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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. MARK JAMES SIMON, Defendant and Appellant.	B238040 (Los Angeles County Super. Ct. No. MA053849)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol Koppel, Judge. (Retired Judge of the former Mun. Ct. for the San Bernardino Jud. Dist. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Maggie Shrout, 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, Paul M. Roadarmel and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Mark James Simon, of: felony assault by means likely to produce great bodily injury (Pen. Code,[1] § 245, subd. (a)(1)); misdemeanor obstructing business operations (§ 602.1, subd. (a)); and misdemeanor battery (§ 242). The jury further found defendant personally inflicted great bodily injury on the victim in the commission of the aggravated assault. (§ 12022.7, subd. (a).) Following a jury trial waiver, the trial court found defendant had previously sustained a serious felony conviction within the meaning of sections 667, subdivisions (a) through (i), and 1170.12. Defendant was sentenced to nine years in state prison. We modify the oral pronouncement of judgment to impose certain fees *as to each count*. We affirm the judgment in all other respects.

II. THE EVIDENCE

A. The Prosecution Case

Elaine M. Heitman was working as a box office manager at the Antelope Valley Fair on August 28, 2011. A person could not enter the fair without purchasing a ticket at the box office. At 1:45 p.m., prior to the fair's 2 p.m. opening, defendant approached a ticket window. He asked how he could volunteer. The salesperson summoned Ms. Heitman. At first, defendant inquired about volunteering. Then he demanded to be let into the fair without purchasing a ticket. Ms. Heitman told defendant three or four times that he could not enter the fairgrounds without a ticket. Nevertheless, defendant went around a corner and entered the fairgrounds through an unstaffed ticket gate. Ms. Heitman radioed the fair security guards. Ms. Heitman acknowledged that a person *could*

[1] All further statutory references are to the Penal Code except where otherwise noted.

enter the fair for free on Sundays from 2 to 4 p.m. if they donated five cans of food. But Ms. Heitman did not remember defendant inquiring about that possibility.

Chris Nollinger was a security supervisor at the fairgrounds. He was notified that someone had run through the front entrance and towards the barn area. Mr. Nollinger proceeded in that direction. Meanwhile, two other security officers, Tim Palen and Thomas Murphy, had detained defendant. When Mr. Nollinger arrived, it appeared defendant was trying to pull away from Mr. Palen and Mr. Murphy. Defendant swung with a closed fist towards Mr. Palen. Mr. Palen testified, "I ducked the punch." Mr. Nollinger approached and told defendant to stop resisting and get on the ground. Defendant attempted to run. Mr. Palen and Mr. Nollinger grabbed defendant's arms. He started to pull away. Mr. Nollinger wrapped an arm around defendant's neck and performed "a takedown" maneuver. Defendant's feet were knocked out from underneath him. Mr. Nollinger's intent was to place defendant on the ground. Mr. Nollinger intended to handcuff defendant. Both men fell to the ground. Defendant landed on his stomach. Another person placed a knee on defendant's left shoulder. Defendant was told numerous times to place his hands behind his back. Defendant refused to comply. Mr. Nollinger testified, "He was using vulgarities and not complying." Defendant grabbed Mr. Nollinger's upper left thigh area. Mr. Nollinger applied a pressure point maneuver. Mr. Nollinger placed a thumb behind defendant's right ear and applied pressure. This was done to get defendant to release Mr. Nollinger's thigh. The maneuver worked temporarily. Defendant released Mr. Nollinger's thigh. But defendant grabbed Mr. Nollinger's testicles and squeezed them. Mr. Nollinger described the squeezing action as involving a severe amount of force. Mr. Nollinger felt extreme pain. He screamed out in pain. Mr. Nollinger tried unsuccessfully to release defendant's grip. Mr. Nollinger then punched defendant in the face. Defendant let go. Mr. Nollinger was then able to control defendant. Other officers handcuffed defendant. No officer hit, stomped on or kicked defendant.

