to have acquired immune deficiency syndrome.

C. Attorney's Fees

Defendant contends the trial court erroneously ordered payment of $8,714 in attorney's fees under section 987.8, subdivision (b) without notice and a hearing to determine his ability to pay. (*People v. Flores* (2003) 30 Cal.4th 1059, 1061; *People v. Turner* (1993) 15 Cal.App.4th 1690, 1695, disapproved on another point in *People v. Flores, supra,* 30 Cal.4th at p. 1068.) The Attorney General agrees. The order is reversed. Defendant asserts any further hearing is unnecessary because he was previously homeless and has now been sentenced to state prison. (See § 987.8, subd. (g)(2)(B).) Whether defendant has an ability to pay is for the trial court to determine. (§ 987.8, subd. (b); *People v. Flores, supra,* 30 Cal.4th at pp. 1068-1069.) Upon remittitur issuance, the trial court, if it wishes to pursue the matter, is to provide notice and a hearing as required under section 987.8, subdivision (b). (*People v. Flores, supra,* 30 Cal.4th at p. 1068; *People v. Tuggle* (2012) 203 Cal.App.4th 1071, 1081-1082.)

D. Presentence Probation Report

Defendant contends he is entitled to a remand for resentencing because the trial court failed to consider a post-conviction probation report as required by section 1203, subdivision (b). At the time defendant was convicted and sentenced, section 1203, subdivision (b)(4) stated: "The preparation of the [post conviction] report or the consideration of the report by the court may be waived only by a written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court, except that there shall be no waiver unless the court consents thereto." (Stats. 2009, ch. 582, § 5, eff. Jan. 1, 2010 to Dec. 31, 2011.) We find no prejudicial error.

To begin with, with the trial court's consent, defense counsel effectively stipulated in open court that the pre-conviction probation report dated November 23, 2010, was sufficient. In effect, defense counsel agreed no additional report was necessary. Following defendant's January 31, 2011 conviction, there was a discussion about a post-conviction probation report: "The Court: "I'll ask for a probation report. We'll set this matter for sentencing. [¶] What's a good date? [¶] [Deputy District Attorney Kaveh Faturechi]: Do we need another probation report? I think we already have one. [¶] The Court: There's one here. Actually, this might be enough. [¶] Mr. Faturechi: I have another copy. [¶] The Court: Do each of you have this already? [¶] Mr. Faturechi: Is it dated 11/23/2010? [¶] The Court: Yes. [¶] Mr. Faturechi: I have that. [¶] [Deputy Public Defender Tyree Campbell]: I have it. [¶] The Court: You're both satisfied with that? [¶] Mr. Faturechi: Yes. [¶] Mr. Campbell: (No audible response.) [¶] The Court: I'll set this over for sentencing, then . . . ." The trial court inquired whether the November 23 probation report addressed defendant's "drug condition" or other circumstances. Mr. Campbell responded, "Not really." The trial court then changed its mind and ordered preparation of a post-conviction probation report.

However, no such report appears to have been prepared and the trial court did not consider a post conviction probation report. In any event, the record demonstrates that Mr. Campbell agreed, albeit inaudibly, that the November 23 report was satisfactory. He did not express any dissatisfaction with relying on it. Under these circumstances, defendant waived preparation and consideration of a post conviction probation report by the trial court. Defense counsel also offered no objection at the time of defendant's sentencing four months after the report was prepared, on March 24, 2011. (*People v. Murray* (2012) 203 Cal.App.4th 277, 289, fn. 12; *People v. Johnson* (1999) 70 Cal.App.4th 1429, 1431-1432.) The issue is thus forfeited.

Even if there was no statutory waiver of the right to a post-conviction probation report, reversal is not required absent a reasonable probability of a result more favorable to defendant. (Cal. Const., art VI, § 13; *People v. Dobbins* (2005) 127 Cal.App.4th 176, 182-183.) There is no such probability in the present case. Defendant had a long

criminal history dating from 1993. He had repeatedly committed criminal offenses up to the present crime. He had spent time in prison. Defendant incurred the following convictions in New York: 1993, petit larceny; 1996, attempted grand larceny; 1997, attempted grand larceny; 1997, felony grand larceny followed by a probation violation; 1998, unauthorized use of a vehicle; 2000, possession controlled substance; 2000, assault with intent to cause physical injury; 2001, automobile stripping; 2002, possession stolen property; 2002, assault with intent to cause serious injury; 2002, automobile stripping; 2003, attempted grand larceny; 2005, possession of burglary tools; 2006, possession controlled substance; 2006, resisting arrest; 2006, assault with intent to cause physical injury; 2006, grand larceny; and 2007, assault with intent to cause physical injury. He incurred further convictions in Florida in 2008 for: culpable negligence/exposure to harm; fleeing or attempting to elude police, a felony; and operating a vehicle without a valid license. He was sentenced to one year and one day in state prison. He was released from custody on April 18, 2009. On December 7, 2009, defendant was arrested in Los Angeles. Defendant was convicted on May 11, 2010, of driving a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)) and felony evading. (Veh. Code, § 2800.2, subd. (a).) He was sentenced to 16 months in state prison on each count. He was arrested in the present case on October 27, 2010, while still on parole. Given defendant's long criminal history and his drug abuse, the pre-conviction report recommended that probation be denied and he be sentenced to state prison. It is not reasonably probable defendant would have been granted probation or sentenced to less than the mid-term had a post-conviction probation report been prepared.

IV. DISPOSITION

The order requiring defendant to pay $8,714 in attorney's fees under section 987.8, subdivision (b) is reversed. Upon remittitur issuance, if it wishes to pursue the matter, the trial court is to provide notice and a hearing as required under section 987.8, subdivision (b). In all other respects, the judgment is affirmed. Upon remittitur issuance,

the superior court clerk must amend the abstract of judgment to reflect any change in the attorney's fee order. Thereafter, the superior court clerk is to deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.