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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. DANNY BELTRAN, Defendant and Appellant.	B249362 (Los Angeles County Super. Ct. No. BA399898)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, David C. Cook and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Danny Beltran appeals from the judgment after a jury convicted him of two counts of willful infliction of corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)), assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), and assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)), arising from two separate attacks on Yvonne Lara. He contends: (1) there was insufficient evidence of cohabitation; (2) there was insufficient evidence that he inflicted great bodily injury on Lara with respect to the second attack; (3) there was insufficient evidence that he used force likely to produce great bodily injury with respect to the second attack; and (4) the trial court erred in failing to instruct the jury on lesser included offenses. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Beltran and Lara dated and were in a sexual relationship for four years. He frequently physically abused her. Lara lived alternately at her parents' house and Beltran's house, "sometimes" staying at Beltran's house for "up to a couple weeks." She kept a toothbrush and a few changes of clothes there.

On June 29, 2012, Beltran and Lara were talking in his bedroom when he became agitated and started arguing with an imaginary person. Beltran then grabbed a golf club and swung it at Lara's head, striking her in the right temple. Lara managed to partially block the blow by raising her hands up to her face, and the golf club also struck her right index finger, breaking it and nearly severing the upper portion.

Beltran then accompanied Lara to the hospital and stayed with her while she received medical treatment. Her head wound required 12 stitches, and her finger, eight. Because she was afraid of how Beltran would react if she disclosed the attack, Lara told medical personnel that she had injured herself in a bike accident. After receiving medical treatment, Lara returned to stay at Beltran's house and departed sometime in the following few days.

On July 6, 2012, Lara returned to Beltran's house to retrieve a prescription for antibiotics. Beltran attacked her again: he pushed her to the ground, punched her multiple times on her arm, repeatedly hit her on the head, pulled her hair near her head

wound, and tried to remove her stitches. Some of the stitches became "loose" and her wound started to bleed.

Lara went to the hospital where medical personnel cleaned her head wound. Los Angeles Police Officer Crissantos Garcia interviewed Lara at the hospital. She told him Beltran had hit her with a golf club a few days prior and then attacked her again earlier that day. Officer Garcia observed that Lara had bruises on her arms and was bleeding from her head.

Beltran was charged with two counts of corporal injury on a cohabitant (counts one and two), assault with a deadly weapon (count three), and assault by means likely to produce great bodily injury (count four). Counts one and three were based on the June 29, 2012 attack with the golf club; counts two and four were based on the July 6, 2012 attack. It was further alleged that Beltran had personally inflicted great bodily injury on Lara under circumstances involving domestic violence (Pen. Code, § 12022.7, subd. (a) and (e).)

At trial, the prosecution introduced photographs of Lara's injuries into evidence. Photographs taken at the hospital on July 6, 2012 showed Lara's forehead and the front half of her scalp covered in blood. A photograph of Lara's right arm taken on July 10, 2012 showed severe discoloration from a large bruise. Officer Garcia testified that Lara told him that, on July 6, 2012, Beltran had pushed her to the ground and punched her multiple times. Los Angeles Police Officer Lydia Saiza testified that she had interviewed Lara on July 10, 2012, and Lara had said that Beltran hit her multiple times when she was on the ground during the July 6, 2012 attack.

Beltran was convicted on all counts and the enhancement allegations were found to be true. The trial court imposed a total prison term of 11 years, 4 months.

CONTENTIONS

Beltran contends there was insufficient evidence of cohabitation, and insufficient evidence he used force likely to produce great bodily injury or inflicted great bodily injury on Lara on July 6, 2012. Beltran also argues the trial court erred in failing to instruct the jury on offenses that were lesser than, and included in, counts two and four.

DISCUSSION

1. *There Was Sufficient Evidence of Cohabitation*

Penal Code section 273.5 provides that any person who willfully inflicts corporal injury resulting in a traumatic condition upon a cohabitant is guilty of a felony. (Pen. Code, § 273.5, subds. (a) and (b).) Beltran contends there was insufficient evidence to support his conviction for inflicting corporal injury upon a cohabitant in counts one and two because the evidence did not support a finding that he and Lara were cohabitants.

