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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. DEMETRIUS PERNELL PICKENS, Defendant and Appellant.	B278762 (Los Angeles County Super. Ct. No. NA101082)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesus I. Rodriguez, Judge. Affirmed.

Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Demetrius Pernell Pickens, of one count of assault with a firearm on B.W. (Pen. Code,[1] § 245, subd. (a)(2), one count of possession of a firearm by a felon (§ 29800, subd. (a)(1)), and one count of resisting an executive officer, Nathan Dunn (Officer Dunn) (§ 69). The jury found true the allegation that defendant personally inflicted great bodily injury in the course of resisting an executive officer (§ 12022.7, subd. (a) (Section 12022.7)). Defendant waived his right to a jury trial on the prior conviction allegations. The trial court found true the allegations that defendant had suffered two prior strike convictions (§§ 667, subds. (b) - (i), 1170.12), one of which was also a serious felony conviction (§ 667, subd. (a)(1)). The court also found true the allegation that defendant had served a prior prison term (§ 667.5, subd. (b)). The court sentenced defendant to a total of 55 years to life in prison, consisting of a term of 25 years to life for the assault conviction, pursuant to the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12), a five year enhancement term pursuant to section 667, subdivision (a)(1), and a 25 years to life term for the resisting conviction, also pursuant to the Three Strikes law.

Defendant contends there was insufficient evidence to support the jury's finding that he personally inflicted great bodily injury on Officer Dunn, and the trial court incorrectly instructed the jury on the meaning of "personally inflicted" in responding to the jury's request for further instruction. Defendant also requests that we independently review the sealed transcript of

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[1] Further undesignated statutory references are to the Penal Code.

the *Pitchess*[2] hearing. Respondent does not object to our doing so.

We conclude there was substantial evidence to support the jury's finding that defendant "personally inflicted" serious injury on Officer Dunn, and the trial court correctly instructed the jury on the personal infliction element of Section 12022.7, subdivision (a). We also conclude the trial court did not abuse its discretion in ruling that there were no discoverable *Pitchess* records. We affirm the judgment of conviction.

FACTUAL SUMMARY

On January 14, 2015, at about 1:00 p.m., B.W. was sitting on the front porch of his house on East 17th Street in Long Beach, when defendant walked up the steps to the porch and told him to go inside the house. When B.W. did not immediately comply, defendant removed a gun from his backpack, pointed it at B.W., and told him to go inside. When B.W. again did not comply, defendant pressed the barrel of the gun against B.W.'s temple. B.W. went inside, locked the door, and called 911. B.W.'s neighbor also called 911.

Residents of the area spotted defendant running toward Pacific Coast Highway (PCH). Long Beach Fire Department Captain Robert Cheng and his partner, Long Beach Police Department (LBPD) Detective Dennis Zigrang, drove to the area, and ultimately saw defendant enter the back of a thrift store and exit the store onto PCH. They pursued him, as did LBPD Officer Mary Covarubias.

Officer Dunn, who was in uniform and driving a marked patrol car at the time, responded to a radio call describing a man

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[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

with a gun on PCH. He saw defendant running in the westbound lanes of PCH, in the direction of the officer's patrol car. Other officers were following defendant. Officer Dunn exited his patrol car and pointed his gun at defendant, who was running toward the officer. Officer Dunn ordered defendant to stop, but defendant did not comply.

When defendant was about 20 feet away, Officer Dunn put his gun in his holster, but kept his hand on the gun. As defendant attempted to run around Officer Dunn, Officer Dunn gave defendant a shove with his left hand, hoping to push him to the ground. Defendant stumbled forward. Officer Dunn followed defendant and caught up to him. Office Dunn put his left hand "on the back of [defendant's] t-shirt and clenched the back of [the] t-shirt to grab [defendant]." Officer Dunn explained that defendant "had slowed down. I had picked up speed. When I caught up to him and grabbed his shirt, I did kind of a [somer]sault over him, and we both hit the ground."

Defendant did not stop resisting once he was on the ground. Although Officer Dunn testified that it was hard for him to remember, Officer Dunn stated, "I remember falling to the ground, doing kind of a [somer]sault. I remember not letting go of his shirt, just hanging onto that shirt. I remember being on the ground and him trying to get up again and me being in a really awkward position on the ground, trying to get to my feet with one arm and pulling him back to the ground." Officer Dunn was "grabbing" defendant with his left arm.