As noted, Mr. Palen encountered defendant. Mr. Palen repeatedly asked defendant to stop. Mr. Palen described defendant as "pretty" agitated. But defendant did not look

confused or disoriented. Mr. Palen testified, "He seemed like he was in a hurry to go somewhere." According to Mr. Palen, defendant was yelling. Defendant did not say he was looking for someone. Mr. Palen testified Mr. Nollinger yelled out when grabbed by the testicles. Mr. Palen knew that Mr. Nollinger was hurt.

Mr. Nollinger was treated by emergency medical personal. He was not transported to a hospital. Mr. Nollinger saw a doctor for the injury the following morning. Mr. Nollinger suffered numerous abrasions on his knees and severe bruising of the testicle region. With respect to his knee injury, Mr. Nollinger testified, "I still have injuries that are resulting from that, from the inner knee." Three months after the altercation, Mr. Nollinger continued to experience pain in his knee. He was receiving ongoing physical therapy. The constant pain and aching in his testicles had lasted the remainder of the day he was injured and into the next day. He had a noticeable limp, had to take rest breaks throughout the day, and was visibly in pain. He felt like he had a severe, constant stomach ache. He described the stomach pain as "lower and very intense." Mr. Nollinger suffered no permanent damage to his testicles.

B. The Defense Case

Defendant testified in his own defense. He recalled speaking with Ms. Heitman and another person at the ticket booth. He was unsatisfied with their response to his request to volunteer. He wanted to volunteer because he did not have money for a ticket. He left the ticket window and walked through what looked like a vendor entrance. He was frustrated and wanted to speak to somebody in charge. A man directed defendant to leave the fairgrounds. Defendant was uncomfortable being handled that way. Defendant said he was going to start walking. Defendant testified: "I was walking along—along the fairgrounds, looking at some of the vendor booths. I walked for, probably, a minute. And then, after that , . . . suddenly, I found myself on the ground." He did not know how he got there. He felt pressure and danger, as if he was being held down. He saw four or five men standing around him. Defendant testified as to what happened next: "[M]y

sight was directed to a man standing right on top of me. . . . I reached up with my hand and squeezed his testicles. I felt that doing that will allow me to . . . get up and start walking again. [¶] . . . And I found myself immediately handcuffed and led into a police car." During the struggle, defendant said he wanted to speak to a police officer. He did not recall anyone telling him to stop.

On cross-examination, defendant denied that had run at any point. He admitted he knew he was not supposed to be on the fairgrounds. And he knew there were security guards at the fair. When he saw the security guards, he knew they were coming to ask him to leave. But he did not recall being asked to leave. His arm was grabbed, but he was not punched or kicked. He felt his body was being violated, did not like it and pulled away. Defendant, who was afraid, did not want them to touch him. Defendant suffered scrapes on his elbows and knees from the fall to the ground. Defendant spoke with a police officer. But defendant did not recall what he said. Defendant admitted he had been convicted of felonies in 1992 and 2001.

III. DISCUSSION

A. Defendant's Competency

Defendant contends the trial court expressed a doubt as to his competency to stand trial. Defendant argues that as a result a competency hearing should have been held. Defendant cites the circumstances described below in support of his claim. Prior to trial, the following discussion transpired: "The Court: . . . [¶] And there has been no renewed motion by the people right? [Deputy District Attorney Adan] Montalban: No, Your Honor. [¶] The Court: And you are looking for that third strike, I take it? [¶] Mr. Montalban: Yes. There is – we are investigating a possible third strike. [¶] The Court: Okay. [¶] And you will let us know as soon as you get it. [¶] Mr. Montalban: Yes, Your Honor. [¶] The Court: Or if you can get it, or you can't get it. [¶] Mr. Montalban: Yes. [¶] The Court: And the defense, there has been no movement? [¶] [Deputy Public

