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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK LAMAR HALLEY et al.,

Defendants and Appellants.

B245423

(Los Angeles County
Super. Ct. No. BA385975)

APPEAL from a judgment of the Superior Court of Los Angeles County,
William C. Ryan, Judge. Affirmed with directions.

Katharine Eileen Greenebaum, under appointment by the Court of Appeal, for
Defendant and Appellant Mark Lamar Halley.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and
Appellant Earl Albert Ford.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson,
Supervising Deputy Attorney General, and Blythe J. Leszkay, Deputy Attorney General,
for Plaintiff and Respondent.

A jury convicted Mark Lamar Halley and Earl Albert Ford of robbery and assault with an enhancement for great bodily injury. Halley and Ford appeal various aspects of their convictions and their sentences. We affirm the convictions and remand for resentencing.

BACKGROUND

An information filed December 2, 2011, charged Halley and Ford with the second degree robbery of Eva Green (count 1) and Nathaniel Delouth (count 2), both in violation of Penal Code section 211, and assault by means likely to produce great bodily injury on Green (count 3) and Delouth (count 4), both in violation of section 245, subdivision (a)(1). The information also alleged that in counts 2 and 4, Halley and Ford personally inflicted great bodily injury on Delouth within the meaning of section 12022.7, subdivision (a), and that the offenses in all counts were committed in association with a criminal street gang pursuant to section 186.22, subdivision (b)(1)(C). The information also alleged that Ford had suffered numerous prior convictions.

Ford moved to suppress identification evidence, and after a hearing the court denied the motion. The first trial witness was Green, who testified that at around 6:00 p.m. on June 13, 2011, Delouth was dropping off Green and their two children, six and one and a half years old, at her apartment on Brynhurst Avenue in Los Angeles. There were a lot of people gathered in front of the apartment building, and a white car was parked in the driveway, making it impossible for Delouth to drive in to get to Green's parking space. Delouth asked Ford, who was standing on the grass close to the street, to tell the owner of the car to move it, and Ford told Halley to move the car. Halley said, "why the fuck do I have to move my car? Who the fuck are they?" but he moved the car to the side.

Delouth drove into the driveway, and Green rolled her car window down to open the gate. Halley asked her, "'Who are you guys? I've never seen you guys here before. Where are you guys from?'" Green understood he was asking "what hood are you from or do you guys gang bang," and she said, "we don't gang bang. I live here." The gate wouldn't open, and Green got out of the car and tried again to open it. Halley got out of

his car and asked Green who Delouth was, and she explained, “[t]hat’s just my baby daddy. . . . we don’t gang bang.” Halley replied, “I don’t give a fuck,” and kept asking over and over where Green and Delouth were from, meaning what gang were they from. She took that as a threat, and repeated that they had “no gang ties, nothing.” Halley said that he had never seen Green before, and “this is 6-0. I’ll have you move up out of my neighborhood,” and Delouth “needs to get the fuck up out of here too.” Green knew her apartment was in Rolling 60’s territory, but she responded, “I don’t give a fuck.”

Green’s back was turned. She heard Halley say something and a woman punched Green in the face, and she fought back. A third woman joined in, and all three women fell to the floor; four men started “stomping” on Green, and she heard Halley say, “yeah, get that bitch. Whip her ass. Check her pockets.” When Delouth got out of the car and tried to pull the third woman off Green, three men grabbed Delouth from behind and dragged him to the grass with his arms over his head. She could see they were men, but not who they were. The men went through her pockets, took her cell phone and her chain, and ripped her clothes, exposing her breasts. She felt kicks to the back of her head. Green heard Ford say, “[g]o in his car. Get his keys. Check the car. Take their shit.”

