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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY ROBERT HERRERA, Defendant and Appellant.	2d Crim. No. B271625 (Super. Ct. No. 1453237) (Santa Barbara County)

Anthony Robert Herrera appeals from the judgment entered after a jury convicted him of battery causing serious bodily injury. (Pen. Code, § 243, subd. (d).)[1] The trial court found true three prior prison terms (§ 667.5, subd. (b)) and one prior conviction of a serious or violent felony within the meaning of California's "Three Strikes" law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) Appellant was sentenced to prison for nine years.

[1] All statutory references are to the Penal Code.

The appeal is confined to a single contention: the trial court erroneously denied appellant's request to instruct the jury on causation pursuant to CALCRIM No. 240. We affirm but direct the trial court to correct the Abstract of Judgment.

Facts

People's Case

Francine Owens is appellant's sister. In July 2014 Owens and appellant got into an argument outside their mother's apartment building. Appellant "headbutted" Owens in the forehead. Owens "turned around and started to call 911" on her cell phone. Appellant told his wife, Leianna Rae, "to call the cops." Appellant "came up from behind [Owens] and pushed [her] so [she] couldn't use [her cell] phone." Owens fell onto a driveway, hitting her knees and the left side of her face. She "slid on the driveway on the side of [her] face." Her face did not strike a curb.

While Owens was lying on her stomach, appellant got on top of her. He weighed about 245 pounds. "[H]e was trying to take [her cell] phone so that [she] couldn't call [911]."

Appellant asked his wife to throw him what appeared to be "a change purse." He caught the purse and "put it down in front of [Owens]." Appellant said, "'That's what you just stole.'" Owens picked up the purse and threw it onto the grass. Appellant punched Owens in the right eye three or four times. Owens never tried to hit appellant.

When the police arrived, appellant was still on top of Owens. Appellant told the police that he and Owens had an argument inside their mother's residence. Owens left the residence with "a strap in her hand that resembled [the strap] of a purse that belonged to [appellant's] wife." Appellant followed

Owens, and she "struck him in the face." "[W]hen she struck him he embrace[d] her and as they were struggling they fell." Owens "struck her face along the raised concrete curbside." Appellant "held her down and told his wife to call the police."

Owens sustained a laceration and abrasion to her left knee and an abrasion to her right knee. She "had swelling to the right side of her face and her head," swelling around the left eye, and "bruising to the upper eyelid around the [right] eye." Her right eye was so swollen that it "was essentially closed and she had a hard time opening it." The right eye had "a subconjunctival hemorrhage" that caused "the white part" to be "all red." The eye socket's wall was fractured. Dr. Eric Ellis, an emergency medicine physician who had treated Owens, explained: "Typically [an eye-socket fracture is] from trauma. What happens is the force causes [a]n increase of pressure in the inner ocular area and . . . it blows out the wall because of the pressure."

Dr. Ellis opined that Owens's head injuries were "too diffuse," meaning "[t]oo big," to have been caused "simply by falling and hitting [her] face on the ground" or "on a raised concrete curb of a sidewalk." He noted: "[The injuries cover] a fairly big area and there wasn't any specific . . . mark . . . [or] line . . . that would delineate hitting . . . the edge of something." Dr. Ellis further opined that Owens's injuries were consistent with being "battered in the face."

Appellant's Case

Appellant and his wife testified as follows: The argument between appellant and Owens started inside their mother's residence. Owens ran out of the residence with a purse that belonged to appellant's wife. The purse contained $300 to

$400 in cash and jewelry worth about $3,000. Appellant followed Owens outside. He intended to "[g]et that purse and put her on the ground, call the cops." Appellant "reached out with [his] right arm to try to grab" the purse's strap.

Owens hit appellant once in the face. "She was swinging and yelling and he was blocking her with his hands and she tripped and fell." The right side of her face struck the curb. Owens tried to "crawl" or "scoot" away. Appellant got on top of her and held her down. Owens "kept moving forward" in an effort "to get up."

Appellant's wife called the police because Owens had taken her purse "and they were fighting." Appellant did not headbutt Owens, push her, or punch her in the face.

Discussion

Appellant claims that the trial court erroneously denied his request to instruct the jury on causation pursuant to CALCRIM No. 240, which provides: "An act . . . causes (injury . . .) if the (injury . . .) is the direct, natural, and probable consequence of the act . . . and the (injury . . .) would not have happened without the act . . . . A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence."

If the case involves multiple potential causes, CALCRIM No. 240 provides that the following instruction should also be given: "[There may be more than one cause of (injury . . .). An act . . . causes (injury . . .), only if it is a substantial factor in causing the (injury . . .). A substantial factor is more than a

trivial or remote factor. However, it does not have to be the only factor that causes the (injury . . .).]"

