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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. LUIS CACERES, Defendant and Appellant.	B238003 (Los Angeles County Super. Ct. No. MA053753)

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

Law Office of Eric Cioffi and Eric Cioffi, 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, Linda C. Johnson, Supervising Deputy Attorney General, Ryan M. Smith, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Luis Caceres guilty in count 1 of assault by a state prisoner with a deadly weapon (Pen. Code, § 4501)[1] and in count 2 of assault by a state prisoner by means likely to produce great bodily injury (§ 4501). In a bifurcated proceeding, defendant admitted suffering a prior prison term (§ 667.5, subd. (b)).[2]

The trial court sentenced defendant to five years in state prison. It imposed the middle term of four years on count 1, plus an additional year for the prior prison term. The court stayed the sentence in count 2 pursuant to section 654.

Defendant argues the trial court: (1) erred by refusing to dismiss count 2; (2) erred when it failed to give the requested self-defense instruction; and (3) abused its discretion when it restricted defendant's ability to cross-examine correctional officers.

We affirm the judgment.

FACTS

On March 3, 2011, defendant and two other inmates attacked the victim, Frank Frye, at the state prison in Lancaster. The three correctional officers who witnessed and responded to the fight observed defendant and the two other inmates on top of Frye, hitting him in the torso and head. Two of the officers testified that Frye was in a defensive position, but that they also saw him throwing punches. The third officer did not see Frye punching his attackers. The officers did not see how the fight started or learn what caused it. The first officer to observe the fight testified that it may have been in progress for up to two minutes before he noticed it and stated that "a lot can happen in two minutes."

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

[2] The prosecution chose not to proceed on a second prior prison term allegation in exchange for defendant waiving his right to jury trial on the prior prison term allegations.

In response to the fight, the officers "put down the yard" by sounding an alarm requiring all inmates to lie down on the ground. All of the prisoners in the yard complied, with the exception of defendant and the two other inmates punching Frye. One officer employed pepper spray on the fighting inmates, which caused two of them to stop hitting Frye. Defendant continued to punch Frye undeterred until an officer was able to subdue him with a baton. All four inmates were handcuffed and taken from the yard for medical examination.

The officers observed that Frye had injuries on his head resembling slash marks. The vocational nurse who examined Frye testified the slash marks were consistent with wounds caused by a razor blade. He also observed abrasions on Frye's back and hands, which were consistent with injuries one would sustain after being scraped on cement.

Inmates are issued razor blades for personal hygiene purposes. It is common for inmates to fashion these razors into weapons. No weapons were recovered from any of the individuals involved in the fight, or from the general area in the yard where the fight took place. Frye may have had a weapon. Frye sustained the slash injuries, and it was possible that an inmate not involved in the fight had inflicted them.

DISCUSSION

Whether the Trial Court Erred in Refusing to Dismiss Count 2

Defendant was convicted under section 4501 in both counts 1 and 2. Section 4501 provides in pertinent part: "[E]very person confined in a state prison of this state who commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, shall be guilty of a felony and shall be imprisoned in the state prison for two, four, or six years to be served consecutively." Defendant argues his two convictions under section 4501 were convictions for the same offense, and the trial court erred by refusing to dismiss his conviction in count 2.

California law distinguishes between three individual but related concepts: multiple prosecution, multiple conviction, and multiple punishment. Under section 954, the prosecution is permitted to *charge* a defendant in different counts under different statements of the same offense, or to charge a defendant with multiple offenses based on a single act or indivisible course of conduct. A defendant may be *convicted* of multiple offenses based on a single criminal act (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034; *People v. Ortega* (1998) 19 Cal.4th 686, 692 (*Ortega*)), with a single "'judicially created exception to the general rule . . . "prohibit[ing] multiple convictions based on necessarily included offenses." [Citation.] . . . [Citation.]'" (*People v. Correa* (2012) 54 Cal.4th 331, 337 (*Correa*).) The California Constitution prohibits multiple convictions of a defendant for the same offense, otherwise known as double jeopardy. (Cal. Const., art. I, § 15.) Moreover, despite the fact that a defendant may be convicted for multiple offenses on the basis of one act, section 654 prohibits *punishment* for a single act under more than one Penal Code provision. The tension between sections 954 and 654 has been reconciled by allowing multiple convictions for a single act but imposing punishment, "under the provision that provides for the longest potential term of imprisonment," and staying punishment for any other convictions related to the act. (§ 654; *Correa*, *supra*, at p. 337; *Ortega*, *supra*, at p. 692.)

