Filed 8/1/12 P. v. Flores CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JESSE FLORES, Defendant and Appellant.	B232548 (Los Angeles County Super. Ct. No. BA 360296)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Affirmed in part; reversed in part and remanded.

Patrick Morgan Ford, 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 and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Jesse Flores was found guilty by a jury of an assault with a deadly weapon on Christopher Ortiz (count I), of an assault by means likely to inflict great bodily injury (count II), also on Christopher,[1] and of battery on Bethany Ortiz (count III). The jury found true the allegations as to the assault counts that appellant personally inflicted great bodily injury on Christopher and, as to all three counts, that the offenses were committed for the benefit of a criminal street gang. The appeal is from the judgment.

FACTS

Around 10:30 p.m. on August 9, 2009, siblings Bethany and Christopher arrived at their apartment on Garfield Avenue in Montebello, along with their sister Heather and their nine-year-old nephew James. They parked in front so that Heather could take the sleeping James into their apartment.

Gang members had previously told Bethany not to park there. As Bethany was parking, a car pulled up alongside and the woman driving the car yelled at her that she knew better than to park there. Bethany got out of her car; a man got out of the other car and moved close to Bethany, preventing her from moving away. The woman, whose name Bethany later learned was Monique, got out of her car. Several men appeared and Monique shouted, "Fuck them up. Fuck them up."

Christopher, who was 22 in 2011, and Bethany were standing together. Bethany was terrified. The men, five or more in number, started yelling the gang name "Lott Trece." Appellant, who was among them, got a stick or crowbar from the car that had driven up next to Bethany's. Appellant hit Christopher on the back of his head. Bethany tried to get between appellant and Christopher, begging appellant not to hit Christopher because he is an epileptic.

Appellant pushed Bethany to the ground. Two other men, one of whom was appellant's brother Joel, started to pummel Christopher. Bethany managed to get Christopher into the apartment. The police and paramedics arrived and took Christopher to the hospital, where he received six stitches and 14 staples.

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[1] We use first names for the sake of clarity.

Bethany learned appellant's and Joel's names from neighbors and passed them on to the police. The two men were arrested on August 16, 2009.

Christopher's epilepsy has worsened since the attack.

Appellant is a member of the Lott 13 gang with the moniker "Crook." A gang expert testified that the crimes that were committed by appellant were for the benefit of the Lott 13 gang.

DISCUSSION

1. One Count of a Violation of Penal Code Section 245, Subdivision (a)(1) Must Be Reversed

Counts I and II, the assault charges, both alleged violations of Penal Code section 245, subdivision (a)(1). Until January 1, 2012, former subdivision (a)(1) of section 245 stated: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm *or by any means of force likely to produce great bodily injury* shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment." (Italics added.) Effective January 1, 2012, the italicized passage was deleted from subdivision (a)(1) and reenacted as subdivision (a)(4) of section 245: "Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment."

Citing *People v. McGee* (1993) 15 Cal.App.4th 107, 110, appellant contends since he committed only one assault, he cannot be convicted of two counts of assault. We have recently held in *In re J.L.* (2012) 206 Cal.App.4th 1182, 1189, that an assault with a deadly weapon and an assault likely to produce great bodily injury is one offense. Respondent agrees that the judgment on count II should be vacated.

The question is whether the amendment of subdivision (a)(1) of Penal Code section 245, and the enactment of subdivision (a)(4), makes a difference.[2] As *People v. McGee* explains, the pre-2012 version of subdivision (a)(1) contained two forms of prohibited conduct but defines only one offense. Moving one of those forms of prohibited conduct to a separate subdivision does not make a difference; there is still only one offense of assault under subdivision (a)(1). Indeed, as the Legislative Counsel's Digest of Assembly Bill No. 1026 (Stats. 2011, ch. 183 (2011-2012 Reg. Sess.) Summary Dig.) states, the intent of the amendments to section 245 was only to make technical, nonsubstantive changes.