Defender Rosario] Corona: Your Honor, Mr. Simon did have an offer that I did relate to the People. His offer would be that the charge be reduced down to a misdemeanor and that he be then allowed to go maybe to, perhaps, a mental institution for some[ ]time until they can say that he's okay, and then for him to be allowed to go and live with his sister in Northern California. [¶] The Court: Before the jurors come in, just let me ask you this. That would be a Department 95 [mental health department] referral, I think, after or before trial, right? Why didn't we do that to start with? [¶] Ms. Corona: . . . [I]s the court indicating that the court is concerned about Mr. Simon's competency? If the court is concerned, I believe that the court can make that determination. [¶] The Court: At any time, I know. . . . [¶] But my concern is even without a . . . third strike is a life case. A second strike is a lot of years. [¶] Ms. Corona: Well, Your Honor, why don't we—the court can—can make that determination. Counsel doesn't make that determination at all. It's -- [¶] The Court: Normally, counsel will indicate that they think it might be appropriate. But I don't know that it's appropriate at this point where we are picking a jury. Maybe after the trial. Or -- [¶] Ms. Corona: I think it's appropriate at any time the court feels that way. [¶] The only information I can provide to the court is that my understanding from Mr. Simon is that he has been started on medication just over the weekend. [¶] The Court: What's he taking? [¶] (The defendant and his counsel confer sotto voce.) [¶] Ms. Corona: Lithium. [¶] The Court: Lithium Carbonate? [¶] Ms. Corona: I think that, that might be sufficient for the court. [¶] But its—the ball is in the court's hand. [¶] The Court: I'm not ready for that at this point. But that was my first indication two days ago, because it was such a serious case, and with the two strikes, I was hoping he would opt for the four years. But that's his—something like that. I don't know. Maybe we should wait. We can do it after the trial. [¶] Ms. Corona: My only concern, Your Honor, is that with the medication having been started over the weekend, I don't know—my understanding, from these types of medication, is—is that it does take time for it to have a therapeutic effect and for them to actually find a therapeutic level. I haven't spent enough time with Mr. Simon this morning to get a better reading as to how he's doing today. I do note that he is more reserved and withdrawn this morning than he

has been in the past. [¶] The Court: You indicated his family was going to be here. So maybe you can talk to them sometime today. [¶] Ms. Corona: Well, that is my understanding, that his family was going to be here today. [¶] The Court: Okay. Maybe they will. Maybe they will show up. [¶] Ms. Corona: So how does the court want to proceed then? [¶] The Court: I think we will proceed with the jury. We will choose a jury, and then maybe after the family comes here and talks to him, we will have some resolution, if at all possible."

Later, just prior to defendant's testimony, the following occurred: "Mr. Montalban: Your Honor, before we bring the jury in, in an abundance of caution, could the court just remind the defendant[] he has an absolute right not to testify and that it's his choice to testify? [¶] I'm not sure if the defense counsel if joining in the admonishment, however, I feel it's appropriate, under these circumstances." The trial court inquired of defendant: "The Court: All right. [¶] Sir, you do understand you have the right not to testify, don't you? [¶] The Defendant: Yes, Your Honor. [¶] The Court: But you have decided to testify? [¶] The Defendant: That's correct. [¶] The Court: All right. [¶] Then we will go forward." Defendant testified he had a general fear of being touched or grabbed; he was afraid of getting into a fight. He also testified that on the date of the altercation, he felt frustrated, but not angry. Ms. Corona asked defendant: "And what was frustrating?" Defendant responded: "It was - - I had a vision of how things were going to turn out, and I found out that - - I had intended to go to the fairgrounds, enjoy the fair. And I was wondering, well, it's not working out that way. [¶] And I - - I understand it sounds like - - like there is a mental problem I have. And I'm sorry volunteering that, but that is correct, I have a problem." On Mr. Montalban's motion, the trial court struck that response.

At the time of sentencing, Ms. Corona requested an Evidence Code section 730 evaluation of defendant be prepared. Ms. Corona stated, "I think that at this point it would be appropriate to do that . . . ." The trial court commented, "You know, I have anguished over this case because of the mental problems that we have discussed, but in the long run and at the end it appears appropriate to sentence this defendant at this time."