Officer Dunn then was able to pull defendant back to the ground. Defendant was still not compliant. Officer Dunn was able to get on top of defendant's back and hold defendant down by using his weight to press defendant onto the ground. Defendant

continued to struggle. Other officers arrived, and one of the officers told Officer Dunn that defendant's left hand was free, meaning that there was nothing in defendant's hand. Officer Dunn pulled defendant's arm out from underneath defendant's body and placed handcuffs on defendant's left wrist. Officer Dunn did not remember whether defendant continued to resist while being handcuffed.

Officer Covarubias, who had arrived to assist Officer Dunn, and who was one of the officers who piled onto defendant in an attempt to subdue him, remembered defendant's resisting. She explained, "Usually when someone complies, [their core] is kind of still, and you can put the handcuffs on. I remember that constant movement. Like this guy is not going to let us handcuff him." She added, "I remember trying to keep him stabilized so that we can get the handcuffs on him." Officer Covarubias noted that it took herself, Officer Dunn, and at least one other officer to subdue the defendant on the ground.

By the time of trial, Officer Dunn had a limited recollection of how he sustained his shoulder injury. He testified, "As soon as I did the [somer]sault, I felt my shoulder. And I remember—that's why I remember when he was getting up and me still holding onto the shirt because it felt like my hand was working great. My shoulder was not. It was kind of like a rope. I was just holding on with my hand. I knew my shoulder was hurt. As soon as I got up from all of this, I knew my shoulder was hurt." His shoulder hurt and continued to hurt thereafter. Officer Dunn explained that in the weeks that followed, "I had enough pain where I couldn't do things with my left arm."

Officer Dunn also testified about his injuries: (1) a torn rotator cuff; (2) a torn labium; and (3) torn cartilage. Officer

Dunn's doctor described the three injuries as a full thickness tear in his left shoulder labrum, a partial tear of his left shoulder tendon, and damaged cartilage that had to be surgically removed. The parties stipulated to the description of these injuries by Officer Dunn's doctor. Officer Dunn underwent two surgeries to repair his shoulder injuries. By the time of trial, he was still in pain and had only about 70 percent capacity in his left arm.

DISCUSSION

I. Substantial Evidence Shows Defendant Directly Contributed to Officer Dunn's Injuries

Defendant contends the jury's true finding on the Section 12022.7 enhancement must be reversed because as a matter of law, defendant did not personally inflict great bodily injury on Officer Dunn. Instead, Officer Dunn injured himself when he somersaulted over defendant in their initial encounter.

We disagree. There was substantial evidence to support an inference that defendant personally inflicted serious injury on Officer Dunn when defendant physically struggled on the ground with Officer Dunn, who was trying to subdue and handcuff the then noncompliant defendant.

In reviewing the sufficiency of the evidence, "courts apply the 'substantial evidence' test. Under this standard, the court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses *substantial evidence*—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.)

Section 12022.7, subdivision (a) provides an enhancement term for "[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony." This section applies only to defendants "who directly perform the act that causes the physical injury to the victim." (*People v. Cole* (1982) 31 Cal.3d 568, 579 (*Cole*).) "[O]ne who merely aids, abets, or directs another to inflict the physical injury is not subject to the enhanced penalty of section 12022.7." (*Id.* at p. 571.)

"*Cole* illustrates that the term 'personally inflict' has a distinct meaning and that its use in a statute signifies a legislative intent to punish only the actor who directly inflicts an injury." (*People v. Rodriguez* (1999) 69 Cal.App.4th 341, 348-349 (*Rodriguez*).) "[A]n individual can and often does proximately cause injury without personally inflicting that injury. For instance, as noted in *Cole,* an aider and abettor of a crime can commit a direct act—affirmatively blocking a victim's exit—which proximately causes injury, but does not constitute personal infliction of an injury. (*Cole*, *supra*, 31 Cal.3d at p. 571.)" (*Rodriguez, supra,* 69 Cal.App.4th at p. 349.)

