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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE A. HERNANDEZ, Defendant and Appellant.	B254693 (Los Angeles County Super. Ct. No. VA132010)

APPEAL from a judgment of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Affirmed as modified.

Paul J. Katz, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mark A. Kohm and Robert C. Schneider, Deputy Attorneys General for Plaintiff and Respondent.

Appellant Jose A. Hernandez was convicted, following a jury trial, of one count of assault with a deadly weapon in violation of Penal Code section 245,[1] subdivision (a)(1), one count of willful harm or injury to a child in violation of section 273a, and one count of misdemeanor corporal injury to a spouse or cohabitant in violation of section 273.5, subdivision (a). The jury found true the allegations that appellant personally inflicted great bodily injury in the commission of the assault and injury to a child offenses within the meaning of section 12022.7, subdivisions (a) and (e), and that the injury occurred under circumstances involving domestic violence within the meaning of section 12022.7, subdivision (b). The jury also found true the allegation that appellant used a dangerous weapon in the commission of the section 273a offense within the meaning of section 12022, subdivision (b)(1).

The trial court sentenced appellant to the high term of six years for the section 273a violation, plus five years for the section 12022.7, subdivision (e) enhancement, plus one year for the section 12022, subdivision (b)(1), enhancement, for a total term of 12 years in state prison. The court sentenced appellant to the high term of four years for the assault conviction plus the high term of five years for the section 12022.7, subdivision (b) enhancement, plus a one-year enhancement term pursuant to section 12022, subdivision (b)(1), but stayed sentence pursuant to section 654.

Appellant appeals from the judgment of conviction, contending the trial court erred in instructing the jury on mutual combat and initial aggression. Appellant also contends the trial court abused its discretion in selecting the upper terms for the felony convictions and great bodily injury enhancements and further contends the court erred in adding a section 12022, subdivision (b)(1), enhancement to the assault conviction. We order the section 12022, subdivision (b)(1), enhancement stricken, but affirm the judgment of conviction in all other respects.

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

Facts

On September 23, 2013, 14-year-old Ernesto Cisneros lived with his mother Jacque and appellant, who was his stepfather. At some point, he returned home from a neighbor's house, intending to get some more beers for his friends who lived nearby. His mother told him he could not take the beers. Jacque and appellant began arguing about Ernesto giving away appellant's beer. Ernesto left the kitchen and started watching television.

Appellant and Jacque stopped arguing, but then began yelling at each other again. Ernesto went to his room, then left the house when the argument turned to the subject of Ernesto's real father. Ernesto's little brother, Anthony, found Ernesto at a friend's house and told him appellant was calling him. Anthony also said appellant and Jacque were fighting and Jacque was hitting appellant.

Ernesto returned home and saw that his mother's face was "all beaten up." Appellant and Jacque were in the kitchen. No one was hitting anyone at that point. Appellant got two large knives and gave one to Ernesto and one to Jacque and he told them to "kill him." Ernesto and Jacque threw the knives into the sink. Appellant started screaming at Ernesto after he and Jacque threw the knives in the sink. Jacque told appellant to stop screaming at Ernesto. Jacque slapped appellant and appellant punched her with a closed hand. Ernesto hit appellant. Appellant tried to hit Ernesto, but Ernesto slipped and fell to the ground.

Jacque started hitting appellant. Ernesto got up and punched appellant. Jacque got on appellant's back and put her arm around his neck. Appellant was larger than Jacque. As Ernesto continued to hit appellant, appellant dropped Jacque on the floor. Jacque got up and started hitting appellant. Appellant hit her in return. Ernesto moved closer to appellant when he felt a "poke" on the left side of his stomach area near his ribs. Ernesto said that Jacque was on the ground at that point, but did not explain how she got there. After stabbing Ernesto, appellant said, "You see what you made me do." It hurt a lot and Ernesto ran outside bleeding. A friend told Ernesto to say the stabbing was an accident, and that was Ernesto's initial story.

Anthony, who was six years old, saw the fight between appellant and Jacque when Ernesto was injured. He saw the argument between his mother and appellant in the kitchen from the beginning. According to Anthony, appellant hit Jacque first, and then Jacque hit back. Ernesto eventually joined in, and Anthony saw appellant stab Ernesto with a knife using an overhand, downward thrusting motion. Ernesto went to the ground after being stabbed. Ernesto told Anthony, "[t]ake care of [my] Mom."

A 10-inch knife with dried blood on it was recovered from the scene.

