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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. JOJIE TOLENTINO, Defendant and Appellant.	B230399 (Los Angeles County Super. Ct. No. KA091974)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed.

Heather L. Beugen, 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, Marc A. Kohm and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Jojie Tolentino, appeals the judgment entered following his conviction for resisting an executive officer and possession of methamphetamine, with great bodily injury and prior prison term enhancement findings (Pen. Code, §§ 69, 12022.7, 667.5; Health & Saf. Code, § 11377).[1] He was sentenced to state prison for a term of seven years, eight months.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

On September 18, 2010, Deputy Sheriff Josue Rodriguez was on patrol in Rowland Heights when he saw a silver BMW stalled on Colima Road. Defendant Tolentino, who was sitting in the car, said he had broken down and asked Rodriguez to use his patrol car to push the BMW to the side of the road. Rodriguez did so and then drove off.

Almost immediately, however, Rodriguez realized he had failed to comply with his station's policy of getting the driver's name and date of birth in this situation, so he drove back. Tolentino, who was now standing alongside the car, seemed nervous; he was looking around and touching his waistband. His eyes looked like he was under the influence of a stimulant. Rodriguez became concerned Tolentino might have a weapon.

Rodriguez asked for Tolentino's driver's license, but Tolentino said he didn't have it. When Rodriguez told Tolentino to put his hands on the hood of the BMW, Tolentino became belligerent and accused Rodriguez of harassing him. Rodriguez thought Tolentino was about to flee, so he grabbed Tolentino's left wrist with his own left hand. He tried to push Tolentino up against the patrol car in order to control his

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

movements, but Tolentino flailed his arm, broke out of Rodriguez's grasp and started to walk away. Rodriguez grabbed the back of Tolentino's shirt, but Tolentino continued to flail, trying to break Rodriguez's grip on his shirt. Rodriguez described Tolentino as "very strong."

At this point, a pickup truck drove up and David Hagopian, a retired police officer, jumped out and offered his assistance. Rodriguez asked him to control Tolentino's left arm. Hagopian grabbed Tolentino's left arm and helped Rodriguez push him up against the patrol car. Rodriguez ordered Tolentino to put his hands behind his back, but Tolentino refused and instead tried to move his arms to the front of his body. Rodriguez testified: "We pressed him up against the side of my vehicle and . . . I kept ordering him to put his hands behind his back, stop fighting, stop resisting, put his hands behind his back."

Rodriguez kneed Tolentino in the torso, below the armpit, and was then able to force Tolentino's right arm behind his back and put a handcuff on it. Hagopian was still holding onto Tolentino's left arm and Tolentino was still flailing around, trying to move his right arm to the front of his body. Rodriguez and Hagopian finally succeeded in getting Tolentino's left arm behind his back and handcuffing it to this right arm.

Hagopian testified he saw Rodriguez reach out to grab Tolentino and Tolentino knock Rodriguez's arm away. Rodriguez lunged forward, grabbed Tolentino and pushed him up against the patrol car. All the while, Tolentino was fighting with Rodriguez, "trying to get free." "[I]t wasn't a fistfight. More like a wrestling match. [Rodriguez] was trying to hold him against the side of the car. He was having a difficult time holding him there." Hagopian testified that after he grabbed Tolentino's left arm, Tolentino kept trying to get the arm free: "I had to hold him fairly strong against that car to keep him in place." After they finally succeeded in handcuffing Tolentino, Rodriguez told Hagopian "he either hurt his fingers or his hand."

A second witness to Rodriguez's encounter with Tolentino was Lucinda Duran, who had been sitting nearby in her parked car. She saw Rodriguez extend his arm toward Tolentino, who "jerked back" and started "cussing." She then saw Rodriguez try to restrain Tolentino:

"A. The officer tried to make the arrest and the defendant was trying to get away as the officer was pulling him by the shirt every which way, and I realized . . . [the] officer was not going to be able to hold the man down.

"Q. Why do you say that?

"A. Just by the way that the defendant was aggressively trying to get away."

"Q. And can you describe how he was doing that. You said he was aggressive. Can you describe what he was doing.

