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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.

DERRICK BARTULIO,

Defendant and Appellant.

B284263

(Los Angeles County
Super. Ct. No. LA083958)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael V. Jesic, Judge. Affirmed.

Melissa L. Camacho-Cheung, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Derrick Bartulio appeals from a judgment of conviction following a jury trial. The jury found defendant guilty of violating one count of Penal Code¹ section 243, subdivision (d), battery with serious bodily injury, and one count of violating section 245, subdivision (a)(4), assault by means of force likely to produce great bodily injury. With respect to count 2, the jury found that defendant personally inflicted great bodily injury on the victim, Douglas V. (§ 12022.7, subd. (a).) Defendant contends the trial court erred by failing to provide a unanimity instruction. We affirm.

II. BACKGROUND

A. *Prosecution Case*

1. Douglas V.'s Testimony

On July 15, 2016, Douglas was at the Anejo Cantina and Grill with Jesus Villanueva and another man. The bar was full, so after waiting 30 minutes, the men left. When Douglas was going down the stairs, defendant hit him from behind on the left side of his face. Douglas was struck a second time and fell to the ground, breaking his foot. He lost consciousness for two or three minutes. After getting up, Douglas saw defendant running. Jesus Villanueva called the police. Douglas and his two companions had never seen defendant before.

¹ Further statutory references are to the Penal Code.

Douglas and his two companions followed defendant to a bus stop to prevent him from evading police. Defendant then attacked Douglas again, hitting him more than five times. Douglas went to the ground. Douglas eventually made his way to a parking lot at a Pavilions, where he spoke with the police who had arrived. Douglas's face was swollen, his left eye shut, and his nose broken.

2. Rosa Gavinet's Testimony

On July 15, 2016, Gavinet was walking up the stairs of the Anejo Cantina and Grill. She saw Douglas and two individuals leaving the bar. She then encountered defendant further up the stairs, who was yelling, "if you want to be with a real man, you should be with an Italian man because they have bigger balls and a bigger penis. Don't be with an Armenian man."

Gavinet saw defendant talk to Douglas and then punch him in the face. Douglas fell to the ground, and defendant walked away. She called 911. Gavinet did not see Douglas or his companions attack defendant. Douglas's companions helped him get up, and they followed defendant with Douglas limping. The three men kept a distance of about five to six feet from defendant. Gavinet followed.

Defendant occasionally turned back to swing at the three men. At a bus stop, defendant attempted to get on a bus, but the three men prevented him from leaving on the bus. At the bus stop, defendant lunged at Douglas, striking him again. Gavinet did not see the three men strike defendant.

Defendant next made his way to a Pavilions parking lot with the three men following. Defendant again struck Douglas. At the parking lot, the police arrived and arrested defendant.

C. Defense Case

Defendant testified to the following. On July 15, 2016, after having multiple beers, defendant was waiting for a friend, Toni Hernandez, to pick him up at the Anejo Cantina and Grill. There, defendant exchanged some words with a group of Armenians. Defendant bumped into a table and someone said: “Fuck you, puta.” Defendant made a joke about deportation, and the individuals at the table called him “puta” again. Defendant identified Douglas and his two companions as the individuals at the table. The owner told defendant to leave.

As he was leaving, defendant made a comment to Gavinet about how she should stay away from Armenians. When defendant reached the bottom of the stairs, he felt someone come up from behind and gouge his eye out. Defendant turned around, grabbed his assailant’s shoulder or collar, and punched him in the face. One person was laughing while another person was cursing at defendant in Spanish. Defendant then backed away, saw a bus coming, and made for the bus.

Defendant reached the bus stop and backed onto the bus. Three men chasing him congregated at the door of the bus. Defendant decided to get off the bus by plowing through the three men. He then headed towards some fire trucks down the street.

At a point not far from the bus stop, Douglas came at defendant, who blocked his punch and hit Douglas in the arm. Someone then used pepper spray on defendant. Defendant heard

his friend calling his name. At that time, someone jumped on defendant's back, and they both fell to the ground. Someone ran up and kicked defendant in the head. Defendant grabbed an assailant's feet and threw him against the wall. Defendant got up and went to his friend's car parked at a Pavilions parking lot.

Defendant's friend, Hernandez, testified that she saw three men chasing defendant at the bus stop, one of the men grab around his neck, the two of them go down, and someone kick defendant's head.

The police arrived and arrested defendant. After the incident, defendant had an eye infection, a concussion, and a scrape on his knee.

III. DISCUSSION

Defendant argues the trial court erred in failing to give a unanimity instruction (CALCRIM No. 3500) because three discrete assaults and batteries occurred: (1) at the Anejo Cantina and Grill stairs; (2) by the bus stop; and (3) on the sidewalk near Pavilions. We review de novo whether failure to give an instruction was error. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 568 (*Hernandez*).)