Ernesto suffered a stabbing injury to his upper left abdomen that was two centimeters wide and appeared to be deep. He suffered a back wound, two to three centimeters wide that was also deep. The treating physician was concerned that there might be wounds to internal organs, but no internal organs were punctured. The wounds had to be sutured internally to stop bleeding and externally to close the wounds.

Appellant called no witnesses on his own behalf.

Discussion

1. Mutual combat instruction – sufficiency of the evidence

Appellant contends the trial court erred in instructing the jury with CALCRIM No. 3471, concerning the right to self-defense of a person who "engages in mutual combat or who starts a fight." Such a person must try to stop fighting and indicate to his opponent that he wants to stop fighting, and must also give his opponent the chance to stop fighting. Appellant contends there was no evidence he was the initial aggressor or that he engaged in mutual combat. He argues the trial court did not understand the legal definition of mutual combat.

a. Hearing on mutual combat

Before instructing the jury, the court went over the jury instructions with counsel in chambers, then returned to the courtroom so that appellant's trial counsel could be heard on the issue of an instruction on mutual combat. Appellant's counsel argued that a mutual combat instruction was not appropriate because mutual combat generally requires

an express pre-arrangement to fight. He further argued that, "[t]his is not a case of mutual combat because there is no express or implied agreement to fight and Jose Hernandez never asked to be assaulted." He added that Ernesto "never asked to engage in an assault either." The prosecutor stated: "I believe that at the point Ernesto entered the kitchen, the fight I suppose was at intermission would be one way to put it, but neither party disengaged from the combat. I believe at that point the jury could make an inference that both parties were impliedly agreeing to continue the fight at the point when Ernesto walked in the kitchen." The court responded, "Okay. Yes, I don't know how that the fight started, but it's clear that there was a fight in progress during this conduct which gave rise to these charges. So they are in the middle of a fight. They are both engaged in it. They are both exchanging blows. So I think they are engaged in mutual combat at that time."

Following the hearing, the court instructed the jury with CALCRIM No. 3471, which includes the following statement, "A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose." Appellant does not dispute that CALCRIM No. 3471 gives the correct legal definition of mutual combat.

b. Analysis

Defense counsel and the prosecutor recognized that an agreement to fight was a requirement of mutual combat. They differed only on whether there was evidence of such an agreement. While the court's remarks are somewhat imprecise, they do not indicate that the court was rejecting the agreement to fight requirement set forth in the instructions and argued by both parties.

Further, even if the trial court had misunderstood the agreement requirement, there was no prejudice to appellant, since there was evidence to support an instruction on mutual combat, and the instruction given correctly sets forth the requirement for an agreement to fight.

When Ernesto entered the kitchen, there was a pause in the fight between appellant and Jacque. Appellant obtained two knives and gave one to Ernesto and one to Jacque and challenged them to kill him. The jury could reasonably infer from this that appellant was inviting Jacque and Ernesto to fight. Jacque and Ernesto discarded the knives, but did not leave the kitchen. Almost immediately after the knives were discarded, a fist fight broke out between appellant and Jacque. Ernesto then joined in, hitting appellant. A jury could infer from Jacque's and Ernesto's decision to stay in the kitchen after discarding the knives that they were agreeing to fight appellant, but with their hands instead of knives. Thus, the evidence was sufficient to present the issue of mutual combat to the jury.

c. Initial aggressor

On appeal, appellant contends that giving CALCRIM No. 3471 was also erroneous because the only evidence he was the initial aggressor in the fight was the unreliable testimony of a confused six-year-old Anthony.[2] It was for the jury to decide whether or not to believe Anthony. His testimony, if believed, was sufficient to support the instruction. Thus, the trial court did not err in giving a version of CALCRIM No. 3471 which included the requirements for self-defense by an initial aggressor.

d. Harmless error

Assuming for the sake of argument that CALCRIM No. 3471 was not supported by the evidence, any error in giving the instruction would be harmless.

"[G]iving an irrelevant or inapplicable instruction is generally '"only a technical error which does not constitute ground for reversal."' [Citation.]" (*People v. Cross* (2008) 45 Cal.4th 58, 67.) In cases where a jury instruction is factually unsupported, "affirmance is the norm." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) However, reversal might be necessary "if the record affirmatively demonstrates there was prejudice,

[2] Appellant did not object in the trial court that there was no evidence that he was the initial aggressor.

that is, if it shows that the jury did in fact rely on the unsupported ground." (*Ibid*.) In determining whether there was prejudice from the unsupported instruction, the entire record should be examined.[3] (*Id*. at p. 1130.)