In arguing below in support of giving CALCRIM No. 240, defense counsel declared: "We have a situation where it's very possible that Ms. Owens inflicted some of the injury on herself. You notice the knees, she was crawling across the asphalt. And also . . . my client testified at one point she turned her head, and it's very possible she was actually injuring herself again on the other side of the face on the asphalt." The court ruled that CALCRIM No. 240 was not appropriate because "we don't really have an intervening cause as to how [Owens's] injuries came to be." The court observed that its ruling would have been different "if there had been a fact pattern such that a person was chased from the home by somebody that they thought was going to do them harm and then ran into the street and was hit by a car."

Appellant asserts: "The causation instruction addressed a crucial aspect of appellant's defense: that there were multiple causes of Owens' injuries." "The jury was presented with disparate facts which could lead to alternate conclusions: 1) that appellant was the proximate cause of all of Owens' injuries, 2) that appellant caused none of her injuries, 3) or, that appellant caused some of her injuries and she caused some of her own injuries. The court had a duty to at the least give the . . . instruction[] stating that 'there may be more than one cause of an injury.'"

The trial court's ruling denying appellant's request to give CALCRIM No. 240 is presumed correct; it is appellant's burden to affirmatively demonstrate error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) We apply a de novo standard of

review. (*People v. Waidla* (2000) 22 Cal.4th 690, 733 ["Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference."].)

Appellant has failed to demonstrate that the trial court's ruling was erroneous. In *People v. Brasure* (2008) 42 Cal.4th 1037, 1056, the trial court did not give similar CALJIC instructions on causation (CALJIC Nos. 3.40[2] and 3.41[3]). Our

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[2] CALJIC No. 3.40 provided: "'[To constitute the crime of _____ there must be in addition to the (result of the crime) an unlawful [act] [or] [omission] which was a cause of that (result of the crime).] [¶] The criminal law has its own particular way of defining cause. A cause of the (result of the crime) is an [act] [or] [omission] that sets in motion a chain of events that produces as a direct, natural and probable consequence of the [act] [or] [omission] the (result of the crime) and without which the (result of the crime) would not occur.'" (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1056, fn. 13.)

[3] CALJIC No. 3.41 provided: "'There may be more than one cause of the (result of the crime). When the conduct of two or more persons contributes concurrently as a cause of the (result of the crime), the conduct of each is a cause of the (result of the crime) if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the (result of the crime) and acted with another cause to produce the (result of the crime). [¶] [If you find that the defendant's conduct was a cause of (injury, death, etc.) to another person, then it is no defense that the conduct of some other person[, even the [injured] [deceased] person,] contributed to the (injury, death, etc.).]'" (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1056, fn. 13.)

Supreme Court concluded that the CALJIC instructions were inappropriate because causation was not an issue. The court explained, "This is not a case involving a possibly independent intervening act [that] the defense contends superseded proximate causation by the proven criminal acts." (*Ibid*.)

"'In general, an "independent" intervening cause will absolve a defendant of criminal liability. [Citation.] However, in order to be "independent" the intervening cause must be "unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause." . . . [Citation.]' [Citations.]" (*People v. Cervantes* (2001) 26 Cal.4th 860, 871.)

Appellant fails to identify any unforeseeable intervening act by Owens that broke the chain of causation set in motion by his own acts, thus absolving him of criminal liability for those acts. If the jury believed Owens, appellant was guilty of battery causing serious bodily injury because Owens was injured as a direct result of his criminal acts. If, on the other hand, the jury believed appellant and his wife, appellant was not guilty because Owens was injured as a result of her own acts. According to appellant and his wife, Owens was the aggressor; appellant neither headbutted, pushed, nor hit her. Causation, therefore, was not an issue, and the court was not obligated to grant appellant's request to give CALCRIM No. 240. (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1056.)

Pursuant to CALJIC No. 925, the jury was instructed that the People must prove that appellant "willfully touched Francine Owens in a harmful or offensive manner" and that "Owens suffered serious bodily injury as a result of the force used." No further instruction on causation was required.

Abstract of Judgment

For the conviction of battery causing serious bodily injury, the trial court selected the three-year middle term and doubled it because of the strike. Thus, the sentence for the conviction is six years. But part 1 of the Abstract of Judgment shows that the sentence is three years. On the other hand, part 8 correctly shows that the total time to be served is nine years, i.e., six years for the conviction plus three years for the three prior prison terms. Part 1 should be corrected to show that a six-year prison term, not a three-year term, was imposed for the conviction.

Disposition

The judgment is affirmed. The trial court is directed to correct part 1 of the Abstract of Judgment to show that on count 1, battery causing serious bodily injury in violation of section 243, subdivision (d), appellant was sentenced to prison for six years, not three years. The trial court shall send a certified copy of the corrected Abstract of Judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Patricia Kelly, Judge

Superior Court County of Santa Barbara

Laurie A. Thrower, 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, Margaret E. Maxwell, Supervising Deputy Attorney General, Timothy L. O'Hair, Deputy Attorney General, for Plaintiff and Respondent.