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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARVEL JACKSON, Defendant and Appellant.	B253194 (Los Angeles County Super. Ct. No. LA071928)

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

Kimberly Howland Meyer, under appointment by the Court of Appeal, for Defendant and Appellant

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II, Marc A. Kohm, Alene M. Games, and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Arvel Jackson (defendant) appeals his convictions and resulting 29 year-plus prison sentence arising out of incidents in which he shoved his wife's face into a sofa and then shot some of her toes off. He challenges the trial court's failure to give two jury instructions, the sufficiency of the evidence supporting two of the counts, and the accuracy of the abstract of judgment. We agree with him that the abstract must be corrected, but otherwise reject his arguments and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In the months leading up to August 2012, defendant suspected he was being stalked by "the Mexicans," whom he believed meant to kill him.[1] He suspected that his wife was in league with them. At first, he threatened his wife with words, telling her, "Before I let them get me, you'll go first." She felt threatened.

The threats escalated.

In early August 2012, defendant again accused his wife of aiding "the Mexicans," again threatened to hurt her, and proceeded to shove her head into the sofa with his hand.

Three weeks later, in late August, he told his wife "the Mexicans" were coming to attack him in the apartment they shared. After telling her, "They're here," he retrieved a gun and watched the window shades of his second-story bedroom window as his wife lay on the bed. When he saw a shadow cross the window shade and heard noises, he fired a shot that penetrated the bed frame and box spring before dismembering two of his wife's toes. She later lost all of her toes on that foot to gangrene.

For the early August incident, the People charged defendant with misdemeanor battery (Pen. Code, § 243, subd. (e)(1)).[2] For the late August incident, the People charged him with (1) mayhem (§ 203), (2) infliction of corporal injury on a spouse (§

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[1] Defendant's paranoia regarding "the Mexicans" was tied to his regular use of illegal narcotics. The trial court excluded any defense of voluntary intoxication, and defendant does not challenge that ruling on appeal.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

273.5), (3) being a felon-in-possession of a firearm (§ 29800, subd. (a)(1)), and (4) assault with a firearm (§ 245, subd. (a)(2)).) The People also alleged that defendant's 1981 robbery conviction (§ 211) was a prior "strike" under the Three Strikes Law (§§ 1170.12, subds. (a)-(d), 667, subd. (b)-(i)) and a prior serious felony (§ 667, subd. (a)(1)); that he personally used a firearm (§ 12022.5, subd. (a)); and that his wife suffered great bodily injury in the course of a domestic violence offense (§ 12022.7, subd. (e)).

The jury convicted defendant of battery causing serious bodily injury (§ 243, subd. (d)) as a lesser-included offense to mayhem; being a felon-in-possession of a firearm; assault with a firearm; and misdemeanor battery, but acquitted him of mayhem and infliction of corporal injury to a spouse. The jury found the enhancements to be true.

The trial court imposed a sentence of 29 years and four months. The court doubled a high-end sentence of four years for the battery causing serious bodily injury, and then added ten years for the personal use of a firearm, five years for the infliction of great bodily injury, and five years for the prior serious felony. The court added an additional, consecutive sentence of 16 months for the felon-in-possession of a firearm charge. The court stayed all remaining sentences.

Defendant timely appeals.

DISCUSSION

I. Instructional Error

The trial court instructed the jury on the "defense" of accident as to the mayhem charge, as to its lesser-included offense of battery causing serious bodily injury, and as to the infliction of corporal injury on a spouse charge; the court did not make that "defense" available for the assault with a firearm charge. The court did not instruct the jury on the "defense" of mistake of fact. Defendant argues that the trial court should have instructed the jury on both "defenses" as to all charges. We disagree.

The "defenses" of accident and mistake of fact are not affirmative defenses in the traditional sense; instead, they "operate[] to negate the requisite criminal intent or mens rea element of the [charged] crime." (*People v. Lawson* (2013) 215 Cal.App.4th 108, 111

[so noting, as to mistake of fact defense]; *People v. Hussain* (2014) 231 Cal.App.4th 261, 269 (*Hussain*) ["the defense of accident seeks only to negate the mental state element of the offense charged"]; *People v. Anderson* (2011) 51 Cal.4th 989, 998 [same]; see generally § 26, subds. (3) [mistake of fact "disproves criminal intent"], (5) ["accident[al]" acts are not criminal under certain circumstances].) Courts are under no sua sponte duty to instruct on accident or mistake of fact precisely because those instructions function as so-called "pinpoint" instructions that merely amplify the intent element already set forth and defined in the instruction(s) spelling out the elements for the relevant crime(s). (*Hussain*, at p. 269.)

In this case, we need not decide whether the trial court erred in not giving the pinpoint instructions for accident and mistake of fact because we conclude that, even if the trial court did err, it is not reasonably probable that the jury would have reached a more defendant-friendly outcome if it had been so instructed. (*People v. Larsen* (2012) 205 Cal.App.4th 810, 830-831 ["Erroneous failure to give a pinpoint instruction is reviewed for prejudice under the [*People v.*] *Waston* [(1956) 46 Cal.2d 818, 836] harmless error standard."].) Our conclusion is the same even if we accept defendant's request that we review prejudice by asking whether the instructional omission was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24.