The trial court inquired: "What would be the benefit of a 730 evaluation? What could it possibly do in this particular case because I, too, have considered even appointing two psychiatrists, but after reviewing the file and my notes it seems that is would be to no avail and not help the defendant or the people because – [at which point Mr. Corona interrupted]." Ms. Corona later asserted: ". . . I do believe that a 730 evaluation would still be appropriate in this case. I understand - - and I understand and have heard what the court has said in terms of its consideration and that it has reviewed its notes and I would again just remind the court that it did have some trepidation in proceeding with trial prior to starting that because the court sensed something about Mr. Simon and I think not being a professional myself - - and I don't know if the court has any background on that, either - - I thought that maybe hearing from a professional mental health worker would aid the court in its position. So I just wanted to put that on the record." The trial court responded: "All right. The motion to continue is denied."

Section 1367, subdivision (a) provides: "A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." Our Supreme Court examined the test of mental competence to stand trial and the procedures necessary to protect that right in *People v. Taylor* (2009) 47 Cal.4th 850, 861-862: "Neither the federal Constitution nor our statutes allow a person to be tried criminally while mentally incompetent. (*Pate v. Robinson* (1966) 383 U.S. 375, 378; § 1367, subd. (a).) The constitutional test is whether the defendant '"has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."' (*Dusky v. United States* (1960) 362 U.S. 402 (per curiam).) Our statutes similarly forbid prosecution while the defendant, 'as a result of mental disorder or developmental disability, . . . is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.' (§ 1367, subd. (a).) [¶] The

federal Constitution further demands that 'state procedures ... be adequate to protect this right.' (*Pate v. Robinson, supra,* 383 U.S. at p. 378; accord, *Drope v. Missouri* (1975) 420 U.S. 162, 172.) Our statutes provide for suspension of criminal proceedings when a doubt as to the defendant's competence arises in the trial judge's mind or when counsel informs the court of counsel's belief the defendant may be incompetent (§ 1368); the appointment of psychologists or psychiatrists to examine the defendant (§ 1369, subd. (a)); and trial of the issue to a jury or to the court (*id.,* subds. (b)-(f)). The defense may waive a jury trial and may even . . . submit the issue to the court on the written reports of psychologists or psychiatrists. (*People v. Lawley* (2002) 27 Cal.4th 102, 131–132; *People v. McPeters* (1992) 2 Cal.4th 1148, 1169[, superseded by statute on another point as stated in *People v. Wallace* (2008) 44 Cal.4th 1032, 1087].)" (Accord, *People v. Ary* (2011) 51 Cal.4th 510, 517-518; *People v. Rogers* (2006) 39 Cal.4th 826, 846-847.)

Our review is for substantial evidence of incompetence. As our Supreme Court explained in *People v. Rogers, supra,* 39 Cal.4th at page 847: "A trial court's decision whether or not to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial. (See *People v. Danielson* [(1992)] 3 Cal.4th [691,] 727[, disapproved on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13]; see also *Drope v. Missouri, supra,* 420 U.S. at p. 181.) The failure to declare a doubt and conduct a hearing when there is substantial evidence of incompetence, however, requires reversal of the judgment of conviction. (*Drope v. Missouri, supra,* 420 U.S. at p. 181; *Pate v. Robinson, supra,* 383 U.S. at pp. 384-385; *People v. Blair* [(2005)] 36 Cal.4th [686,] 711.)"

Defendant cites no substantial evidence he was unable to: understand the nature of the proceedings; consult with Ms. Corona with a reasonable degree of rational understanding; or assist in his own defense. Neither defendant nor Ms. Corona ever advised the trial court defendant was having difficulty understanding the nature of the trial proceedings or communicating with his attorney. Defendant's trial counsel, Ms. Corona, was necessarily in a position to advise the trial court if defendant showed signs he was not competent to stand trial. She did not do so. Nor did the trial court ever

express any concern about defendant's ability to understand the proceedings or to assist in his own defense. Moreover, while testifying and at other times when defendant interacted with the trial court, he did not act incompetently. Under these circumstances, we find no error in failing to hold a competency hearing.