We conclude that count II should be reversed. There is no change in the sentence, as the trial court stayed the sentence on count II under Penal Code section 654.

2. It Was Not Error to Admit Evidence of Gang Graffiti

A day or two after the attack, Detective Rodriguez noticed graffiti on a block wall near the entrance of the parking lot of the apartment where the attack had taken place. The graffiti had been recently painted. There was the letter "V" with an arrow followed by the word "Lott," below it was "L Crook," and below that "Crook" with the letters "DBS" behind it. The gang expert explained that "V" stood for the Lott 13 gang, "L. Crook" was appellant's brother's Joel's moniker, "Crook" was appellant's moniker and "DBS" stood for the Diablos clique of the Lott 13 gang.

Appellant objected to the admission of this evidence, contending it could not be authenticated and that it was hearsay. The trial court overruled the objection, finding that the graffiti was a verbal act and not hearsay and, to the extent it was hearsay, that it was an adoptive admission.

"Frequently, an utterance may justify an inference concerning a fact in issue, regardless of the truth or falsity of the utterance itself. It is admitted as *circumstantial evidence* of that independent fact." (1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 36, pp. 718-719.) Whether the attacks took place on appellant's gang's "turf" was an issue in

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[2] The opening brief was filed in 2011; the respondent's brief was filed in May 2012. Neither brief comments on the changes in section 245, which were approved by the Governor on August 5, 2011. (Assem. Bill No. 1026 (2011-2012 Reg. Sess.).)

the case. The gang graffiti were circumstantial evidence of the "independent fact" that the attacks occurred on territory claimed by appellant's gang. Viewed from this perspective, the graffiti were not hearsay.

On the other hand, as appellant points out, the prosecutor stated in the closing argument that the graffiti indicated that appellant and his brother were taking "responsibility" for what happened. In this sense, the graffiti were intended to be a communication, which would make them hearsay. However, we agree with the trial court that the graffiti were adoptive admissions.

There was probative evidence in the form of the gang expert's testimony that appellant knew of and approved the graffiti. The expert testified that writing appellant's moniker on the wall without his knowledge and approval could get the writer assaulted or shot. This means that the requirements of an adoptive admission were met.[3] Viewed in this light, the graffiti were an admission that appellant was a member of the Lott 13 gang.

While appellant stresses that this case is like *People v. Lewis, supra*, 43 Cal.4th at page 497, when the court concluded it was error to admit certain drawings because there was no evidence that the defendant made the drawings, in this case, as respondent points out, there is strong evidence that appellant knew about the graffiti and approved of them.

In sum, we do not agree with appellant that it was error to admit evidence about the graffiti. It is therefore unnecessary to explore appellant's claim that his due process rights were violated by the admission of this evidence. (*People v. Nelson* (2011) 51 Cal.4th 198, 210, fn. 5.)

3. Evidence About Christopher's Epilepsy Was Not Prejudicial

Before a mistrial was declared in appellant's second trial,[4] the trial court indicated that medical expert testimony was required to show that Christopher's epilepsy got worse as

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[3] In an adoptive admission, the party against whom a declarant's hearsay statement is offered had knowledge of the contents of declarant's statement, and having such knowledge, has, by words or other conduct, manifested his adoption or his belief in its truth. (*People v. Lewis* (2008) 43 Cal.4th 415, 498.)

[4] There were two mistrials for late discovery.

a result of the assault. This position appears to have steadily eroded until the trial court eventually ruled that there could be testimony by Christopher, as well as by Bethany, that he was having more seizures since the attack.

While respondent contends that Christopher and Bethany were only testifying about the number of seizures and were not offering opinions about the medical cause of the seizures, this is an unrealistic view of the matter. Obviously, the only point of testimony about the number of seizures was to suggest that they increased because of the assault.

