Filed 7/25/12 P. v. Ubiarco Ca2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JASON ULYSES UBIARCO, Defendant and Appellant.	B233933 (Los Angeles County Super. Ct. No. BA375010)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dennis Landin, Judge. Affirmed.

Lynette Gladd Moore, 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, Paul M. Roadarmel, Jr., and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Jason Ulyses Ubiarco appeals from the judgment entered upon his convictions by jury of assault by means of force likely to cause great bodily injury (Former Pen. Code, § 245, subd. (a)(1) [now subd. (d)], count 1)[1] assault with a firearm (§ 245, subd. (a)(2), count 2) and false imprisonment (§ 236, count 3). As to counts 1 and 3, the jury found to be true the allegation that a principal was armed with a firearm (§ 12022, subd. (a)(1)), and as to all counts the allegation that appellant committed the charged offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(A)). The trial court sentenced appellant to an aggregate state prison term of four years. Appellant contends that (1) the trial court's denial of his motion for new trial deprived him of his right to fair trial under the Sixth Amendment, and (2) there is insufficient evidence to support his conviction in count 1.

We affirm.

FACTUAL BACKGROUND

The attack

Near 10:00 p.m., on January 22, 2010, 14-year-old Maria M. (Maria) was walking home from church when confronted by appellant, who was her best friend's brother, Andy Murillo (Murillo), whom she also knew, and a third man with a gun (third man), whom she did not know. Appellant and Murillo were displaying Rose Hills gang signs and yelling at Maria, "Fuck Avenues."

As Maria tried to walk by them, the third man punched her near her left eye, and Murillo pulled her to the ground by her hair. Appellant approached her and kicked her hard six times, all over her body, for five seconds, while the others continued yelling, "Rose Hills gang," "KTA," and, "Fuck Avenues." Murillo joined appellant in kicking Maria for another 30 seconds. Then, the third man got on top of Maria, grabbed her head and twice banged it on the cement. He pulled out a gun from his waistband, cocked it and placed it against her forehead. Appellant and Murillo encouraged him to shoot, appellant stating, "Shoot her up, just do it." Maria was frightened. Then, a heavy set,

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1 All further statutory references are to the Penal Code unless otherwise indicated.

Black man named "DK," who Maria did not know, exited the apartment where the Rose Hills gang frequented (the apartment), and told the third man to "leave her alone," pushing him off of Maria, who got up and ran home.[2]

When Maria arrived home, she was frightened and crying. She told her mother, Juana E. (Juana), that a group of males hit her, and one of them pointed a gun at her. She did not identify her attackers. She had a bruise by her left eye. Juana went outside with Maria to look for the attackers and saw Murillo. Juana asked him who hit Maria, and "Where did they go." She threatened to call the police. Murillo did not answer the questions, swore at Maria, repeated, "Fuck Avenues," and warned her and Juana that they had better not call the police. Juana did not see a gun while she was outside.

As Juana and Maria were returning to their house, Juana called 911. Maria saw appellant and the third man come out of the apartment, with DK holding the third man from the back. The third man was drinking wine, came towards Maria and tried to hit her. Because he was being held, all he could do was throw the wine in Maria's face. Appellant also approached Maria, told her not to call the police and tried to kick her. DK told the third man and appellant to leave, which they did.

As a result of the attack, Maria suffered a bruise on her face and bruises to her legs, lasting three to four weeks. She did not go to the hospital.

The 911 call

The voice recording of the 911 call reflects that both Juana and Maria spoke to the operator. Juana made the call and spoke first, telling the operator that a "20-year-old guy" hit her daughter with his fist but that she did not need an ambulance. As she was talking to the operator, Juana said that associates of that man were approaching, trying to hit her daughter, and pushed her and Maria. Juana said that she did not know the man, and his associates were "taking him away." Juana asked Maria who he was, and Maria

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[2] Trachel Pleasant testified for the defense that in October 2010, Maria called her and told her that she had lied about appellant. Maria asked if appellant was still in jail and said she felt bad that she had lied. Trachel was best friends with Gizela, appellant's sister.

said "Gaiser's brother," who was in the gang. Maria could be heard telling someone near her, while she was on the phone, not to worry she was not going to "bring the police to [his] house." When Maria took the phone, she told the 911 operator that she did not know the man who hit her in the face or if he had a weapon. She said she was "okay," and did not need an ambulance. Maria did not report that three people beat her, that she was kicked and punched, that her head was hit on the cement, that the gun was pointed at her, that she suffered any injuries, or mention appellant's or Murillo's name. Maria testified that she told the 911 operator that she did not see any weapons because she did not want to sound like a snitch with people all around.