On review of the sufficiency of the evidence to support a criminal conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "In making this determination, the appellate court ' "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citations.]' " (*People v. Barnes* (1986) 42 Cal.3d 284, 303.)

The term "cohabitation" has been "broadly" interpreted to mean " 'an unrelated man and woman living together in a substantial relationship–one manifested, minimally, by permanence and sexual or amorous intimacy.' [Citation.]" (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1333.) "The element of 'permanence' in the definition refers only to the underlying 'substantial relationship,' not to the actual living arrangement." (*Id.* at p. 1334.) Factors that may be considered in determining whether persons are cohabitants include "[s]exual relations between the parties while sharing the same living quarters[,] [s]haring of income or expenses[,] [j]oint use or ownership of property[,] [w]hether the parties hold themselves out as husband and wife[,] [t]he continuity of the relationship[,] [and] [t]he length of the relationship.' " (*People v. Holifield* (1988) 205 Cal.App.3d 993, 1001 (*Holifield*).)

Beltran contends that he was not cohabitating with Lara because her primary residence was with her parents, there was no evidence they "shar[ed] income or expenses," there was no evidence of "joint use" of his property, they did not hold

themselves out as husband and wife, and their relationship lacked "continuity, commitment, and permanency." Although Beltran attempts to minimize his long-term romantic relationship with Lara, the evidence here was sufficient to establish they were living together in a substantial relationship characterized by "permanence and sexual or amorous intimacy." (*People v. Moore, supra,* 44 Cal.App.4th at p. 1333.)

Here, the evidence established that Beltran and Lara had a sexual relationship for four years, Lara lived with Beltran at his house for weeks at a time during those years, and she kept clothes and a toothbrush there. Although Lara's primary residence was with her parents, the fact that she "sometimes lived separately with other relatives similarly does not preclude a finding that [she and the defendant] were cohabitants at the time of the charged offenses. [Citations.]" (*People v. Taylor* (2004) 118 Cal.App.4th 11, 19.) For example, a person may cohabitate with two people at the same time "by maintaining two substantial relationships with two separate persons in two separate residences and dividing [her] time between the two." (*People v. Moore, supra*, 44 Cal.App.4th at p. 1334.)

In *Holifield,* the victim and the defendant had been in a relationship "off and on" for four years, and, during the three months before the assault, the defendant stayed in at least three other places for weeks at a time. (*Holifield, supra,* 205 Cal.App.3d at p. 995.) The defendant kept his clothing and personal effects both at the victim's residence and the other three residences, did not share income and expenses with the victim, and had " 'infrequent' " sexual relations with the victim. (*Id.* at pp. 995-996.) The Court of Appeal found there was sufficient evidence to support the finding that the couple was cohabitating. (*Id.* at p. 1002.)

Here, similar to *Holifield*, Beltran and Lara had a sexual relationship for four years and did not share income and expenses.[1] Furthermore, Lara also alternated

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[1] Beltran cites to Lara's testimony at the preliminary hearing that her relationship with Beltran was "on and off" for four years, and argues that his counsel should have introduced this evidence at trial. However, as demonstrated by *Holifield*, evidence that the defendant's relationship with the victim was "off and on" for the four years they

between living at Beltran's house and another residence, and kept clothing and personal belongings both at Beltran's house and the other residence. A quasi-marital relationship is not required to establish cohabitation. (*People v. Moore, supra,* 44 Cal.App.4th at p. 1333.) That Beltran and Lara had a sexual relationship for an extended period of time – the four years preceding the attacks – and lived together for substantial amounts of time during those years, was sufficient to support the finding that they were cohabitants.

2. *There Was Sufficient Evidence of Great Bodily Injury*

In count two, the jury convicted Beltran of corporal injury on a cohabitant and found that Lara had suffered great bodily injury as a result of the July 6, 2012 attack. Beltran argues there was insufficient evidence Lara suffered great bodily injury because his attack only caused her head wound to bleed while "all her stitches remained intact."