"[N]othing in *Cole* precludes a person from receiving enhanced sentencing treatment where he joins others in actually beating and harming the victim, and where the precise manner in which he contributes to the victim's injuries cannot be measured or ascertained." (*People v. Modiri* (2006) 39 Cal.4th 481, 495.) Similarly, when the injury is inflicted during a struggle between the defendant and the victim, "the fact that it takes two to struggle" does not absolve a defendant of responsibility for personally inflicting injury on the victim. (*People v. Elder* (2014) 227 Cal.App.4th 411, 421.) Even

accidental injuries suffice for purposes of Section 12022.7, which was amended in 1995 to delete the requirement that the defendant act with the intent to inflict the injury. (*Id*. at p. 420.)

Officer Dunn sustained three major injuries to his left shoulder. Defendant argues Officer Dunn's testimony shows that all the injuries to his left shoulder occurred when the officer somersaulted over him and there was no evidence that any injury occurred thereafter.

Officer Dunn testified, "As soon as I did the [somer]sault, I felt my shoulder." This testimony demonstrates Officer Dunn sustained some injury somersaulting over defendant, but not the extent of that injury. We view the evidence in the light most favorable to the jury's finding, and in that light, circumstantial evidence supports the inference that Officer Dunn's initial injuries were exacerbated during his subsequent physical struggle with defendant.

Officer Dunn described his shoulder as not "working great" and feeling "like a rope" when he was first on the ground struggling to keep defendant down. He did not describe being in pain at that time. When he finally stood up after defendant was handcuffed, Officer Dunn indicated that his shoulder hurt. Officer Dunn explained that after the encounter, "I had enough pain where I couldn't do things with my left arm."

Based on the evidence, the jury could have found that defendant's attempt to get up from the ground pulled on Officer Dunn's left hand, arm and shoulder, which the officer was using to hold onto defendant's shirt. Defendant then resisted being handcuffed. Officer Dunn was forced to pull defendant's left arm out from underneath defendant's body in order to handcuff defendant, a two-handed maneuver during which

defendant's continued resistance most likely would have put further stress on the officer's left shoulder.[3] The "fact that it takes two to struggle" does not absolve defendant of responsibility. (*People v. Elder, supra*, 227 Cal.App.4th at p. 421.)

In sum, there was evidence that defendant struggled with, and resisted Officer Dunn after both men were on the ground; defendant's struggle pulled on the officer's left arm and shoulder; and Officer Dunn's shoulder injury became more painful and serious over the course of his struggle with defendant. A reasonable trier of fact could infer from this evidence that defendant's struggles exacerbated the officer's shoulder injury. As set forth above, Section 12022.7 does not require that a defendant be the sole cause of the victim's great bodily injury, or that a defendant's contribution to a victim's injuries be quantifiable. (*People v. Modiri, supra,* 39 Cal.4th at p. 495.) These facts and inferences constitute substantial evidence to support the jury's finding that defendant personally inflicted great bodily injury on Officer Dunn.

Defendant relies on *Cole*, *supra*, *Rodriguez, supra* and *People v. Valenzuela* (2010) 191 Cal.App.4th 316 to argue that the evidence was not substantial. None of these cases is apposite.

In *Cole*, defendant verbally directed the attack on the victim and blocked the victim's escape, but did not actually strike the victim. (*Cole, supra*, 31 Cal.3d at p. 571.) In *Rodriguez*, a police officer tackled a fleeing defendant, and fell and hit his head

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[3] After defendant's struggle with Officer Dunn, Officer Dunn's shoulder was in such precarious condition that his shoulder had to be immobilized in a sling once defendant was subdued.

on the sidewalk or a lamppost. (*Rodriguez, supra,* 69 Cal.App.4th at p. 346.) "According to the record, Rodriguez did not push, struggle or initiate any contact with the officer during the . . . incident." (*Id.* at p. 352.)

In *Valenzuela*, the issue was whether there was substantial evidence to support a finding that defendant's prior conviction for reckless driving causing great bodily injury was a serious felony for purposes of doubling his sentence. Defendant admitted in his plea that he drove recklessly and proximately caused great bodily injury to the victims. Noting the paucity of the record on how the accident happened, the appellate court held defendant's plea alone was insufficient evidence: "But the fact that defendant proximately caused great bodily injury to another person does not establish that defendant *personally inflicted* great bodily injury to another person." (*People v. Valenzuela, supra*, 191 Cal.App.4th at p. 321.) Given the limited factual record before it, the *Valenzuela* court was not able to determine whether the defendant's driving directly caused the victim's injuries.[4]