Maria's statements to police

Shortly after the 911 call, Los Angeles Police Officer Peter Bueno arrived at the scene. He spoke with Maria in her house. The officer observed redness on her face, but no other injuries. She was crying, frightened and distraught. Maria said she was assaulted by three men, one of whom was appellant, but did not mention Murillo's name. The third man was wearing a black beanie. She said she was "hanging out" with these individuals and started to walk home. One of the men said, "Fuck the Avenues," and appellant then pushed her to the ground. While on the ground a third person approached and spit on her. The man who had disparaged the Avenues gang then came back and pointed a gun at her. She said she got up and was able to escape from her assailants only because they were intoxicated. When she got home, she called 911.

Maria did not tell Officer Bueno that anyone punched or kicked her, that Murillo grabbed her by the hair and dragged her to the ground, that he banged her head against the ground several times or that anyone sat on her and pointed a gun at her, though she did say that one of the men had a gun. Maria also did not say that anyone yelled, "shoot her."

Three to four weeks later, Los Angeles Police Officer Jorge Alfaro interviewed Maria. He saw no injuries on her, nor did she show him any. She told him that she knew appellant and Murillo and had previously seen the third man in the neighborhood. She said that appellant was the person who first grabbed her by the hair, pulled her to the

ground and began punching her. She did not say Murillo kicked her or that the third man punched her in the face.

Gang evidence

Maria had friends at her high school who were members of the Avenues Street gang, including her boyfriend. In her MySpace account she went by the name "Ave. Loca." Maria had been involved in an incident a few weeks before the charged incident, where she was associating with two Avenues gang members, and some Rose Hills gang members warned her not to do so again.

Based upon evidence adduced in a search of appellant's residence, the facts of the case and appellant's admissions, Los Angeles Police Officer Allan Krish opined that appellant was a Rose Hills gang member and that the charged crimes were committed for the benefit of, at the direction of, or in association with the Rose Hills gang.

DISCUSSION

I. Denial of motion for new trial

A. Background

At the sentencing hearing on March 9, 2011, defense counsel informed the trial court that he had located a new witness and requested, and was granted, a continuance to allow him time to file a motion for new trial (Motion). Sentencing was continued until April 4, 2011.

The written Motion was filed nearly three weeks later, asserting two grounds; that there was insufficient evidence and that there was newly discovered evidence. Only the latter ground is urged on this appeal. With regard to that claim, the Motion stated that after the trial, defense counsel had communications with Murillo's attorney, who told him that Miguel Villalobos (Villalobos) witnessed the assault on Maria, said that only one person was involved, and, when shown appellant's booking photograph, said that he was not the perpetrator. The perpetrator pushed a girl to the ground and threw a cup of liquid at her. Villalobos recognized the girl because she lived in the area and recognized the male because he had visited Villalobos's neighbor. The Motion also stated that defense counsel acted diligently because he did not, and could not, know of Villalobos's

existence until he received the call from Murillo's counsel, and appellant could not provide information to counsel about this witness because appellant had no recollection of the incident and did not believe he was present. The Motion was not accompanied by any declaration.

At the April 4, 2011 hearing, the parties agreed to a continuance, which the trial court granted until April 7, 2011, warning defense counsel that it wanted to know on that date "why [appellant] has not submitted a declaration from the newly discovered witnesses" as the court felt "that would be crucial in ruling on [t]his motion." The matter was again continued to April 15, 2011, at the People's request so they could file opposition. The trial court asked again if defense counsel planned to file a declaration of Villalobos. Defense counsel said he had one and would submit it later that day.

The People's written opposition argued that the Motion lacked the required declaration of Villalobos, was supported only by the investigator's reports, lacked a declaration stating why the evidence could not have been produced at trial, and that it was not probable that the newly discovered evidence would yield a different result at trial because Villalobos's statement lacked credibility.

At the April 15, 2011 hearing, the trial court stated that it had expected a declaration of Villalobos, but only received a "statement" of appellant's investigator. Defense counsel indicated that he did not have Villalobos's declaration, but that it was a technical error, that Villalobos was willing to come to court and that the trial court should not rule against appellant because of counsel's error. The trial court felt that "[i]ts entirely possible that what [Villalobos] saw was the tail end of the altercation, not the complete thing." "If we learn that through the declaration or through examination, it would not constitute grounds for a new trial." It agreed to give defense counsel another opportunity to provide a "detailed declaration," and believed "it's appropriate to have [Villalobos] available to testify as well." Defense counsel agreed to submit a detailed declaration and subpoena Villalobos for the hearing. The matter was continued until April 29, 2011, and, later, continued again until May 5, 2011.