Green was able to get up and saw that both of her children were crying in the car. She saw Delouth lying on the grass and trying to get up, and “a black guy just kicked him dead in the mouth.” Halley was egging the men on, saying, “yeah, get them. Check his pockets. Take his chain,” and he kicked Delouth. Green walked onto the grass, “yelling stop. Please stop. We don’t bang. We’re not into that. He doesn’t bang. I don’t bang. I live here.” Ford then walked toward her and said, “I don’t give a fuck. You guys need to go.” Green tried to help Delouth up, but he was going in and out of consciousness. She got him up and put him in the driver’s side of the car. Green put her head in the car window and asked her screaming six-year-old if anyone hit him, and Ford walked up with a smirk, and said, “yeah, you all need to go.” Ford said, “Give that nigger his keys,” and another man wiped the keys off and threw them onto the car seat. Her son told her,

‘Mommy, they took your purse. They took your purse. They took your stuff,’” and she saw those things were missing.

Delouth started the car. His mouth was “horrible. There’s blood everywhere. He can’t see.” Green told him to get in the passenger seat and let her drive, but he kept saying, “no, get in.” Meanwhile, Ford kept talking to Green, and she told him to leave her alone and let her check on her son. Ford stepped back, said, ““Oh, you think this is a game? We don’t fuck around,”” and “This 6-0, we don’t play,” took off his watch, raised his hand, and backhanded her on the back of her head by her ear. Green straightened up and he hit her again with an open hand. Ford followed her as she walked to the front of the car and hit her again, and again as she was getting in on the passenger side.

Delouth drove three blocks and had to pull over, unable to continue. Green drove him to Kaiser, where they spent four or five hours getting him medical care; she was in pain, but refused medical attention. Her mother picked up the kids from the hospital, and when Green and Delouth left they went directly to the police station to make a report. She told the police what happened and described the attackers, including Ford and Halley. Green remembered that she was asked what color their eyes were. She did not answer, but she thought Nathaniel did.

Four days later, on June 17, Green spoke to police at Delouth’s house. She remembered telling the officers that Ford had “light green eyes.” She believed she had seen Ford’s eyes and Delouth had confirmed the next day that they were green; she also said that Delouth told her in the parking lot of the hospital that he thought Ford had green eyes. She and Delouth had numerous conversations about Ford. At the June 17 interview, Green made an identification of Halley from a photographic lineup, among several she was shown. She looked at the photograph for more than three minutes before selecting it, saying at the preliminary hearing that she “was more than positive.” She wrote: ““The person identified in Picture 6 was the person that assaulted me, punching, kicking. Sent two girls to jump and steal my belongings. He was saying, “That bitch. This is my hood, and I’ll have you move out of my hood.””” Four days later at another interview, Green identified Ford in another photographic lineup. She wrote: ““The

person, No. 4, Mr. Ford, was the person that backhanded my face and kicked and pulled my hair and took his watch off and continued to hit me in the head and face. As the attack was going on, he had the other guys go into my boyfriend's car and took my purse, keys and cell phone. He beat me like I was a man.” She did not talk to Delouth about the photographic lineups.

Green had lived in the apartment about three months, and knew it was a Rolling 60's area. Ford looked different now, because he was wearing glasses and was about 100 pounds thinner. Green identified Halley and Ford in court as the men who had attacked her.

Delouth testified that on June 13, 2011, when Halley got out after moving his car, he said to Green, ““You know where the fuck you at because you're in fucking 60's neighborhood. This is my motherfucking neighborhood.”” After the two women attacked Green, Delouth went to break up the fight and was dragged over to a grassy area by Halley and someone else, where Ford stood over him while he was beaten. His glasses were broken, and someone reached into his pockets and took his gold chain, cell phone, money clip, and identification and bank cards. When he was kicked hard in the face, he “kind of like blacked out,” going in and out of consciousness. He had a few stitches put in his mouth, his left eye was completely closed, his other eye was blackened, he had knots on his forehead, upper and lower lips and behind his ear, his cheek was swollen, and he had scratches on his neck. His right pinkie finger “was like fractured.”

