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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. QUAYSHAWN L. JENKINS, Defendant and Appellant.	B230712 (Los Angeles County Super. Ct. No. MA044720)

APPEAL from a judgment of the Superior Court of Los Angeles County. Christopher G. Estes, Judge. Affirmed.

Ava R. Stralla, 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, Senior Assistant Attorney General, Stephanie A. Miyoshi and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Quayshawn Jenkins was convicted, following a jury trial, of one count of kidnapping to commit robbery in violation of Penal Code[1] section 209, subdivision (b)(1), one count of second degree robbery in violation of section 211 and one count of assault with a deadly weapon in violation of section 245, subdivision (a)(1). The jury found true the allegations that appellant personally used a deadly and dangerous weapon in the commission of the kidnapping and robbery within the meaning of section 12022, subdivision (b)(1) and personally inflicted great bodily injury in the commission of the assault within the meaning of section 12022.7, subdivision (a). The trial court sentenced appellant to life in prison with the possibility of parole for the kidnapping conviction plus one-year for the weapon enhancement plus three years for the assault conviction plus three years for the great bodily injury enhancement. Sentence for the robbery conviction was stayed pursuant to section 654.

Appellant appeals from the judgment of conviction, contending that there is insufficient evidence to support the kidnapping conviction or the great bodily injury enhancement. He further contends that the definition of great bodily injury in section 12022.7 is unconstitutionally vague on its face and as applied to him. We affirm the judgment of conviction.

Facts

On January 25, 2009, Juan Bautista, a delivery man for Domino's Pizza, went to a house on Stable Drive in Palmdale to deliver pizza. He rang the doorbell of the house and identified himself. As the door slowly opened, four masked people approached Bautista from behind, holding objects which resembled guns. One of the individuals told Bautista to go into the house. Bautista said, "What do you want? The pizza? Take the pizza." He told them they could take everything. They insisted that Bautista go inside the house. He complied.

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

Bautista moved about 8 to 10 feet, to the inside of the house. The house was empty and there were no lights inside. Bautista got down on his knees. One of the individuals told him to remove everything from his pocket. He complied, placing his wallet, keys and cell phone on the floor. One of the individuals asked Bautista if that was everything he had. He replied that it was. Another individual grabbed the items. Bautista was hit in the face, head and shoulder by shots from the robbers' BB guns. The shooters were about six feet away from him when they fired. After firing, the robbers fled, leaving Bautista alone in the house.

Bautista was able to leave the house. He used someone's cell phone to call police. Los Angeles County Sheriff's Deputy Robin Soukup came to the location. She noticed Bautista's injuries. Deputy Soukup searched the house and found both copper and red plastic BB's in the entrance area where Bautista said that he was shot and robbed. She also discovered that two upstairs windows were broken. Each had a BB lodged in it.

On January 26, 2009, a groundskeeper of the near-by Casablanca Apartments found a black BB gun and BB's in a plastic bag near some trash bins. The groundskeeper turned the items over to deputies.

That same day, appellant was interviewed by Deputy India Inez. Appellant confessed to participating in the crimes along with his sister Tatiana, Christopher Smith, Master Lincoln Johnson and Destiny. The night of the robbery, Smith and Destiny discussed having a pizza delivered to a vacant house across the street from appellant's residence. Destiny ordered the pizza and everyone went inside the vacant house. When the pizza delivery man arrived, appellant went outside with Smith. Smith said, "This is a robbery." When the delivery man attempted to run away, Smith grabbed him, pointed a gun at his head and forced him inside the house. Smith told the delivery man to get on his knees and empty his pockets. Johnson picked up the wallet and pizza and Tatiana picked up the keys. Everyone but Smith fled. Smith stayed behind briefly and shot the delivery man several times, then left.

On January 27, 2009, a resident of the Casablanca Apartments found a set of keys and turned them over to deputies. The keys belonged to Bautista.

A search of appellant's residence recovered a clear plastic air-soft gun, a BB gun, and some copper and red plastic BB's.

About two weeks after the robbery, Bautista received medical treatment to remove a copper BB lodged in his cheek from the shooting.