The court instructed the jury, "You must decide what the facts are. It is up to all of you and you alone to decide what happened based on the evidence that has been presented to you in this trial." The court further instructed the jury, "Some of the instructions may not apply depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." Thus, the jury was aware it could find that there was no evidence to support mutual combat, and that in such a situation the mutual combat instruction would not apply.

The record shows the jury rejected appellant's self-defense claim, but there is nothing to suggest that it did so on the basis that appellant was engaged in mutual combat, particularly since the evidence of self-defense was virtually non-existent. According to Ernesto, the stabbing occurred after appellant dropped Jacque from his back to the floor. Ernesto "got close to" appellant and felt a poke which hurt a lot. There is no indication that Ernesto was hitting or trying to hit appellant when he was stabbed. Ernesto acknowledged hitting appellant moments earlier when Jacque was on appellant's back, and being hit back by appellant, but there is nothing to indicate that Ernesto was trying to hit appellant when appellant stabbed him. Further, Ernesto's hitting did not inflict any visible damage on appellant, and thus there is no indication that the hitting posed a serious danger to appellant.

In sum, there is nothing in the record to affirmatively show that the jury in fact relied on the mutual combat instruction in reaching its verdict. Thus, assuming that instruction was unsupported by the evidence, any error would be harmless.

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[3] Giving a factually unsupported instruction is state law error, subject to subject to the traditional *Watson* test. (*People v. Guiton, supra*, 4 Cal.4th at p. 1130.)

2. Escalation of force

In a supplemental brief, appellant contends Jacque's act of putting him in a chokehold constituted a sudden use of deadly force. He contends the trial court erred by omitting the portion of CALCRIM No. 3471 which concerns a sudden escalation of force. There was no error.

The last paragraph of CALCRIM No. 3471 reads: "[If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting]." The trial court did not give this paragraph.

Appellant does not explain how Jacque's alleged use of deadly force would entitle him to stab Ernesto, who did not use deadly force. In any event, the evidence does not show that Jacque's "chokehold" constituted sudden and deadly force. Jacque was smaller than appellant. The only description of the chokehold came from Ernesto's testimony. According to Ernesto, Jacque got on appellant's back and put her right arm around appellant's neck.[4] Ernesto started hitting appellant and "then [appellant] had dropped" Jacque. Jacque fell to the floor and "was laying down." Appellant hit Ernesto back. There is nothing in this description to support an inference that Jacque was able to exert sufficient force to endanger appellant's life, or to cause appellant to think that his life was in danger. Appellant was easily able to remove Jacque from his back, with no indication of a struggle. Appellant remained on his feet while Jacque ended up on the ground. Although the prosecutor characterized Ernesto's non-verbal description of Jacque's position as a "chokehold," there is no evidence that Jacque was actually choking appellant, that is applying force to appellant's neck sufficient to reduce or cut off his airflow.

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[4] Ernesto used gestures to explain Jacque's position on appellant's back. The prosecutor described it for the record as Ernesto putting "his right arm around his own neck as though indicating a forearm choke hold, I suppose." The court stated, "That's correct."

Ernesto's description of the encounter also shows the "chokehold" would not have prevented appellant from withdrawing from the fight. Appellant dislodged Jacque from his back, and she ended up on the floor. Appellant remained on his feet. Nothing prevented appellant from withdrawing from the fight at that point.

3. Aggravated term

Appellant contends that the trial court gave improper reasons for selecting the high terms for the section 273a conviction and accompanying enhancement and gave no reason at all for selecting the high terms for the assault conviction and accompanying enhancement. Appellant acknowledges that he did not object to the terms, but contends this failure should be excused because the trial court did not give him a meaningful chance to object. Respondent contends that appellant's failure to object is not excused and he has forfeited his claims. When the trial court first stated that it intended to impose "a lot of time," appellant did object to a number of aggravating factors set forth in the prosecutor's brief. The trial court then imposed the high terms for both felony offenses and enhancements, and moved on to other matters. Under the circumstances, appellant has not forfeited his claim.

a. Section 273a conviction

Appellant contends the trial court improperly relied on Ernesto's age in selecting the upper term, because age is an element of the crime. Respondent agrees that relying on age would be improper, but does not agree that the court so relied.

The court stated: "The court selects the high term because the victim was particularly vulnerable. He was a minor at the time." Appellant understands the word "minor" to refer solely to Ernesto's age.