Delouth was not sure how long he was at the hospital because he was under pain medication. He got to the police station at around 3:00 a.m., feeling groggy. Four days later, detectives came to his house; he was still in shock. With Green in a different room, Delouth was shown several different photographic lineups. He selected a photograph, writing: ““The person in No. 6 started the whole fight, and he banged on us. He and two other females jumped my kids' mother, and then when I tried to break that up, No. 6 and a large group of other dudes beat me until I was unconscious and bleeding from my mouth, and he stole my chain and cell phone.”” He saw that person in court; it was Halley. At the later interview eight days after the assault, he selected from a six-pack a

photograph of Ford, whom he identified in court. He wrote next to Ford's photo that Ford "engaged the whole attack," cheering on those who were attacking Green and Delouth, "repeatedly kicking me in the face while I was down on the grass and shouting, 'Stay down, nigger. Stay down.'" Delouth also wrote that Ford took off his watch and slammed Green four or five times; her head hit the car and "she looked faint and got teary eyed."

Delouth thought he had seen Ford before, at a car show. Ford was wearing glasses in court, but he was not wearing glasses that day, and Delouth had noticed Ford's green eyes when he drove into the driveway. Asked about his testimony at the preliminary hearing that he had not been in a position to notice Ford's eye color, and that Green had told him that Ford had green eyes, Delouth said he was not sure that was correct, and he could not remember. He and Green talked about Halley and Ford in the four days after the attack before their first interview with the police, but they did not discuss the photographs before they identified the defendants.

The investigating officer, Los Angeles Police Department (LAPD) Officer Miguel Gutierrez, testified that he prepared the photo lineups before the follow-up interviews with Delouth and Green. The victims were separated when they made the identifications. Both Halley and Ford told Officer Gutierrez that they were at the location at the time of the offenses.

Ford's defense counsel called the LAPD officer who had arrested him, who explained his preparation of the six-packs, and whose follow-up investigation form had stated that Ford had brown eyes, although Green had told him that she now remembered that Ford's eyes were green. The officer who took the initial report from Green and Delouth at the police station testified that the report stated that Ford's eye color was "unknown at the time." He had checked "no" whether there were any serious injuries. The owner of a long-haul trucking company where Ford had worked as a driver from 2009–2011 testified that Ford wore glasses, although on cross-examination he admitted that Ford did not wear glasses in a DMV photograph from that time, and in a photograph from 2007. Akim McLyn, who lived with Ford and had a child with him, testified that he

had worn glasses for the last five years, and never wore jewelry. Ford had a niece who lived in the apartment building in front of which the offenses occurred.

Halley's defense counsel called the organizer of a family youth center that provided after-school programs with contracts from the city's gang reduction program, who testified that Halley's daughter attended the program, and Halley volunteered there and participated in anti-gang activities.

The jury found Halley and Ford guilty on all counts and found true the allegations, although on count 3 the jury found Ford guilty of simple assault only. Halley received a total sentence of six years, and Ford was sentenced to a total of 16 years. Both men filed timely notices of appeal.

DISCUSSION

I. CALCRIM No. 315 Is Not Unconstitutional

Ford argues (with Halley joining) that the instruction given to the jury regarding eyewitness identification is unconstitutional, because it includes, as one of 14 questions for the jury to consider in evaluating eyewitness testimony: "How certain was the witness when he or she made an identification?" No objection was made at trial, but we nevertheless review the instruction to determine if it affected Ford and Halley's substantial rights, resulting in a miscarriage of justice and making it reasonably probable that Ford and Halley would have obtained a more favorable result if the instruction had not been given. (*People v. Elsey* (2000) 81 Cal.App.4th 948, 953, fn. 2.)

The jury was instructed with CALCRIM No. 315, as follows: "You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. [¶] In evaluating identification testimony, consider the following questions: [¶] Did the witness know or have contact with the defendant before the event? [¶] How well could the witness see the perpetrator? [¶] What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation? [¶] How closely was the witness paying attention? [¶] Was the witness under stress when he or she made the observation? [¶] Did the witness give a description

and how does that description compare to the defendant? [¶] How much time passed between the event and the time when the witness identified the defendant? [¶] Was the witness asked to pick the perpetrator out of a group? [¶] Did the witness ever fail to identify the defendant? [¶] Did the witness ever change his or her mind about the identification? [¶] *How certain was the witness when he or she made an identification?* [¶] Are the witness and the defendant of different races? [¶] Was the witness able to identify other participants in the crime? [¶] Was the witness able to identify the defendant in a photographic or physical lineup? [¶] Were there any other circumstances affecting the witness's ability to make an accurate identification? [¶] The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty.” (Italics added.) Ford argues that telling the jury to consider the eyewitnesses' level of certainty was error.