Here, defendant physically struggled with Officer Dunn. This is in contrast to *Cole*—where the defendant merely blocked the victim's escape and did not touch the victim. The facts adduced at trial here differ markedly from those in *Rodriguez*—here there was no evidence that defendant initiated any physical

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[4] "While the bare facts of his plea establish that defendant's reckless driving was a volitional act, we are still left to speculate on the precise cause of the victims' injuries. . . . [¶] . . . Without additional facts regarding the crime, there is insufficient evidence that defendant's prior conviction was for a serious felony." (*People v. Valenzuela*, *supra*, 191 Cal.App.4th at pp. 322-323.)

contact with the officer. Finally, unlike in *Valenzuela*, the record here was well developed in the jury trial. These cases simply do not support a reversal here for insufficient evidence.

II. Instruction on Personal Infliction Was Correct and Not Misleading

During deliberations, the jury sent a note to the trial court that read "Better definition to 'personally inflicted' under Penal Code [section] 12022.7." After consulting the parties, the trial court, over defendant's objection, gave the following instruction: "A person personally inflicts injury to another when he directly performs an act or acts that cause the physical injury. To prove personal infliction, the People need not prove that the defendant intended to cause the great bodily injury but only that the great bodily injury was personally inflicted as a result of the defendant's conduct." Both in the trial court and on appeal, defendant contends the trial court's phrasing allowed the jury improperly to equate proximate cause with personal infliction.

We review the correctness of jury instructions de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570.)

As defendant acknowledges, the first sentence of the above instruction uses language that is virtually identical to the California Supreme Court's language in *Cole*, *supra*, 31 Cal.3d 568. There, the Court stated, "In sum, we conclude that in enacting section 12022.7, the Legislature intended the designation 'personally' to limit the category of persons subject to the enhancement to *those who directly perform the act that causes the physical injury to the victim*." (*Cole, supra*, 31 Cal.3d at p. 579 [emphasis added].) The trial court's supplemental instruction adequately conveyed the principle that defendant had to have directly caused the victim's injury.

Assuming for argument's sake that the instruction was ambiguous, we "independently review whether there is a 'reasonable likelihood that the jury construed or applied the challenged instructions in a manner' contrary to law. [Citations.]" (*People v. Olivas* (2016) 248 Cal.App.4th 758, 772-773; see *People v. Smithey* (1999) 20 Cal.4th 936, 963.) Defendant contends the instruction might have caused the jury to believe that defendant personally inflicted injury merely because defendant's fleeing led Officer Dunn to tackle and somersault over him. The prosecutor's closing argument, however, made clear that the People were basing the Section 12022.7 enhancement solely on acts that occurred during the struggle between the two men on the ground after the tackle. (See *People v. Avena* (1996) 13 Cal.4th 394, 417 [considering counsel's final argument as factor in determining whether jury might have misapplied ambiguous instruction].) Under these circumstances, there was no reasonable likelihood that the jury understood the instruction in the manner posited by defendant.

III. *Pitchess* Hearing

Defendant requests that we independently review the sealed transcript of the in camera hearing on his *Pitchess* motion for discovery of peace officer personnel records. Respondent does not object to this request.

Defendant's *Pitchess* motion sought seven categories of complaints against five of the LBPD officers involved in his arrest. The trial court granted defendant's motion in part, finding good cause for discovery of complaints of excessive force against Officer Dunn and "complaints of perjury, or any arrests

for perjury or accusation of perjury against Officer Kosoy."[5] On December 11, 2015, the court conducted an in camera review of the deputies' records. The trial court did not disclose any records to the defense.

When requested to do so by a defendant, we independently review the transcript of the trial court's in camera *Pitchess* hearing to determine whether the trial court disclosed all relevant complaints. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.) We have reviewed the transcript of the in camera hearing and conclude that the trial court followed the proper procedures and further conclude the trial court did not abuse its discretion in determining that there were no relevant records to disclose to defendant. (See *People v. Hughes* (2002) 27 Cal.4th 287, 330 [court's ruling is reviewed for abuse of discretion].)

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[5] Officer Mark Kosoy wrote the police report concerning defendant's encounter with Officer Dunn and other LBPD officers. He did not testify at trial.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

BENDIX, J.*

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

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