"A. Pulling back at times. At times trying . . . to run or lean forward. The officer had him by the scruff of the neck of the shirt, was trying to get him with his legs . . . trying to put him over the police car, and the defendant was struggling at all times."

Duran saw Hagopian arrive and go to Rodriguez's aid. "The man went to help him. They both tried to subdue him. They were still having difficulty trying to get the man down." The struggle became "quite intense" when Rodriguez tried to put on the handcuffs. Before Tolentino was finally handcuffed, Duran saw Rodriguez "shaking his [right] hand off as if he hurt himself."

After Tolentino was finally restrained, Rodriguez found he had a folding knife in his right pants pocket, and a bag containing 1.05 grams of methamphetamine in his left pants pocket.

After the incident, Rodriguez went to the hospital. His right ring finger had been dislocated and fractured in three places. He had first noticed the pain in his hand while he was handcuffing Tolentino's right hand and he mentioned the injury to Hagopian at the time. As a result of this injury, Rodriguez wore a splint on his finger for three weeks and had to be assigned to light duty.

CONTENTIONS

1. There was insufficient evidence to sustain the great bodily injury enhancement.

2. The trial court misinstructed the jury on the elements of the great bodily injury enhancement.

DISCUSSION

1. *There was sufficient evidence Tolentino caused the officer's injury.*

In connection with Tolentino's conviction for unlawfully attempting by violent means to prevent Officer Rodriguez from performing his duties, the jury found true a great bodily injury allegation (§ 12022.7). Tolentino contends the enhancement must be reversed because there was insufficient evidence he caused the injury. This claim is meritless.

a. *Legal principles.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, 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. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's

findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

" 'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].' [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise. To meet that burden, it is not enough for the defendant to simply contend, 'without a statement or analysis of the evidence, . . . that the evidence is insufficient to support the judgment[] of conviction.' [Citation.] Rather, he must *affirmatively demonstrate* that the evidence is insufficient." (*Ibid.*)

Section 12022.7 provides for an enhancement in cases where the defendant "personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony . . . ." In *People v. Cole* (1982) 31 Cal.3d 568, our Supreme Court "conclude[d] that in enacting section 12022.7, the Legislature intended the designation 'personally' to limit the category of persons subject to the enhancement to those who directly perform the act that causes the physical injury to the victim." (*Id*. at p. 579.) *Cole* reasoned: "Among the several dictionary definitions of 'personally,' we find the relevant meaning clearly reflecting what the Legislature intended: 'done in person without the intervention of another; direct from one person

to another.' (Webster's New Internat. Dict. (3d ed. 1961).) No other expression could have more clearly and concisely expressed what we interpret to be the plain meaning of the Legislature: that the individual accused of inflicting great bodily injury must be the person who directly acted to cause the injury. The choice of the word 'personally' necessarily excludes those who may have aided or abetted the actor directly inflicting the injury." (*Id.* at p. 572.)

Case law has construed *Cole* to mean that "for the [great bodily injury] enhancement to apply, the defendant must be the *direct*, rather than proximate cause, of the victim's injuries." (*People v. Warwick* (2010) 182 Cal.App.4th 788, 793; see also *People v. Valenzuela* (2010) 191 Cal.App.4th 316, 321 ["Case law establishes that proof a defendant proximately caused great bodily injury does not constitute proof the defendant personally inflicted such injury"]; *People v. Rodriguez* (1999) 69 Cal.App.4th 341, 349 ["To 'personally inflict' injury, the actor must do more than take some direct action which proximately causes injury"].)

b. *Discussion.*

Citing *People v. Cole, supra,* 31 Cal.3d 568, and *People v. Rodriguez, supra,* 69 Cal.App.4th 341, Tolentino argues "there was an insufficient showing that [he] was the *direct* cause of the injury as no one saw the injury occur, and Rodriguez could not say how or when his right finger was injured." Tolentino asserts the evidence showed nothing more than that Rodriguez had been injured at some point during the struggle and this was insufficient.