We conclude that defendant may be properly convicted under section 4501 in both counts, because he was convicted of two separate offenses. Defendant was convicted in count 1 of assaulting Frye with a deadly weapon—specifically an "inmate manufactured slashing instrument." In count 2, he was convicted of assaulting Frye using his fists, a means of force likely to cause great bodily injury.

The prosecution distinguished between the two counts at length in its argument to the jury, emphasizing that count 1 related only to defendant's use of a slashing instrument or to his aiding and abetting of another attacker's use of a slashing instrument, and that count 2 related only to defendant's use of his fists to punch Frye:

"Count one, assault with a deadly weapon . . . . [¶] . . . [¶] Let's talk about a deadly weapon. In this case it was a slashing instrument, and we know that by the nature

of the wounds on Frank Frye. The nurse Calvin Young dubbed them slashes and you will see that on the medical form. [¶] . . . [¶] And although the razor in our case is very, very small, it is absolutely capable of producing death or great bodily injury and we know that because the nurse, Mr. Young, actually said he has seen injuries that resembled Mr. Frye's in people that were trying to commit suicide and they were using those razors. We know that is capable of doing that. And, in fact, it's one of the most common weapons used by prisoners. [¶] So, again, the focus of your inquiry here is capable, if used correctly, of being a deadly weapon. A razor blade absolutely is. If you cut someone in the carotid artery, the femoral artery, places that would cause instant bleeding, heavy bleeding, it is absolutely a deadly weapon. [¶] . . . [¶] So it comes down to who used the razor. We don't know. . . . Luckily, it doesn't matter because there are two very distinct theories that you can rely on. One, we can believe that [defendant] had the razor and used it . . . . And although, again, none of the officers saw a weapon, that could be explained. It is small. You could hold it in your hand. You are not going to see it. It is very small. So what may look like punching, he is actually taking that razor and slashing at him. [¶] Or two . . . aiding and abetting. . . . [I]f [another one of the attackers] had the razor . . . and they were doing the cutting, [defendant] is still guilty."

"[With respect to count 2,] is being punched in the face and the torso and all over the body force capable of causing great bodily injury? And I think we can all agree that it in fact is. We have all heard of that one punch knock-out, and we know that you can break a jaw. You can break multiple bones. You can have black eyes, split lips, get stitches. These are all effects of being punched in the face and the torso. [¶] . . . [¶] So the defendant when he was punching Frank Frye over and over again, he committed an assault. He knew he was doing it, intended to do it, had the ability to do it, and the force he was using is absolutely capable of creating great bodily injury. And that is count two."

The jury was instructed as to aiding and abetting under CALJIC No. 3.01, in addition to being instructed as to assault by prisoner with a deadly weapon or by means of force likely to produce great bodily injury under CALJIC No. 7.36. It returned a

verdict in count 1 finding defendant guilty of assault by state prisoner with a deadly weapon, to wit, an inmate fashioned slashing instrument, in violation of section 4501, and in count 2, guilty of assault by state prisoner by means of force likely to cause great bodily harm, also in violation of section 4501. The jury verdicts clearly distinguished between the slashing and punching assaults.

Defendant argues that assault by means of a deadly weapon and assault by means of force likely to cause great bodily injury do not constitute separate offenses but are merely different means of committing a single offense. This argument misses the point. Undoubtedly, the crime of assault conduct described in section 4501can be accomplished by *either* use of a deadly weapon *or* by use of force likely to cause great bodily injury. But in this case, where two different acts independently accomplish distinct crimes under the same provision, two offenses have been committed. The two acts were independent and of a different nature, with each constituting a discrete form of assault by a prisoner.