"In a criminal case, a jury verdict must be unanimous," and "the jury must agree unanimously the defendant is guilty of a *specific* crime." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).) "This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.'" (*Ibid.*; *People v. Selivanov* (2016) 5 Cal.App.5th 726, 751-752 (*Selivanov*).) The

trial court has a sua sponte duty to give a unanimity instruction if the prosecution presents evidence of multiple acts to prove a single count. (*Russo, supra*, 25 Cal.4th at p. 1132.)

There are exceptions to this rule. “[N]o unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises ‘when the acts are so closely connected in time as to form part of one transaction’ [citation]” (*People v. Jennings* (2010) 50 Cal.4th 616, 679 (*Jennings*); *Selivanov, supra*, 5 Cal.App.5th at p. 752.) And no unanimity instruction is needed “if the defendant offers the same defense or defenses to the various acts constituting the charged crime. [Citation.]” (*Jennings, supra*, 50 Cal.4th at p. 679; accord, *People v. Williams* (2013) 56 Cal.4th 630, 682; *Selivanov, supra*, 5 Cal.App.5th at p. 752; *Hernandez, supra*, 217 Cal.App.4th at p. 572.)

The continuous-course-of-conduct exception applied in *Selivanov* where the defendants were charged with and convicted of embezzlement for unauthorized use of credit cards on multiple occasions and at different locations. (*Selivanov, supra*, 5 Cal.App.5th at pp. 740, 750 [describing use of cards for floral arrangements, gift cards, clothing, restaurants, and bowling alleys].) The court held that no unanimity instruction was necessary because the parties characterized the charges in their opening statements “as a single, continuing course of conduct.” (*Id.* at p. 752.) And the defendants “offered essentially the same defense to all of the acts”—that the charges were for business expenses. (*Id.* at p. 753; see also *People v. Percelle* (2005) 126 Cal.App.4th 164, 182 [no unanimity instruction needed where defendant convicted of one count of attempted use of counterfeit access card; defendant visited store twice in one hour].)

The record shows that defendant's actions took place in a short window of time as one continuing course of conduct, not discrete acts. As described by both Douglas and defendant, the events flowed one to another in a circumscribed area—from the bar to the bus stop to the nearby parking lot—and in a short period of time without interludes.

As in *Selivanov*, the parties' counsel described the evening as one continuing course of conduct. The prosecutor's closing argument confirmed this view of the events: "For those [two] counts, don't go to each separate incident. We've heard of two to three incidents in front of Anejo, by the bus stop, in front of the . . . building next to the Pavilions. Each count looks at the totality of the circumstances. So you look at all the evidence, and you apply all the evidence of this case to one count and the second count. *But don't look at them as separate incidents.*" (Emphasis added.) Defense counsel also described a continuing course of conduct, not a series of discrete acts, saying for example that defendant "just wants to get away and be done with this incident, but they won't let it go. They continue to follow him."

In addition, defendant contends that the instruction was necessary because he offered different defenses—self-defense to the events at the bar and bus stop and lack of sufficient evidence to the conduct at the parking lot. We disagree.

Defendant offered one defense: self-defense. During closing argument, defense counsel asserted: "This is something that [Douglas] and his friends started. And [defendant], outnumbered like he was, felt like he had to protect himself. That is when he hit back. So self-defense." Defense counsel's discussion of the reasonable doubt standard occurred in the

context of asking the jury to disbelieve the prosecution's version of events.

Even if distinct crimes occurred, if there is no danger that some jurors would find defendant committed one crime while others would find he committed the other crime, then a unanimity instruction is not necessary. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199 [no instruction needed where defendant asserted one defense because “there was no evidence here from which the jury could have found defendant was guilty of the robbery in the car but not the earlier one” given defendant’s defense that he was asleep].) Here, there is no evidence from which a juror could have found that defendant acted in self-defense at the bar but not at the bus stop or parking lot. Based on the record, it is “inconceivable that a juror would believe” that defendant acted in self-defense at the bar but then, moments later, became the aggressor. (*Id.* at p. 1200.) The evidence of the continuous flow of events supports only the conclusion that defendant acted in self-defense from the beginning through to the end, or that at a minimum he committed battery or assault at the bar. The jury by rendering its guilty verdict clearly rejected defendant’s entire defense. (*Hernandez, supra*, 217 Cal.App.4th at p. 572.) We find no instructional error.

IV. DISPOSITION

The judgment is affirmed.
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SEIGLE, J.*

We concur:

BAKER, Acting P.J.

MOOR, J.

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