But *Cole* and *Rodriguez* are clearly distinguishable from the facts of Tolentino's case. In *Cole*, the defendant and an accomplice broke into the victim's house. When the victim was slow to respond to their orders, Cole ordered his accomplice to kill the victim and the accomplice hit the victim in the head with a rifle. Cole himself never touched the victim; the only thing he did was block the victim's escape by pointing a gun at him. At trial, Cole was convicted of robbery, burglary, and grand theft. The Supreme Court vacated a great bodily injury finding because "the Legislature intended to impose an additional penalty for causing great bodily

injury only on those principals who perform the act that directly inflicts the injury, and that one who merely aids, abets, or directs another to inflict the physical injury is not subject to the enhanced penalty of section 12022.7" (*People v. Cole*, *supra*, 31 Cal.3d at p. 571.)

In *Rodriguez*, the defendant "was being transported with other prisoners from a police station to a jail. He escaped custody and began running away, instigating a chase by Officer Martin. At one point during Martin's pursuit of Rodriguez, a bystander handed Rodriguez a bicycle to aid in his escape. Martin tackled Rodriguez on the bicycle and both men fell to the ground. Martin testified that during the tackle he hit his head, either on the ground, the concrete sidewalk, or the lamppost, and was knocked unconscious." (*People v. Rodriguez, supra*, 69 Cal.App.4th at p. 346.) *Rodriguez* reversed a great bodily injury finding because "in this case Rodriguez did not initiate a struggle or any other physical contact with the officer. Nor can we find evidence in this record of any act by Rodriguez that directly caused the officer injury." (*Id*. at p. 351.) "[A]lthough the record contains evidence Rodriguez proximately caused the officer's injury, we conclude that, as a matter of law, this record does not establish that Rodriguez directly inflicted the injury. According to the record, Rodriguez did not push, struggle or initiate any contact with the officer . . . . Instead, the evidence shows that Rodriguez was trying to escape arrest on a bicycle and the officer injured himself when he tackled Rodriguez." (*Id*. at p. 352.)

Thus, *Cole* involved a defendant who had no physical contact whatsoever with the victim, and in *Rodriguez* the officer injured himself when he tried to tackle a fleeing defendant who, before that moment, had not had any physical contact with the officer. Here, on the other hand, Tolentino had substantial physical contact with Rodriguez when he violently and unlawfully resisted Rodriguez's attempt to detain him, and it was during the ensuing struggle that Rodriguez was injured.

The Attorney General cites *People v. Guzman* (2000) 77 Cal.App.4th 761, as a more apposite case. There, Guzman, while driving under the influence, made an unsafe turn and collided with another vehicle, injuring his passenger. On appeal, Guzman challenged a great bodily injury enhancement on the ground he did not "personally" injure his passenger because "the other driver involved in the accident is the person who directly performed the act that caused the injury." (*Id*. at p. 764.) The Court of Appeal rejected this claim, reasoning:

"[A]ppellant turned his vehicle into oncoming traffic. This volitional act was the direct cause of the collision and therefore was the direct cause of the injury. Appellant was not merely an accomplice. Thus, appellant personally inflicted the injury on [his passenger]. . . . The 1995 amendment to section 12022.7 deleted the requirement that the defendant act 'with the intent to inflict the injury.'

"Appellant's argument that the enhancement is inapplicable because another vehicle was involved in the collision is unavailing. More than one person may be found to have directly participated in inflicting a single injury. For example, in *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1210-1211 . . . , the defendant who held the victim while a codefendant struck her was found directly responsible for the injury the victim suffered when she fell while pulling away. Similarly, in *People v. Corona* [(1989) 213 Cal.App.3d 589, 594], the court held that the defendant could be punished with a great bodily injury enhancement when he participated in a group beating, although it was not possible to determine which assailant inflicted which injuries. [Citation.] Thus, the fact that the collision involved two vehicles does not absolve appellant of direct responsibility for [his passenger's] injuries." (*People v. Guzman, supra*, 77 Cal.App.4th at p. 764.)

As in *Guzman*, Tolentino committed a volitional act by resisting and then fighting with Deputy Rodriguez. During the ensuing struggle, which apparently lasted less than a minute, Rodriguez's finger was injured. Whether that injury occurred when

Tolentino hit the finger, Rodriguez banged it against the patrol car, or Hagopian crashed into it,[2] Tolentino was a direct cause of the injury. As *Guzman* teaches, neither the accidental nature of the injury, nor the fact that more than one person may have participated in inflicting it, absolves Tolentino of responsibility.

