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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DEMONT F. CONWAY,

Defendant and Appellant.

B267567

(Los Angeles County
Super. Ct. No. BA434156)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Mildred Escobar, Judge. Affirmed.

Phillip A. Trevino, under appointment by the Court of Appeal, for
Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury convicted defendant Demont F. Conway of assault by means of force likely to produce great bodily injury on Michael Rost (Pen. Code, § 245, subd. (a)(4))¹ and found true the allegation that he inflicted great bodily injury on Rost (§ 12022.7, subd. (a)). In this appeal from the judgment of conviction, defendant's counsel on appeal filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, asking that we independently review the record to determine whether any arguable issues exist. Thereafter, defendant filed a supplemental brief, contending that his trial attorney was ineffective and that the evidence was insufficient to support the great bodily injury allegation. We affirm the judgment.

BACKGROUND

On September 10, 2014, around 11:00 p.m., defendant was in the process of being booked into the Los Angeles County Men's Central Jail. As captured by surveillance videos, defendant got off his gurney in the Inmate Reception Center medical clinic to urinate. When he returned to the gurney, another inmate, Michael Rost, was occupying it. Defendant struck Rost once in the jaw with his closed fist. Employees at the clinic rushed to defendant and Rost.

Los Angeles County Sheriff's Deputy Hrant Bairamian arrived a few minutes later and observed "blood pouring out of [Rost's] mouth." Rost's cheek was swollen, his lower gum was cut, and the back of his head was red. Deputy Bairamian took photos of the injuries and secured the videotapes showing the assault. In his testimony at trial, he described the contents of the videos when they were played.

¹ Further section references are to the Penal Code.

Dr. Ara Mirzaians, a first year oral and maxillofacial surgeon at Los Angeles Medical Center, examined Rost at 6:26 p.m. the next day, September 11. Referring to his contemporaneous notes of the examination and Rost's medical records (at trial he had no independent recollection), Dr. Mirzaians testified that Rost's X-rays showed two fractures to the right lower jaw. Dr. Mirzaians scheduled Rost to have his jaw wired shut for about 8 weeks for the fractures to heal.

Rost did not testify, and defendant presented no evidence. In his closing argument, defense counsel conceded that defendant struck Rost, but contended that the blow did not cause the fractures to Rost's jaw. Rather, he argued that Rost had the fractures before he was brought to the medical clinic at the Inmate Reception Center.

DISCUSSION

In his supplemental brief, defendant contends that his attorney was ineffective because (as best we understand) he did not seek to suppress Rost's medical records and did not call Rost as a witness, thereby denying defendant his right to confront and cross-examine Rost. To prevail on his claim of ineffective assistance, defendant must establish that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686–687.)

Here, the relevant medical records were Dr. Mirzaians' notes of his examination and diagnosis of Rost, on which Dr. Mirzaians based his testimony at trial. No basis appears in the record on which defense counsel could have sought to exclude Dr. Mirzaians' notes. Pursuant to a subpoena,

copies of Rost's medical records (including Dr. Mirzaians' notes) had been sent to court in a sealed envelope, accompanied by an affidavit of the custodian of records of County U.S.C. Hospital authenticating the records. Under Evidence Code section 1560, this was the proper procedure to use to have the records produced.

Further, Dr. Mirzaians authenticated the notes he made at the time of his diagnosis of Rost. He testified that he made his notes in the regular course of business at the time he examined Rost, and that the notes were accurate. This testimony met the requirements of the business records exception to the hearsay rule, and was sufficient for Dr. Mirzaians' notes, on which he based his testimony concerning Rost's injuries, to be admitted.² Thus, the record on appeal discloses no basis on which trial counsel could have legitimately objected to admission of Dr. Mirzaians' notes.

Defendant contends that defense counsel should have called Rost as a witness. However, the record on appeal sheds no light on whether Rost could be located (the prosecutor had told defense counsel he would not call Rost because he had been released from custody and moved out of state) or what testimony Rost might have given that would be helpful to defendant. Further, to the extent defendant contends that his attorney's failure to call Rost as a witness violated his right to confront and cross-examine witnesses,

² Evidence Code section 1271 provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

"(a) The writing was made in the regular course of a business;

"(b) The writing was made at or near the time of the act, condition, or event;

"(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

"(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

he is mistaken. The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant's right to confront the prosecution's witnesses at trial. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Crawford v. Washington* (2004) 541 U.S. 36, 42; *People v. Wilson* (2005) 36 Cal.4th 309, 340.) Here, the prosecution did not call Rost as a witness, and thus the right to confrontation was not implicated.

Defendant contends that the evidence was insufficient to prove that he inflicted great bodily injury on Rost. Viewing the record in the light most favorable to the judgment, and drawing all inferences in support (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), we disagree. “[G]reat bodily injury” means a significant or substantial physical injury.” (§ 12022.7, subd. (f).) A bone fracture necessarily qualifies as great bodily injury. (See *People v. Escobar* (1992) 3 Cal.4th 740, 749.) Here, there was no dispute at trial that defendant struck Rost; indeed, defendant concedes as much in his supplemental brief on appeal. Further, Deputy Bairamian’s observation of Rost’s injuries to his lower jaw immediately after the assault, and Dr. Mirzaian’s diagnosis that Rost suffered two fractures to his lower jaw, was sufficient to prove that defendant’s blow to Rost’s face broke Rost’s jaw.

We have independently examined the record and conclude that no arguable issues exist. Therefore, we affirm the judgment.

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DISPOSITION

The judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.