The trial court had no sua sponte duty to delete or alter the language regarding certainty. (*People v. Ward* (2005) 36 Cal.4th 186, 213.) Our Supreme Court has rejected an argument similar to Ford's in *People v. Johnson* (1992) 3 Cal.4th 1183, 1231–1232, holding that it was not error to instruct on the certainty factor, even though an expert witness had testified that a witness's certainty is not positively correlated with accuracy of identification. The Court has also held that an eyewitness identification instruction should list “in a neutral manner, the relevant factors supported by the evidence,” without taking “a position as to the impact of each of the psychological factors listed,” so as to avoid adopting a particular theory or particular expert's views. (*People v. Wright* (1988) 45 Cal.3d 1126, 1141, italics omitted.) It is not error to give an instruction including the degree of eyewitness certainty as a neutral factor for the jury to consider. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 561–562; *People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1302–1303, disapproved of on another ground in *People v. Martinez* (1995) 11 Cal.4th 434, 452.)

In the face of these rejections of his argument, Ford asserts that recent “research has shown that the certainty with which the witness makes the identification has little

correlation with its accuracy.” That research is not in the appellate record, Ford has not requested judicial notice, and we will not disregard our Supreme Court’s guidance on the basis of brief descriptions of selective research. We do not find the out-of-state cases he cites to be directly in conflict or persuasive, and none of those cases finds a violation of the defendant’s substantial rights.

In any event, any error was harmless. As required by *People v. Wright, supra*, 45 Cal.3d 1126, the standard instruction given was neutral regarding the effect of a witness’s certainty. Green and Delouth corroborated each other’s identifications in photographic lineups and in court. Ford and Halley both admitted they were at the scene. Further, the identifications were vigorously challenged in cross-examination by Ford’s and Halley’s trial counsel, both of whom also argued in closing that the identifications were “quite fallible” and the defendants were “pure victims of misidentification,” focusing on the unreliability of eyewitness identification, the inconsistencies in describing Ford’s eye color, the chaotic scene at the apartment building, issues with the photographic lineups, and differences between Green’s and Delouth’s descriptions of their assailants. Even the prosecutor acknowledged the inconsistencies in Green’s and Delouth’s identifications, and did not argue that the certainty of the identifications made them more reliable. There has been no showing that the jury would have reached a result more favorable to Ford and Halley if the certainty factor had been absent from the instruction. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 824, 17 L.Ed.2d 705, 710]; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

We also reject the claim that Ford’s and Halley’s trial counsel were ineffective for failing to call an expert witness to testify “on the psychology of eyewitness identification to account for Green and Delouth’s false certainty.” For counsel to be found ineffective, the defendants must demonstrate that their performance fell below an objective reasonableness standard and that but for that deficient performance, there was a reasonable probability of a different result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688 [104 S.Ct. 2052, 80 L.Ed.2d 674].) First, Ford and Halley have not shown that competent counsel would necessarily have consulted an expert. Second, counsel

cannot be faulted for failing to present the evidence when the California Supreme Court has held that the failure to offer “exculpatory expert identification testimony” was not prejudicial error or ineffective assistance: “Expert testimony on the psychological factors affecting eyewitness identification is often unnecessary. For this reason, the trial court’s discretion regulating its use is rarely disturbed. [Citation.]” (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 995–996.) Third, as we have explained above, Ford and Halley have not demonstrated that there is a reasonable probability of a different result if such testimony had been presented, where the witnesses’ certainty was not a central issue.

II. Substantial Evidence Existed of Great Bodily Injury

Halley argues, joined by Ford, that there was insufficient evidence to support the jury’s true finding that Delouth suffered great bodily injury. Under section 12022.7, subdivision (f), “‘great bodily injury’ means a significant or substantial physical injury.” The jury was instructed with that definition, followed by “[i]t is an injury that is greater than minor or moderate harm.” Whether Delouth suffered great bodily injury “is not a question of law for the court but a factual inquiry to be resolved by the jury. [Citations.]” (*People v. Cross* (2008) 45 Cal.4th 58, 64.) We review the trial record in the light most favorable to the jury’s finding, and we do not reverse the judgment if it is reasonably justified by the circumstances, even if we would reach a different conclusion. (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60.)