The trial court's decision not to make the accident "defense" available for the assault with a firearm offense was not prejudicial because the jury in this case specifically rejected that defense. Defendant testified that his acts in aiming the gun at his wife and pulling the trigger were an accident; his lawyer argued the shooting was an accident; the court gave the accident instruction as to the battery causing serious bodily injury charge; and the jury nevertheless convicted him of that battery charge. The jury's conviction necessarily rests on a rejection of defendant's accident defense. Because the crime of assault with a firearm has the same "willfulness" intent element as the crime of battery causing serious bodily injury (see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 (*Lara*)

[willfulness as an element of battery]; *People v. Wyatt* (2008) 48 Cal.4th 776, 780 [willfulness as an element of assault]), the jury's finding that defendant's battery was willful—rather than accidental—applies with equal force to the assault charge. Given the jury's findings, the accident instruction would not have mattered. For the first time at oral argument, defendant asserted that the jury's acquittal on the infliction of corporal injury on a spouse count necessarily rested on its *acceptance* of his accident defense, thereby creating some possibility that the jury made inconsistent findings regarding the accident defense. We disagree. The jury's acquittal on the infliction of corporal injury count could rest on several grounds other than its acceptance of the accident defense, including that the crime of inflicting corporal injury requires proof of traumatic injury while battery does not. More to the point, any uncertainty as to why the jury acquitted on the inflicting corporal injury count does not call into question or otherwise negate the jury's unambiguous rejection of the accident defense as to the battery count.

Defendant's challenge to the trial court's failure to give a mistake of fact instruction is without merit for much the same reason. The jury's rejection of the accident defense was, on the facts of this case, synonymous with a rejection of any mistake of fact defense. To be sure, the trial court drew a possible distinction between the two defenses during the charging conference, positing that mistake of fact might apply to where the defendant thought the gun was pointed while accident might apply to whether the defendant meant to pull the trigger. However, we need not opine on whether this distinction was a valid one because, as far as the jury was concerned, the defendant's aim and his trigger-pulling were both presented—in the evidence, during argument, as in the jury instructions—as a single course of accidental conduct. The jury was asked to determine whether the shooting—which involved both defendant's aim and his firing of the gun—was accidental or willful, and its guilty verdict answered the question: It was willful.

Even if we ignore the jury's finding as to accident, the trial court's omission of a mistake of fact instruction was still harmless beyond a reasonable doubt. By its terms,

this "defense" requires proof that the defendant actually held a reasonable belief that, if true, rendered his conduct lawful. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425.) But defendant's proffered mistake in this case—namely, that he thought the gun was pointed at the ground—finds no support in the record, which instead shows that defendant had no idea where the gun was pointed and that it was, in actuality, pointed at his wife (because the bullet severed her toes).

II. Substantial Evidence

Defendant further contends that substantial evidence does not support the jury's finding that he acted willfully, rather than accidentally, as to the battery causing serious bodily injury and assault with a firearm charges. In assessing the sufficiency of the evidence, we review the record in the light most favorable to the verdict and ask whether it is supported by evidence that is reasonable, credible and of solid value. (*People v. Lopez* (2013) 56 Cal.4th 1028, 1069.)

The crimes of battery causing serious bodily injury and assault a firearm, as noted above, each require proof of willfulness. For an act to be "willful," the defendant need not be shown to have "a purpose or willingness to commit the act"; no proof of "intent to violate the law, or to injure another, or to acquire any advantage" is "require[d]." (§ 7; *Lara*, *supra*, 44 Cal.App.4th at p. 107.)

In this case, the jury had before it evidence that defendant believed "the Mexicans" were after him, and that his wife was in cahoots with them, and that he had acted on his suspicions of her in the past by verbally threatening her and shoving her face into the sofa, and that he pulled out a gun and shot her. Moreover, defendant immediately fled the scene and then implored his wife to lie to the police and to tell them it was all an accident. This post-shooting conduct could reasonably be viewed as more consonant with an effort to "cover up" a willful shooting than a reaction to an accidental one.

Defendant points to the evidence he adduced at trial supporting his position that the shooting was an accident, including his own testimony, the testimony of his wife

(which came after his efforts to get her to say just that), and the testimony of his expert indicating that defendant did not aim the gun at his wife's head or torso. This evidence at most conflicts with the People's evidence, but it does not render the People's evidence insubstantial. (See *People v. Hicks* (2014) 231 Cal.App.4th 275, 286 ["Conflicting evidence . . . does not cast doubt on the trial court's factual findings because we review factual findings for substantial evidence."].)

III. Abstract of Judgment

The abstract of judgment reflects that defendant was convicted of mayhem. That is incorrect, as he was acquitted of mayhem and convicted of the lesser-included offense of battery causing serious bodily injury. The abstract should be corrected. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385-386, 388, 389 [where the clerk's minutes or abstract of judgment do not accurately reflect the oral pronouncement, the appellate court may order them corrected].)

DISPOSITION

The abstract of judgment dated December 26, 2013, is ordered amended to reflect that defendant was convicted in count 1 of the offense of battery with serious bodily injury, in violation of section 243, subdivision (d). Accordingly, the trial court is ordered to prepare and forward to the California Department of Corrections and Rehabilitation a modified abstract of judgment. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

HOFFSTADT

We concur:

_____, Acting P. J.

ASHMANN-GERST

_____, J.

CHAVEZ