We are not swayed by defendant's argument that California precedent mandates a different result. In *People v. Ryan* (2006) 138 Cal.App.4th 360, the defendant was convicted in two counts for forging checks and convicted in an additional two counts for later passing the same checks. (*Id*. at pp. 362-363.) Both the acts of forging and passing the checks were punishable pursuant to the same statutory provision and, as in this case, constituted different means of committing the same crime. (*Id*. at pp. 366-368.) The *Ryan* court vacated the two convictions for forging the checks, while allowing the two convictions for passing the checks to stand, reasoning that the "conduct in each incident appear[ed] to be more completely covered by [the affirmed convictions.]" (*Id*. at p. 371.) *Ryan* is distinguishable from this case because there, the defendant could not have passed the forged check if it were not, in fact, forged. One act depended entirely on the other for its commission, so the two actions were components of the same offense. Here, defendant's use of a razor and use of his fists were entirely independent and, as such, constituted two separate offenses.

Defendant also relies on *People v. Craig* (1941) 17 Cal.2d 453, in which a rape conviction was vacated where two counts were brought under the same statute, based on

a single act of intercourse. (*Id*. at p. 454.) The defendant was charged with rape accomplished by force and violence, and rape upon a child under the age of consent, under different subdivisions of the same statute. (*Id*. at pp. 454-455.) The *Craig* court determined there was but one offense, because the defendant performed only one act of intercourse on one victim. (*Id*. at pp. 454, 457.) *Craig* also differs significantly from this case. Unlike *Craig*, defendant's convictions were not based on one act but were instead founded upon discrete forms of assault, both of which could be committed independent of the other.

Finally, defendant cites to no cases holding that a defendant may not be convicted in several counts under the same provision where the defendant's actions each constitute a crime independent of the other, and indeed, precedent shows that the opposite is true. (*People v. Harrison* (1989) 48 Cal.3d 321 [the defendant guilty of three counts of rape although penetrations occurred in rapid succession and for the same purpose]; see also *People v. Trotter* (1992) 7 Cal.App.4th 363 [extending the reasoning in *Harrison* to non-sexual assault cases].)

For all of the foregoing reasons, we hold the trial court did not err in refusing to dismiss count 2.

Whether the Trial Court Erred in Refusing to Instruct on Self-Defense

Trial counsel requested the trial court instruct the jury on the right to self-defense under Judicial Council of California Criminal Jury Instructions (2011-2012) CALCRIM No. 3470. He argued the instruction was supported because Frye had been observed throwing punches by two of the officers. The trial court denied the request because there was insufficient factual basis to support the instruction. The court reasoned that evidence had been presented that the fight was by three men against one, and that without more, giving the self-defense instruction would not be appropriate.

Defendant contests the trial court's ruling and argues the court erroneously judged the credibility of the defense's evidence. He contends substantial evidence in the record

supported giving the instruction. In addition to the evidence that Frye may have been throwing punches during the fight, defendant contends there is circumstantial evidence defendant acted in self-defense, because none of the officers saw how the fight started. They did not know who instigated the fight or how many people were initially involved, and one officer never ruled out the possibility that Frye had a weapon, or that an inmate not involved in the fight could have caused Frye's slash injuries. Defendant asserts the trial court's refusal to give the instruction deprived him of his constitutional right to present a defense.

"'A defendant has a constitutional right to have the jury determine every material issue presented by the evidence.' [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) In accordance with this right, "[a] court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial." (*People v. Lopez* (1998) 19 Cal.4th 282, 287.) But "'[a] trial court has no duty to instruct the jury on a defense—even at the defendant's request—unless the defense is supported by substantial evidence.' [Citation.] 'In other words, "[t]he court should instruct the jury on every theory of the case, but only to the extent each is supported by substantial evidence." [Citation.]' [Citation.] 'If the evidence should prove minimal and insubstantial, however, the court need not instruct on its effect.' [Citation.] Instructions only need be given where the 'evidence [is] substantial enough to merit consideration.' [Citation.]" (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1101 (*Hill*), overruled on other grounds in *People v. French* (2008) 43 Cal.4th 36, 48, fn. 5.) This court independently reviews the trial court's decision to refuse to instruct on a defense. (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

CALCRIM No. 3470 instructs in pertinent part: "The defendant acted in lawful [self-defense] if:

"1. The defendant reasonably believed that [he] . . . was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully];

"2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

"AND

"3. The defendant used no more force than was reasonably necessary to defend against that danger."