"Penal Code section 12022.7 provides for the imposition of enhanced punishment upon persons inflicting 'great bodily injury' during the commission of felonies. . . . " (*People v. Jaramillo* (1979) 98 Cal.App.3d 830, 836 (*Jaramillo*).) It provides that "[a]ny person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony . . . shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years." (Pen. Code, § 12022.7, subd. (e).) "Great bodily injury" is defined as "a significant or substantial physical injury." (*People v. Escobar* (1992) 3 Cal.4th 740, 746.) It is a "substantial injury *beyond* that inherent in the offense," but not necessarily a " 'permanent,' 'prolonged,' or 'protracted' disfigurement, impairment, or loss of bodily function." (*Id.* at p. 750.)

"A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description. Clearly it is the trier of fact that must in most situations make the determination." (*Jaramillo, supra,* 98 Cal.App.3d at p. 836.) Here, there were sufficient facts by which the jury could find that Lara had suffered

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were together is not dispositive: the *Holifield* court upheld a finding of cohabitation even under these facts.

great bodily injury on July 6, 2012. Beltran's blows to Lara's head and attempt to remove her stitches caused blood to flow from the head wound she had received approximately a week earlier. In addition, Lara suffered multiple contusions from Beltran's punches which left severe discoloration on her right arm.

Courts have found severe bruising, in conjunction with other injuries, to constitute great bodily injury. In *Jaramillo*, the Court of Appeal affirmed the finding that multiple contusions, swelling and severe discoloration caused by the striking of a six-year-old with a wooden dowel established great bodily injury for purposes of a Penal Code section 12022.7 enhancement. In *People v. Sanchez* (1982) 131 Cal.App.3d 718 evidence of "*multiple* abrasions and lacerations" including "one long scratch diagonally across [the victim's] back[,] numerous bruises and small lacerations on her neck" and "serious swelling and bruising" on the victim's face was held to be sufficient to support a finding of great bodily injury. (*Id.* at pp. 733-734.)

In this case, the jury saw photographs of Lara's injuries after the July 6, 2012 attack which showed both severe bruising and substantial blood flowing from Lara's head as a result of that attack. This constituted sufficient evidence to support the jury's finding that Beltran inflicted great bodily injury on Lara on July 6, 2012.

3. *There Was Sufficient Evidence of Force Likely to Produce Great Bodily Injury*

In count four, Beltran was convicted of assault by means likely to produce great bodily injury based on the July 6, 2012 attack. Penal Code section 245 punishes assault committed by "any means of force likely to produce great bodily injury." (Pen. Code, § 245, subd. (a)(4).) " 'The statute prohibits an assault by means of force *likely* to produce great bodily injury, not the use of force which does *in fact* produce such injury. While . . . the results of an assault are often highly probative of the amount of force used, they cannot be conclusive.' [Citation.] '[T]he question of whether or not the force used was such as to have been likely to produce great bodily injury, is one of fact for the determination of the jury based on all the evidence, including but not limited to the injury inflicted. [Citations.]' [Citation.]" (*People v. Armstrong* (1992)

8 Cal.App.4th 1060, 1065-1066.) "That the use of hands or fists alone may support a conviction of assault 'by means of force likely to produce great bodily injury' is well established. [Citations.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.)

Here, Beltran argues there was insufficient evidence supporting his conviction of assault with force likely to produce great bodily injury because Lara testified at trial that Beltran had only pulled her hair and slapped her once on the head. In fact, Lara testified at trial that, on July 6, 2012, Beltran had hit her multiple times on her head and she could not remember if he hit her "with an open hand or closed hand."

Beltran also acknowledges that two police officers testified that Beltran had hit Lara. Officer Garcia took Lara's statement at the hospital and testified that Lara told him Beltran had pushed her to the ground and punched her multiple times. Officer Saiza testified that Lara told her Beltran had hit her multiple times while she was lying on the ground. However, Beltran contends, without citing to any authority, that Lara's statements to the police should not be granted the same weight as her testimony at trial that Beltran only pulled her hair.

Beltran mischaracterizes Lara's testimony, suggesting that her testimony at trial contradicted her prior statements to the police. In fact, both Lara's testimony at trial and her statements to the police were consistent: she said that Beltran had hit her multiple times on July 6, 2012. Furthermore, "it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Accordingly, the jury was entitled to attribute greater weight to the testimony of the police officers to the extent they provided additional details as to the force used by Beltran.