Hence, we do not agree with Tolentino's assertion *Guzman* is inapposite because there was insufficient evidence to know precisely how Rodriguez incurred his injury. That is, we do not think it makes any difference to the result in *Guzman* whether the precise cause of the passenger's injury had been the impact from Guzman's steering wheel, from the other car's bumper, or from a traffic light that came crashing down as a result of the collision. Guzman and Tolentino each *personally* inflicted the great bodily injury even if the injury was also the result of some concurrent cause.

As our Supreme Court explained in *People v. Modiri* (2006) 39 Cal.4th 481, while construing the identical phrase "personally inflict great bodily injury" in section 1192.7, subdivision (c)(8)[3]: "*The term 'personally,' which modifies 'inflicts' . . . does not mean exclusive* here. This language refers to an act performed 'in person,' and involving 'the actual or immediate presence or action of the individual person himself (as opposed to a substitute, deputy, messenger, etc).' [Citation.] Such conduct is '[c]arried on or subsisting between individual persons directly.' [Citations.] Framed this way, the requisite force must be one-to-one, but does not foreclose

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[2] This possibility can apparently be discounted. It was a fair inference from the evidence that Hagopian, who was occupied with holding onto Tolentino's left arm, had nothing to do with Rodriguez's injury. Indeed, at one point, while discussing jury instructions, the trial court asked, "Would you agree that the aider is not responsible for the injury?", to which defense counsel replied, "Yes."

[3] Section 1192.7, subdivision (c)(8), defines a "serious felony" as "any felony in which the defendant *personally inflicts great bodily injury* on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm . . . ." (Italics added.)

participation by others. [¶] In short, nothing in the terms 'personally' or 'inflicts,' when used in conjunction with 'great bodily injury' . . . necessarily implies that the defendant must act alone in causing the victim's injuries." (*People v. Modiri, supra,* at p. 493, italics added.) "Thus, *Cole* stands for the modest proposition that *a defendant personally inflicts great bodily harm only if there is a direct physical link between his own act and the victim's injury*." (*Id*. at p. 495, italics added.)

Here, there was obviously a "direct physical link" between Tolentino's act and Rodriguez's injury. Hence, there was sufficient evidence to sustain the great bodily injury enhancement.

2. *Jury was not misinstructed on the great bodily injury enhancement.*

Tolentino contends the trial court misinstructed the jury on the elements of the great bodily injury enhancement. This claim is meritless.

a. *Background*.

The jury was given the following instruction with regard to the great bodily injury enhancement allegation:

"If you find the defendant guilty of the crime charged in Count 1, you must then decide whether the People have proved the additional allegation that the defendant personally inflicted great bodily injury on J. Rodriguez in the commission of that crime. You must decide whether the People have proved this allegation and return a separate finding. Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"Committing the crime of resisting an executive officer by force or violence, in violation of Penal Code section 69, is not by itself the infliction of great bodily injury.

"If you conclude that the acts of J. Rodriguez may have caused his own injury and you cannot decide whether J. Rodriguez or the defendant personally caused the injury, you may conclude that the defendant personally inflicted great bodily injury on J. Rodriguez if the People have proved that:

"1. The physical force that the defendant used on J. Rodriguez was sufficient to cause great bodily injury in combination with the force used by J. Rodriguez in lawfully detaining or arresting the defendant. The defendant must have applied substantial force to J. Rodriguez. If that force could not have caused or attributed [*sic*; contributed?] to the great bodily injury then it was not substantial. An act causes injury if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes.

"In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

"There may be more than one cause of injury. An act causes injury only if it is a substantial factor in causing the injury. A substantial factor is one that is more than [a] trivial or remote factor; however, it does not have to be the only factor that causes the injury.

"An act causes injury – the People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find the allegation has not been proved."

b. *Discussion*.