No evidence was presented that Frye was the aggressor. Although two officers observed Frye to be throwing punches, they qualified that he did so from a defensive position. Frye was on the ground, first with three men on top of him and attacking him, and then with defendant alone on top and attacking. The fact that Frye may have taken some action to protect himself rather than enduring the beating does not in itself constitute substantial evidence supporting a self-defense instruction. Furthermore, beyond the lack of substantial evidence that Frye instigated the fight or placed defendant in fear of imminent danger of suffering bodily injury or being touched unlawfully, there was no evidence from which the jury could infer that defendant reasonably believed immediate use of force was necessary to defend himself, or that the force used was no more than reasonably necessary. Initially, two other inmates were beating Frye along with defendant. Frye was substantially out-numbered, and the relentless punching of the three inmates was more force than was needed to prevent any danger he might have posed to them. Once officers recognized that a fight was in progress, they put down the yard and proceeded to break up the fight. At that point, it was no longer necessary for defendant to apply any force. However, defendant persisted in punching Frye and continued to do so despite being admonished by the officers and pepper-sprayed. An officer had to strike defendant with a baton to end his attack on Frye. Our review of the record reveals no evidence defendant assaulted Frye in order to lawfully exercise a right of self-defense.

Defendant urges us to conclude the trial court erred on the basis of a series of unknowns: it was unknown how the fight started; it was unknown whether Frye was the instigator; it was unknown whether Frye was initially assisted by other inmates; and it was unknown whether Frye might have had a weapon at some time. A lack of evidence that defendant was *not* acting in self-defense is not substantial evidence that he *was*

defending himself. We will not reverse the trial court's ruling absent substantial evidence the instruction should have been given. (*Hill, supra,* 131 Cal.App.4th at p. 1101.)

Because there was no substantial evidence to support a self-defense instruction, it necessarily follows that defendant was not deprived of his constitutional right to present a defense.

Whether the Trial Court Abused its Discretion in Restricting the Defense's Cross-Examination of Officers

Defendant next argues the trial court abused its discretion when it restricted the defense's cross-examination of the officers. In particular, trial counsel sought to elicit testimony regarding Frye's disciplinary history and history of previous altercations. The court denied the request, finding it was more prejudicial than probative under California Evidence Code section 352. The court stated that Frye's prior history was tangential to the issues and speculative. It did, however, allow the defense to question the officers regarding whether they had seen the start of the fight and to question them as to whether Frye might have received his slash injuries prior to the fight.

A trial court's exercise of discretion in excluding evidence "'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evidence is probative if it "ha[s] a 'tendency in reason to prove or disprove any disputed fact' [citation] . . . ." (*People v. Prince* (2007) 40 Cal.4th 1179, 1237.) "'[U]ndue prejudice is that which "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." [Citations.]' [Citation.]" (*People*

v. Jones (2012) 54 Cal.4th 1, 61.) """In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." [Citation.]' [Citation.]" (*People v. Scott* (2011) 52 Cal.4th 452, 491.)

"Evidence Code section 1101, subdivision (a) provides that 'evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion.' Evidence Code section 1103, subdivision (a)(1) provides an exception to Evidence Code section 1101, subdivision (a) when a defendant offers evidence regarding the character or trait of a victim 'to prove conduct of the victim in conformity with the character or trait of character.' [¶] . . . Where no evidence is presented that the victim posed a threat to the defendant, exclusion of evidence regarding the victim's propensity for violence is proper." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827-828.)

Here, as we have previously discussed, the record does not contain substantial evidence to support a theory of self-defense. Evidence of Frye's disciplinary record, unconnected in any way to this altercation, was of dubious relevance and certainly possessed the potential for confusing the jury and consuming an undue amount of time. Defendant has not established an abuse of discretion under section 352.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.