We agree with the trial court's initial ruling. Whether a serious blow to the head can worsen an epileptic condition is a matter for a medical expert.

We do not agree with appellant, however, that the admission of lay opinions about this medical issue was prejudicial. Appellant states that identification testimony in this case was "weak and uncertain" and that the testimony about the epilepsy encouraged the jury to make appellant pay for Christopher's injury "even if they had a reasonable doubt that he was involved in the assault."

The issue was whether appellant hit Christopher's head with a stick. Whether Christopher has epilepsy, and how serious that epilepsy is, is completely unrelated to this issue. If, as appellant appears to contend, identification was the key factual issue in the case, that must have been the jury's focus. Christopher's epilepsy has absolutely no bearing on the question whether it was appellant who hit Christopher.

That this evidence was so inflammatory as to sweep the jury off its feet is to give this evidence too much credit and accord very little credit to the jury. One would think that any reasonable adult would appreciate that Christopher's epilepsy had nothing to do with who hit Christopher.

In sum, the admission of testimony about Christopher's epilepsy could have had no effect on the jury's deliberations and was therefore not prejudicial error.

4. The Trial Court Reasonably Excluded Evidence of Bethany's Prior Juvenile Adjudications

Bethany was 28 at the time she testified in this trial. Appellant sought to impeach her with juvenile adjudications made when she was 13 and 17 years old. The earlier one was a threat made to a teacher and the second adjudication was for threatening to mace someone.

Appellant contends that making threats is a crime of moral turpitude and that these adjudications were not remote.

We review the trial court's decision under the *People v. Watson* (1956) 46 Cal.2d 818 standard, i.e., we determine whether it is reasonably probable that a result more favorable to appellant would have occurred in the absence of error. (*People v. Castro* (1985) 38 Cal.3d 301, 319.)

Appellant contends that Bethany was a very important witness in that, unlike Christopher, she told a "generally consistent story." Not introducing the juvenile adjudications, appellant contends, gave Bethany "a false aura of honesty."

Two juvenile adjudications that were more than 10 years in the past had very little, if any, bearing on Bethany's truthfulness as a witness. Both adjudications were based on the impulsive acts of a teenager and while it is true that these were acts of moral turpitude, they are of vanishing relevancy to the character of a 28-year-old woman. It is not likely that the jury would have been moved in the slightest by these adjudications to disbelieve Bethany. Thus, even if it was error to exclude these adjudications, it was not prejudicial.

In any event, we cannot say that the trial court erred in this regard. The court found the adjudications to be old, occurring when Bethany was young, and also thought that under Evidence Code section 352 this evidence would be confusing in that it was questionable how these adjudications reflected on her credibility as a witness. The trial court was reasonable on all of these points. As we have already noted, these adjudications shed little light on whether the 28-year-old Bethany, recounting the attack on her brother, could or should be believed.

5. There Was Evidence That Justified the Flight Instruction

Appellant objected to the flight instruction because there was allegedly no evidence that he fled the scene.

The evidence was that after Bethany got Christopher into the apartment and she began dialing 911, emergency vehicles started arriving. Detective Rodriguez arrived on the scene within a minute and a half after the 911 calls. Appellant was not there when he arrived; and one of 911 calls stated that the attackers had "sped out."

The nub of it is that appellant was not there when the police arrived on the heels of the 911 calls. This means that appellant left the scene, which is another way of saying that he fled.

An instruction may be given on an inference that can be reasonably drawn from the evidence. (*Phillips v. G. L. Truman Excavation Co.* (1961) 55 Cal.2d 801, 807; see generally 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 258, p. 312.) Since appellant had disappeared within minutes from the scene, it was a reasonable inference that he fled.

It was not error to give this instruction.

In light of our dispositions of appellant's contentions, it is not necessary to address his cumulative error argument.

DISPOSITION

The judgment of conviction of count II is reversed and the case is remanded with directions to correct the abstract of judgment. The balance of the judgment is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.