Tolentino argues these instructions were erroneous because they allowed a finding he personally inflicted the injury even if the jury could not decide whether he or Rodriguez had actually caused it. However, as discussed *ante*, this was correct. "The defendant may . . . be criminally liable for a result directly caused by his or her act, even though there is another contributing cause." (1 Witkin & Epstein, Cal. Criminal Law 3d ed. 2000) Elements, § 37, p. 243; see e.g., *People v. Ross* (1979) 92 Cal.App.3d 391, 401 ["Where concurring causes contribute to the fatal result, one may be criminally liable by reason of his own conduct which directly contributes to such result."].)

Tolentino argues the instructions were erroneous because they "incorporated the 'group assault' principle of collective causation, which had no application to the facts of this case, a case involving a single defendant, not several assailants who each threw at least one blow to the victim which collectively caused the victim great bodily harm." But the "group assault" instruction is itself based on the notion of concurrent causation, a principle which applied here. And that is why *People v. Guzman*, *supra*, 77 Cal.App.4th at p. 764, cited a group assault case, *People v. Corona*, *supra*, 213 Cal.App.3d 589, in support of its conclusion that Guzman was liable for having inflicted great bodily injury even though his passenger's injury was caused by the *collision* between Guzman's car and another car. (*Id*. at p. 594 ["While *Cole* has logical application with regard to the section 12022.7 culpability of an aider and abettor who strikes no blow, it makes no sense when applied to a group pummeling."].)

Finally, citing *People v. Rodriguez, supra,* 69 Cal.App.4th 341, Tolentino argues: "As in *Rodriguez*, the instruction in this case is wrong because it allowed jurors to find that Mr. Tolentino personally inflicted great bodily injury if they found him to be *a* proximate cause of Rodriguez's injury without requiring them to find that he was the direct cause of it." Not so. The problem in *Rodriguez* was that the jury was *only* given a proximate cause instruction, and therefore was able to find the defendant responsible for inflicting great bodily injury even though he "did not push, struggle or initiate any contact with the officer . . . ." (*Id.* at p. 352.)

The pertinent portions of the jury instruction in *Rodriguez* were the following:

" 'Now, a person personally inflicts injury to another when he directly performs [an] act or acts that cause the physical injury. To prove personal infliction, the People need not prove that the defendant intended to cause the great bodily injury, but only that the great bodily injury was personally inflicted as a result of the defendant's conduct. . . . [¶] . . . To constitute the personal infliction of great bodily injury there must be in addition to the injury an unlawful act which was a cause of such injury. [¶] Criminal law has its own particular way of defining cause. A cause of injury is an act

that sets in motion a chain of events that proceed [*sic*] a direct, natural and possible consequence of the act, the injury, and without which the injury would not occur.' " (*People v. Rodriguez, supra*, 69 Cal.App.4th at pp. 346-347.)

Noting this was not a standard CALJIC instruction, but had been drafted by the prosecutor, *Rodriguez* condemned the instruction because it "expressly equates 'personally inflict' with 'proximate cause.' It tells the jury that personally inflict means to directly perform an act that *causes* injury and then expressly defines cause as proximate cause. The problem with the instruction is that the definition of cause is inaccurate in this context. To 'personally inflict' an injury is to directly cause an injury, not just to proximately cause it. The instruction was wrong because it allowed the jury to find against Rodriguez if the officer's injury was a 'direct, natural and probable consequence' of Rodriguez's action, even if Rodriguez did not personally inflict the injury." (*People v. Rodriguez, supra*, 69 Cal.App.4th at pp. 347-348.)

And although the Attorney General agrees with Tolentino that the instructions here made the same mistake,[4] we find otherwise. What happened in *Rodriguez* could not have happened here because Tolentino's jury was instructed on *both* a proximate cause requirement *and* a substantial physical force requirement. The instructions said the People had to prove Tolentino "applied substantial force to" the officer, *and* that "[t]he physical force that [Tolentino] used on [the officer] was sufficient to cause great bodily injury in combination with the force used by [the officer] in lawfully detaining or arresting [Tolentino]." Under these instructions, Tolentino's jury could not have found the great bodily injury allegation true had the facts been similar to the facts in *Rodriguez*.

Hence, we conclude there was no instructional error in this case.

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[4] The Attorney General states: "Like the instruction in this case, the jury instruction in *Rodriguez* said that proximate causation was all that was required for a true finding on the great bodily injury enhancement . . . ."

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.