In his defense, appellant called his mother Lynette Jenkins. She testified that along with appellant, about 15 people lived in her house. Prior to January 25, 2009, Smith stayed in the loft area of the house for about a week. The loft was an open area with no doors. This was the area where the BB gun was found. Appellant had his own bedroom, which he did not share with anyone. Lynette had never seen appellant with any type of gun.

Discussion

1. Kidnapping

Appellant contends that his kidnapping conviction must be reversed because the evidence shows that the victim was moved only a trivial distance and the kidnapping was incidental to the robbery. We do not agree.

The crime of kidnapping consists of moving a person against his will by force or fear. (§ 207, subd. (a).)

Appellant was convicted of kidnapping to commit robbery. A defendant may be convicted of kidnapping to commit robbery (or other specified felonies) only "if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in," the robbery. (§ 209, subd. (b)(2).)

A "jury must 'consider[] the "scope and nature" of the movement,' as well as 'the context of the environment in which the movement occurred.' [Citations.] This standard suggests a multifaceted, qualitative evaluation rather than a simple quantitative assessment. Moreover, whether the victim's forced movement was merely incidental to the [felony] is necessarily connected to whether it substantially increased the risk to the

victim. 'These two aspects are not mutually exclusive, but interrelated.' [Citation.]" (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1151-1152.)

There are various circumstances which should be considered in determining whether the movement substantially increased the risk of harm to the victim, including "whether the movement decreases the likelihood of detection, increases the danger inherent in a victim's foreseeable attempts to escape, or enhances the attacker's opportunity to commit additional crimes." (*People v. Dominguez, supra,* 39 Cal.4th at p. 1152.)

No minimum distance is required to satisfy the asportation requirement. (*People v. Dominguez, supra*, 39 Cal.4th at p. 1152.) "Measured distance, therefore, is a relevant factor, but one that must be considered in context, including the nature of the crime and its environment. In some cases a shorter distance may suffice in the presence of other factors, while in others a longer distance, in the absence of other circumstances, may be found insufficient." (*Ibid*.)

Here, the robbers first encountered Bautista at the front of the house. The robbers forced him at gunpoint to move inside the house. The movement from the public space at the front door to the private area inside the house decreased the likelihood that the robbers would be detected, reduced Bautista's ability to escape and enhanced the robbers' ability to commit other crimes. All of the property taken in the robbery was on Bautista's person when he approached the house, so moving him inside the abandoned house could not have been for the purpose of finding more of Bautista's property to steal. Based on these facts, a jury could reasonably have found that Bautista's movement was not incidental to the robbery and increased the risk of harm incidental to the robbery. (See, e.g., *People v. Corcoran* (2006) 143 Cal.App.4th 272, 276, 279-280 [movement of victim about 10 feet from public area to enclosed back office sufficient to show kidnapping for robbery]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 167 [movement of victim about nine feet from front counter of store to small back room]; *People v. Smith* (1995) 33 Cal.App.4th 1586, 1594 [victim moved 40 to 50 feet from driveway open to public view to camper behind house].)

Appellant cites a number of cases to support his claim that the movement of Bautista was too trivial to support a kidnapping for robbery conviction. Many of these cases date from the 1970's. At that time, a conviction for kidnapping to commit robbery (and other specified felonies) required that the movement "substantially" increase the risk of harm. (See *People v. Daniels* (1969) 71 Cal.2d 1119, 1139-1140.) Section 209 was amended in 1997, and there is no longer a requirement for a "substantial" increase in the risk of harm. (*People v. Martinez* (1999) 20 Cal.4th 225, 232, fn. 4.) Thus, cases which predate the 1997 amendment are not helpful.

The two post-1997 cases cited by appellant are not helpful. In *People v. Hoard* (2002) 103 Cal.App.4th 599, the victims were moved to the back of the store and confined there to give the robber free access to the store's jewelry. Thus, the victims were only moved around within the store. (*Id*. at pp. 606-607.) In *People v. Washington* (2005) 127 Cal.App.4th 290, the victims were moved inside the bank to the vault to get money, and thus the movement was merely incidental to the robbery. (*Id*. at pp. 294, 300.)