B. Section 654, Subdivision (a)

Defendant argues his concurrent six-month sentence for misdemeanor battery should have been stayed under section 654, subdivision (a). Section 654, subdivision (a), precludes multiple punishment for a single act or omission. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; accord, *People v. Assad* (2010) 189 Cal.App.4th 187, 200.) The Attorney General argues that defendant forfeited his section 654, subdivision (a) contention because he pled no contest to two misdemeanor charges in a separate case. No doubt, the trial court made reference to "the other case" and the "misdemeanor case" when it imposed the six-month term on the battery count. However, defendant was convicted in this case in count 2 of obstructing a business operator in violation of 602.1, subdivision (a). In count 3, defendant was convicted of misdemeanor battery. The abstract of judgment clearly states that defendant was convicted of misdemeanors in counts 2 and 3. Thus, there was no separate misdemeanor case to which defendant had entered into any plea bargain.

In any event, we review a multiple punishment contention for substantial evidence. (*People v. Coleman*, *supra*, 48 Cal.3d at p. 162*; People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338.) There were multiple assaultive acts inflicted upon Mr. Nollinger. The trial court could reasonably conclude these separate acts evidenced distinct intentions to do violence to Mr. Nollinger. (*People v. Harrison* (1989) 48 Cal.3d 321, 329-337; *People v. Surdi* (1995) 35 Cal.App.4th 685, 690; *People v. Trotter* (1992) 7 Cal.App.4th 363, 368; see 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, § 284, p. 448.) No section 654, subdivision (a) violation occurred.

C. Sufficiency Of The Evidence Of Great Bodily Injury

Defendant challenges the sufficiency of the evidence Mr. Nollinger suffered great bodily injury within the meaning of section 12022.7. Whether a victim suffered great bodily injury is a question of fact for the jury. (*People v. Escobar* (1992) 3 Cal.4th 740, 750; *People v. Wolcott* (1983) 34 Cal.3d 92, 107.) Our review is for substantial evidence. (*People v. Le* (2006) 137 Cal.App.4th 54, 59; *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1755.)

Pursuant to section 12022.7, subdivision (f), "As used in this section, 'great bodily injury' means significant or substantial physical injury." Our Supreme Court has held: "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. [Citations.]" (*People v. Cross* (2008) 45 Cal.4th 58, 66.) As our Supreme Court held in *People v. Escobar, supra,* 3 Cal.4th at page 750, "[There is] no specific requirement that the victim suffer 'permanent,' 'prolonged,' or 'protracted' disfigurement, impairment, or loss of bodily function." (See, e.g., *People v. Escobar, supra,* 3 Cal.4th at pp. 744, 750 [multiple abrasions, neck pain, vaginal pain lasting more than a week]; *People v. Le, supra,* 137 Cal.App.4th at p. 59 [shooting victim suffered pain and was unable to walk, stand, or sit unassisted for weeks].)

Here, Mr. Nollinger suffered extreme pain when his testicles were grabbed and squeezed. Mr. Nollinger continued to experience pain, required rest breaks from work, and was unable to walk properly for the remainder of the day. And he was still unable to walk properly during part of the following day. Mr. Nollinger also suffered an injury to his knee. He continued to experience pain in his knee three months after the altercation. At the time of trial, he was undergoing continuing physical therapy for the knee injury. This was substantial evidence from which the jury could reasonably conclude defendant inflicted great bodily injury on Mr. Nollinger.

D. Court Facilities and Court Operations Assessments

The trial court orally imposed a single $30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)) and one $40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)). However, the assessments should have been orally imposed *as to each count*. (*People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3 [court facilities assessment]; *People v. Roa* (2009) 171 Cal.App.4th 1175, 1181 [court operations assessment]; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866 [same]; see *People v. Alford* (2007) 42 Cal.4th 749, 758, fn. 6.) The abstract of judgment is correct in this regard and need not be amended.

IV. DISPOSITION

The oral pronouncement of judgment is modified to impose a $30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)) and a $40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)) as to each count. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

KRIEGLER, J. FERNS, J.*

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