At the continued hearing, defense counsel argued that Villalobos's declaration corroborated the conversation in the 911 call that there was but one perpetrator.[3] The declaration stated that at the time of the incident, Villalobos was walking his dog and saw a crowd. As he approached, he heard a male and female yelling at each other. He saw the female approach and lunge at the male. The female slipped or was pushed to the ground by the male. Before she fell, the male either threw a plastic cup with liquid at the female or just the liquid. This was the only physical altercation he saw. Before he left, he saw the female get up and run into her apartment. He did not see anyone with a gun, and the incident involved only one male and one female. He recognized the male as a person named "Eddie" and the female from the neighborhood. He was shown a photograph by a defense investigator, which he said was not the male involved in the altercation. Villalobos said that he was willing to testify.

The prosecutor argued that defense counsel failed to bring Villalobos to court as he was told to do. The trial court ruled that the statement by Villalobos was insufficient to warrant granting a new trial.

B. Contention

Appellant contends that the trial court erred in denying his motion for new trial on the ground of the newly discovered witness, thereby depriving appellant of his right to a fair trial guaranteed by the Sixth Amendment. He argues that Villalobos saw the altercation from the beginning and affirmed that it was between only two individuals. His affidavit was newly discovered evidence which there was no reason to disbelieve. This contention lacks merit.

C. Standard of review

Generally, a trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it exercised that discretion properly. (*People v.*

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3 While there is a declaration of Villalobos, filed on April 27, 2011, in the supplemental record before us, defense counsel stated that he "didn't have time to get a declaration, . . ."

Davis (1995) 10 Cal.4th 463, 524; *People v. Thompson* (2010) 49 Cal.4th 79, 140.) "'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."'" (*People v. Davis, supra*, at p. 524.) A motion for new trial based on newly discovered evidence is looked upon with disfavor, and unless there is a clear abuse of discretion, an appellate court will not interfere with the trial court's ruling. (*People v. Owens* (1967) 252 Cal.App.2d 548, 551.)

D. Requirements for new trial based on newly discovered evidence

Section 1181 subdivision (8) provides: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] 8. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, . . ."

To entitle a party to a new trial on the ground of newly discovered evidence, it must be shown that the evidence, not just its materiality, was newly discovered, the evidence is not merely cumulative, it is such as to render a different result at retrial probable, that the party could not have discovered and produced the information at trial with reasonable diligence, and the facts be shown "'by the best evidence of which the case admits.'" (*People v. Dyer* (1988) 45 Cal.3d 26, 50; § 1181, subd. (8) [must be evidence which could not have been presented at trial with reasonable diligence].) To grant a motion for new trial, the new evidence must be such as to make a different result probable on retrial. (*People v. Ochoa* (1998) 19 Cal.4th 353, 473.)

E. No abuse of discretion in denying appellant's motion for new trial

Maria testified that the charged incident had two distinct parts. First, when she was coming home from church she was attacked and beaten by appellant, Murillo and a third, unknown man with a gun. Maria then ran home and told her mother of the incident. The second part of the incident occurred when Maria and her mother went back

outside to look for the perpetrators. While on the phone to 911, the perpetrators approached them, and according to Maria, one of them threw wine or beer on her and tried to hit her, and appellant tried to kick her again.

Maria's description of the two stages of the incident was corroborated by the 911 telephone call. It reflects that while she and her mother were outside trying to find Maria's attackers and on the phone with the 911 operator reporting the attack, the perpetrators came towards them, tried to hit and kick Maria, pushed her and her mother, and the third man threw a drink in Maria's face.

Appellant's counsel represented in argument to the trial court that Villalobos saw the incident from the beginning. However, Villalobos's declaration does not, and could not, say he saw it from the beginning. He only saw it from the time he saw it and would not know if something had occurred before that time. His declaration merely purports to describe what he saw and does not say he saw it from the beginning.

Moreover, in his declaration, Villalobos states that the only physical altercation that he saw was a female lunging at the male, falling down and "the male either threw the plastic cup with liquid at the female or just the liquid." As previously stated, there were two aspects to this incident, and only the second part involved a thrown drink. Because Villalobos saw a drink thrown, he must have observed only that part of the incident and not the part where a beating was inflicted. Thus, the declaration did not contradict the testimony of Maria regarding the beating she received, but referred to a different part of the incident.

Some aspects of Villalobos's declaration are inconsistent with Maria's and Juana's testimony regarding what occurred during the second part of the incident. For example, Villalobos makes no reference to Juana being present and refers to Maria falling and running to her apartment. But he was not present at the hearing to clarify these aspects of his declaration. This, despite the fact that his attorney represented to the trial court that he would subpoena Villalobos for the hearing, and the trial court emphasizing to defense counsel that it was concerned that the investigator's reports suggested that Villalobos observed only the second part of the incident and that without an adequate clarification in

a declaration, it would not likely grant a new trial. A motion for a new trial must be decided on the evidence before the court at the time, not on basis of evidence that might be developed. (*People v. Beeler* (1995) 9 Cal.4th 953, 1004.)