A reasonable jury could find that Beltran's infliction of multiple blows to Lara's head, his efforts to reopen her head wound by removing her stitches, and his pushing Lara to the ground and punching her constituted force likely to produce great bodily injury. That Lara did, in fact, suffer great bodily injury from the July 6, 2012 attack, as explained above, also supports this conclusion.

4. *The Court Did Not Err in Declining to Instruct on Lesser Included Offenses*

The trial court instructed the jury on willful infliction of corporal injury on a cohabitant (count two) and assault by means likely to produce great bodily injury (count four) as charged against Beltran. It did not instruct on assault and battery, which were not charged. Beltran now contends the trial court erred in failing to instruct the jury sua sponte on assault and battery as offenses that were lesser than, and included in, count two. He also contends that the court should have instructed the jury on assault as a lesser offense included in count four.

"A trial court must instruct the jury sua sponte on an uncharged offense that is lesser than, and included in, a greater offense with which the defendant is charged 'only if [citation] "there is evidence" ' (citation) specifically, '*substantial* evidence' (citation) ' "which, if accepted . . . would absolve [the] defendant from guilt of the greater offense" [citation] *but not the lesser.*' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) A sua sponte duty to instruct does not arise from the existence of any evidence, no matter how weak. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) " 'We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.]' " (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

Simple assault and misdemeanor battery of a cohabitant are lesser included offenses of inflicting corporal injury on a cohabitant. (*People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952; *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1457.) Simple assault is also a lesser included offense of aggravated assault. (*People v. Carmen* (1951) 36 Cal.2d 768, 775.) "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.) "A battery is any willful and unlawful use of force or violence upon the person of another." (Pen. Code, § 242.)

With respect to count two, "[i]t is *injury* resulting in a traumatic condition that differentiates [the crime of inflicting corporal injury] from [the] lesser offenses [of

simple assault and misdemeanor battery]." (*People v. Gutierrez, supra,* 171 Cal.App.3d at p. 952.) For purposes of Penal Code section 273.5, a "traumatic condition" is defined as " 'a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force.' " (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 771.)

Beltran acknowledges that Lara was injured during the July 6, 2012 attack but contends that her injuries were so "superficial" that a jury could have found him guilty of only simple assault or misdemeanor battery. However, the traumatic condition required by Penal Code section 273.5 includes even minor injuries, and here, there was abundant evidence Lara had suffered severe bruising and bleeding from a head wound as a result of the July 6, 2012 attack. Therefore, there was no substantial evidence absolving Beltran of the offense of inflicting a corporal injury on a cohabitant.

With respect to count four, the question is whether there was substantial evidence Beltran committed assault but not assault by means likely to produce great bodily injury. Beltran again argues that a reasonable jury could have found that the injuries Lara sustained during the July 6, 2012 attack were only superficial and, therefore, there was substantial evidence that Beltran's use of force was not likely to produce great bodily injury.

However, as explained above, although " 'the results of an assault are often highly probative of the amount of force used, they cannot be conclusive' " as to "whether or not the force used was such as to have been likely to produce great bodily injury . . . . " (*People v. Armstrong, supra,* 8 Cal.App.4th at p. 1066.) Here, there was substantial evidence Beltran used force likely to produce great bodily injury: he punched, hit, and pushed Lara to the floor, and tried to remove the stitches on her head wound. That Lara's injuries were not more severe as a result of that attack does not absolve Beltran of the greater offense; her injuries were severe enough that they supported the finding of force used.

Even if the trial court erred by not instructing on lesser included offenses, the error was harmless. As discussed above, the prosecution's evidence as to counts two and four was quite strong. As such, it was not reasonably probable that a result more favorable to Beltran would have been reached. (See *People v. Moye* (2009) 47 Cal.4th 537, 555-558.)

DISPOSITION

The judgment is affirmed.

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LAVIN, J.*

WE CONCUR:

EDMON, P. J.

KITCHING, J.

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