The use of the word "minor," rather than Ernesto's actual age makes the statement ambiguous. The court might have been referring to Ernesto's age. However, the word "minor" might have been used to convey a legal status or relationship, rather than simply

age, and thus to indicate that Ernesto was vulnerable due to his mother's involvement in the fight, a fact which the court had mentioned moments earlier.

Even if the trial court erred in relying on Ernesto's age, the trial court also relied on two other factors, and those factors were valid. "When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 492.)

Here, the two remaining factors were appellant's prior conviction for domestic violence and his status on probation at the time of the current offense. The court clearly viewed the prior conviction as a major factor, particularly given the nature of the prior offense and its similarity to the present offense. The court did not view the factors in mitigation as compelling. Appellant's counsel argued that appellant had an alcohol problem and an anger problem and was to some extent provoked by Jacque. The court acknowledged these factors, but did not consider them significant. The court states, "A lot was said . . . about alcohol, drugs, et cetera, but he still stabbed a kid." The court noted that there was evidence that Jacque started the fight, but concluded "there is no excuse to stab" Ernesto. Thus, there is no reasonable probability that the court would have chosen a lesser sentence if it had known that Ernesto's age was not a proper sentencing factor.

b. Section 12022.7 enhancement

Appellant contends the trial court improperly relied on the fact that he caused "serious injury" to Ernesto to impose the upper term for the section 12022.7, subdivision (e) great bodily injury enhancement.

The mere fact that the injury was "serious" would not be a proper factor to support the upper term for a great bodily injury enhancement, since serious injury is the type of harm inherent in the enhancement. (See *People v. Wade* (2012) 204 Cal.App.4th 1142, 1149-1150 ["serious" bodily injury is essentially equivalent to "great" bodily injury];

People v. Lincoln (2007) 157 Cal.App.4th 196, 203-204 [an inherent feature of enhancement cannot be used to impose high term on the enhancement].)

The trial court did rely on at least one other proper factor, the fact that appellant stabbed Ernesto twice. The court stated, "He stabbed him twice, and could have killed him. He caused serious injury to the child and for that reason, the court will impose the high term." One of the wounds alone would have constituted great bodily injury. The second was not needed to prove the enhancement. Evidence of conduct exceeding the minimum necessary to establish an offense or enhancement is a proper factor to support the upper term. (See *People v. Castorena* (1996) 51 Cal.App.4th 558, 562.) As we discuss above, the trial court gave very little weight to the factors in mitigation. Accordingly, there is no reasonable probability that the court would have chosen a lesser sentence if it had known that "serious" injury was not a proper sentencing factor. (See *People v. Price, supra*, 1 Cal.4th at p. 492.)

c. Assault conviction and enhancement

The trial court did not expressly state its reasons for imposing the upper term for the section 245 assault conviction and accompanying section 12022.7, subdivision (e), enhancement. Even though the trial court stayed this sentence pursuant to section 654, it was error for the trial court to omit an oral statement of its reasons for the sentence.

"'[A] failure to state reasons is not prejudicial error per se: If the error is harmless the matter need not be remanded for resentencing.' [Citation.]" (*People v. Gutierrez* (1991) 227 Cal.App.3d 1634, 1638.)

Here, the facts of the assault conviction and its enhancement are identical to the facts of the section 273a conviction and its enhancement. The trial court clearly conveyed its belief that the offense was a serious one which deserved "a lot of time." Further, the trial court had had previously identified valid factors for imposing the upper term for the section 273a conviction and its enhancement which are equally applicable to the assault conviction. And, the factor of Ernesto's vulnerability based on his age alone could properly be considered in sentencing the assault conviction, since age is not an

element of that offense. Thus, there is no reasonable probability that the trial court would choose a lesser sentence if the matter were remanded for resentencing on this count. (See *People v. Price*, *supra*, 1 Cal.4th at p. 492.)

4. Section 12022, subdivision (b)(1) enhancement

Appellant contends the trial court erred in adding a one-year enhancement term for knife use pursuant to section 12022, subdivision (b)(1), to the assault conviction. He points out this enhancement was not alleged in the information or found true by the jury. Respondent agrees, and points out that a conviction pursuant to section 245, subdivision (a)(1) may not be enhanced pursuant to section 12022, subdivision (b), in any event. (*People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070.) We agree as well, and order the enhancement stricken.

Disposition

The one-year term for the section 12022, subdivision (b)(1), enhancement to the assault conviction is ordered stricken. The clerk of the superior court is instructed to prepare an amended abstract of judgment to reflect this change and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GOODMAN, J.*

We concur:

TURNER, P.J.

KRIEGLER, J.

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