Great bodily injury is “substantial injury *beyond* that inherent in the offense” (*People v. Escobar* (1992) 3 Cal.4th 740, 746.) The injury need not be so grave as to cause the victim “‘permanent,’ ‘prolonged,’ or ‘protracted’” bodily damage. (*Id.* at p. 750.) “Proof that a victim’s bodily injury is “great”—that is, significant or substantial within the meaning of section 12022.7—is commonly established by evidence of the severity of the victim’s physical injury, the resulting pain, or the medical care required to treat or repair the injury.” (*People v. Cross, supra*, 45 Cal.4th at p. 66.) “Abrasions, lacerations, and bruising can constitute great bodily injury.” (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1042.) “[L]oss of consciousness . . . is a ‘serious bodily injury,’”

which is ““essentially equivalent”” to ““great bodily injury”” as used in section 12022.7. (*People v. Wade* (2012) 204 Cal.App.4th 1142, 1149.)

The evidence included testimony that Delouth was dragged to the grass where, with Ford standing above him, Halley and several men kicked Delouth, including in the mouth, breaking his glasses. He was going in and out of consciousness and bleeding heavily, and drove only three blocks before he had to stop. At the hospital, Delouth was given pain medication and received stitches in his mouth. His left eye was swollen closed, his right eye was blackened, and he had knots on his forehead, his lips, and behind his ear. His cheek was swollen, he had scratches on his neck, and his right pinkie finger was fractured. The jury reasonably found that Delouth’s injuries were significant or substantial so as to constitute great bodily injury.

III. Remand for Resentencing In Ford’s Case Is Necessary

First, Ford argues and respondent concedes that it was error for the trial court to impose two five-year enhancements for violent felony convictions, pursuant to section 667, subdivision (a). Ford was charged with eight enhancements under section 667 subdivision (a), all with the same case number and conviction date. Seven were for robbery, and one was for assault with a firearm pursuant to section 245, subdivision (a)(2). Ford waived his right to jury trial on the prior allegations, and the court found them true. At sentencing, the court stated: “For the two priors, violent felony convictions as alleged in Penal Code section 667(a), I impose ten years, five years for each” This was an unauthorized sentence. Section 667, subdivision (a)(1), provides for “a five-year enhancement for each such prior conviction *on charges brought and tried separately*,” to run consecutively. (Italics added.) All agree that the prior charges were not brought separately, and so only one five-year enhancement was authorized. We therefore strike one of the two five-year enhancements, and remand to give the court the opportunity to reconsider the sentence so long as the total term is not greater than the original total sentence. (*People v. Castaneda* (1999) 75 Cal.App.4th 611, 614.)

Respondent also concedes that the abstract of judgment incorrectly states that Ford was convicted of assault by means likely to produce great bodily injury in count 3. On

remand, the abstract of judgment should be corrected to reflect that the jury convicted Ford of misdemeanor simple assault, which should appear under number 13, “Other orders.”

Finally, Ford’s abstract of judgment should be amended to reflect a total restitution amount to Green of \$3,220, which is the amount orally imposed by the trial court, to be paid jointly and severally by Ford and Halley. Although Ford’s minute order states that the total restitution to Green is \$3280, the court’s oral pronouncement controls. (*People v. Farrell* (2002) 28 Cal.4th 381, 384, fn. 2.)

DISPOSITION

Earl Albert Ford's sentence on count 3 is vacated, one of the two five-year enhancements is stricken, and the matter is remanded for resentencing for the trial court to reconsider the sentence. The court shall amend the abstract of judgment accordingly. The trial court shall also amend Earl Albert Ford's abstract of judgment to reflect that Earl Albert Ford was convicted of simple assault in count 3, and a total restitution amount to Eva Green of \$3,220 to be paid jointly and severally. The superior court is directed to prepare an amended abstract of judgment reflecting these modifications and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

MILLER, J.*

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