2. Great bodily injury enhancement

Appellant contends that there is insufficient evidence to support the jury's true finding on the great bodily injury enhancement because Bautista's injury was not significant or substantial. We see sufficient evidence.

Whether an injury is "great bodily injury" within the meaning of section 12022.7 is a question of fact. "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." (*People v. Escobar* (1992) 3 Cal.4th 740, 750.)

Section 12022.7, subdivision (f), defines great bodily injury as "a significant or substantial physical injury." Great bodily injury does not require that the victim suffer permanent, prolonged, or protracted disfigurement, impairment or loss of bodily function. It does require proof of a substantial injury beyond what is inherent in the offense itself. (*People v. Escobar* (1992) 3 Cal.4th 740, 749-750.) Abrasions, lacerations, and bruising

can constitute great bodily injury. (*Id*. at p. 752; see also *People v. Nitschmann* (1995) 35 Cal.App.4th 677, 680, 683 [large gash on face and profuse bleeding]; *People v. Sanchez* (1982) 131 Cal.App.3d 718, 734 [multiple abrasions and lacerations, swelling and bruising]; *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 836 [bruises associated with pain].) Gunshot wounds to soft tissue also constitute great bodily injury. (*People v. Mendias* (1993) 17 Cal.App.4th 195, 206 [unextracted bullet fragments and soft tissue injury with no pain constituted great bodily injury]; see *People v. Lopez* (1986) 176 Cal.App.3d 460 [great bodily injury occurred where one victim was shot in buttock, another in thigh; there was no evidence that injuries required medical attention]; *People v. Wolcott* (1983) 34 Cal.3d 92 [great bodily injury occurred where victim shot in calf, doctor removed one fragment but left others, no stitches were required and victim went to work the next day].)

Here, the evidence showed that Bautista was shot three times and suffered injuries to his cheek, shoulder and head. The jury saw photographs of Bautista's injuries. The injuries to his head and shoulder were minor. Bautista testified that a BB lodged in his cheek. His cheek bothered him. After about two weeks, he went to the doctor. The doctor made an incision and removed the BB. It left a little scar. Bautista felt fine at the time of trial. The offense in this case was assault with a firearm or by means of force likely to produce great bodily injury. The offense does not require that the victim suffer any injury. Thus, Bautista's injuries are beyond those inherent in the offense. This is sufficient evidence to support a great bodily injury enhancement.

Appellant cites a number of cases where courts have held that injuries more serious than appellant's constitute great bodily injury. This shows only that a range of injuries can constitute great bodily injury. It does not invalidate the finding in this case.

3. Vagueness

Appellant contends that section 12022.7, which defines great bodily injury, is unconstitutionally vague on its face and as applied to him in this case. Respondent

contends that appellant has forfeited this claim by failing to raise it in the trial court. We agree in part with respondent's forfeiture argument.

Appellant's claim that section 12022.7 is unconstitutionally vague on its face is not forfeited. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 ["defendant's claim that her probation condition was unconstitutionally vague and overbroad was not forfeited by her failure to raise it in juvenile court" because it presents a pure question of law].) His claim that it is vague as applied to him is forfeited. (*People v. Young* (2005) 34 Cal.4th 1149, 1202 [failure to request clarifying instruction forfeits claim].)

As appellant acknowledges, we have previously held that the phrase "great bodily injury" standing alone, is not vague. (*People v. Maciel* (2003) 113 Cal.App.4th 679, 685.) Appellant argued that our case is wrong because it relies on the fact that the phrase has been in long use without further definition. He contends that the United States Supreme Court in *Kolender v. Lawson* (1983) 461 U.S. 352 found a section of California's Penal Code vague even though it had enjoyed long use. Appellant reads *Maciel* very narrowly and *Kolender* quite broadly. We do not understand *Kolender* as invalidating the holding of *Maciel*. In any event, we decline appellant's invitation to depart from the holding of *Maciel*.

As the California Supreme Court has explained: "This court has long held that determining whether a victim has suffered physical harm amounting to great bodily injury is not a question of law for the court but a factual inquiry to be resolved by the jury. [Citations.] '"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." (*People v. Cross* (2008) 45 Cal.4th 58, 64.) "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." (*Id*. at p. 66.)

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.