Villalobos's declaration is also merely corroborative of other evidence. As defense counsel argued, the transcript of the 911 call can be construed to show that there was only one assailant, and it was not appellant because neither Maria nor Juana identified him to the 911 operator, though both knew him. Villalobos's declaration states that there was only one assailant, and it was not appellant. Thus, it was corroborative of evidence already before the jury. It is not error to deny a motion for new trial based on newly discovered evidence that is merely cumulative. (*People v. Johnson* (1952) 111 Cal.App.2d 497, 499; *People v. Avila* (1938) 29 Cal.App.2d 627, 630.)

The trial court heard the testimony of both Maria and her mother and was in the best position to make a credibility determination regarding those witnesses. That assessment would obviously loom large in deciding whether the evidence in Villalobos's declaration would likely lead to a different result. (*People v. Sousa* (1967) 254 Cal.App.2d 432, 435 [the trial court can consider the credibility as well as relevance of proffered testimony].)

The trial court might also have considered the fact that Villalobos's declaration was not promptly forthcoming. Initially, only the defense investigator's reports of his conversations with Villalobos were submitted, followed by the investigator's declaration, and lastly, only after several months, Villalobos's declaration. Even then, the declaration stated his willingness to testify, and defense counsel represented that he would subpoena him to the hearing, but he did not attend. This chronology could properly concern the trial court that the finely parsed words of Villalobos's declaration, concealed evidence unfavorable to appellant.[4]

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[4] Because we conclude that Villalobos's declaration was insufficient to establish that appellant would probably receive a different verdict on retrial, we need not consider whether an adequate showing of diligence was presented.

II. Sufficiency of evidence of assault

A. Background

The complaint alleged in count 1 that appellant committed assault by means likely to produce great bodily injury. In closing argument, the prosecutor argued that this referred to when the attackers were kicking her "over and over again as she lay on the ground."

B. Contention

Appellant contends that there is insufficient evidence to support his conviction of assault by means likely to cause great bodily injury. He argues that while one can kick someone hard enough to cause great bodily injury, Maria had no visible bruises, she required no medical attention, and the only injury she received was a slight redness on her cheek. This, he claims is not substantial evidence. This contention lacks merit.

C. Standard of review

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) All conflicts in the evidence and questions of credibility are resolved in favor of the verdict, drawing every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' (*People v. Bolin*, *supra*, at p. 331.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

D. Assault by means of force likely to cause great bodily injury

Former section 245, subdivision (a)(1), (now subd. (a)(4)) prohibits assault by means of force likely to produce great bodily injury. This section "prohibits an assault by means of force *likely* to produce great bodily injury, not the use of force which does *in fact* produce such injury." (*People v. Muir* (1966) 244 Cal.App.2d 598, 604.) The

gravamen of this offense is the likelihood that great bodily injury will result from the force applied, not that injury actually occurred. (*People v. Chambers* (1964) 231 Cal.App.2d 23, 27.) Actual bodily injury is not an element of the offense. (*People v. Richardson* (1972) 23 Cal.App.3d 403, 410.) It is not necessary that the injuries be serious. (*People v. Dewson* (1957) 150 Cal.App.2d 119, 132.) Great bodily injury is injury that is significant or substantial and not insignificant. (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066.) Nonetheless, the extent of the injuries suffered is probative of the amount of force used, but it is not conclusive. (*People v. Muir, supra,* at p. 604.) The kind of force likely to produce great bodily injury is a question of fact. (*People v. Dewson, supra,* at p. 132.)

Maria, a 14-year-old girl, testified that three adult or almost adult men, including appellant kicked her "hard," punched her in the face with a fist and knocked her head against the concrete when she was on the ground.[5] Maria also testified that while she did not go to the hospital, she suffered a bruise on her face that lasted for several days as well as injuries to her legs that lasted three or four weeks. We need not decide if these injuries constituted "great bodily injury," because we must evaluate the force used and its likelihood to result in great bodily injury, not the injury itself. (*People v. Chambers, supra,* 231 Cal.App.2d at p. 27.) If use of fists can constitute force likely to cause great bodily injury (*People v. Dozie* (1964) 224 Cal.App.2d 474, 475), there is little doubt that hard kicks, a punch in the face and banging of the head on concrete can also constitute great bodily injury. The jury concluded that substantial force was used, and that conclusion is supported by Maria's testimony.

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[5] While there is no evidence that appellant personally did more than hit and kick Maria, the jury was instructed on aider and abettor culpability, and, as such, appellant would be culpable for all of the action of each of the three perpetrators.

Appellant bases his argument almost entirely on his assessment that Maria did not suffer significant injuries. The fact that she did not suffer more severe injury than she did, while germane, is not determinative. (*People v. Muir, supra*, 244 Cal.App.2d at p. 604.) The evidence of the nature of the attack is even more probative, and that evidence here was sufficient.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD