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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. KURIYAN DICKINSON, Defendant and Appellant.	2d Crim. No. B275676 (Super. Ct. No. 1444210) (Santa Barbara County)

A jury convicted Kuriyan Dickinson of assault of Steven Leoni with a deadly weapon (Pen. Code, § 245, subd. (a)(1)[1]; count 1) and assault of Osama Miro by means of force likely to produce great bodily injury (§ 245, subd. (a)(4); count 3). The jury found true the allegation that he inflicted great bodily injury (§ 12022.7, subd. (a)) on both counts. The trial court sentenced him to eight years in state prison, suspended execution of that sentence, and placed him on probation for five years.

[1] Further unspecified statutory references are to the Penal Code, unless stated otherwise.

Dickinson contends there was insufficient evidence he stabbed Leoni; there was no medical evidence or direct testimony to prove Miro suffered a great bodily injury; the court erred in admitting evidence of a prior fight to negate a self-defense issue that he did not assert at trial; and the court erred when it imposed three probation conditions. We modify a probation condition, but otherwise affirm.

BACKGROUND

Dickinson and Cooper Terrones confronted Miro. Dickinson punched Miro on the side of the head while Miro was arguing with Terrones.

Several witnesses said that the punch rendered Miro unconscious. Leoni said that Dickinson "cold cocked" Miro and that Miro "crumpled" to the ground and "seemed unconscious." Another witness said that Dickinson threw an "overhand right haymaker," which hit Miro "with such force he had knocked him out cold." After Miro was punched, he was "really out of it," according to Leoni. Miro stumbled toward Leoni and punched him. Leoni did not fight back because Miro "didn't . . . know who [Leoni] was" and Miro's "eyes were all over the place when he came up and looked at [Leoni], right before he hit [him]." Miro later told a law enforcement officer that he believed he had a concussion based on having suffered one before. Miro said the incident "was a blur."

Leoni, Terrones, Dickinson, and a fourth person fought. Someone stabbed Leoni when he turned to walk back to the house. He said someone grabbed him from behind and "took a swing" at him. A video of the fight showed Dickinson grabbing Leoni from behind. After watching the video, Leoni said he believed Dickinson stabbed him at that moment.

Jason Larkin saw Dickinson stab Leoni. He started watching the fight when it seemed to have "cooled down near the end of it." He saw Dickinson pull a small black object from his back right pocket. He said Dickinson walked over to a group of people, switched the object from his right hand to his left hand, and made a "stabbing motion," and Leoni "went straight down." Larkin watched a video depicting Dickinson making a "stabbing motion" and said the motion was consistent with what he had seen.

Conner Mecnevin told sheriff's deputies that he saw the stabbing. Mecnevin and several other people pointed to Dickinson and said, "That's him." A video shows Mecnevin say, "[Leoni] got stabbed. [¶] . . . [¶] I got it all on video," before he helped deputies find Dickinson.

Dickinson matched the description of the suspect provided by witnesses to the sheriff's deputies. After two witnesses identified Dickinson in an in-field line-up as being involved "in the assault," a deputy arrested Dickinson. Deputies searched Dickinson and the surrounding area, but never found a knife.

Dickinson denied stabbing anyone and denied "knocking out" anyone. He told law enforcement officers he was trying to defend himself in the fight and he was "getting beat up." He said that someone pushed him into a bush, and he ran away. A deputy showed Dickinson a video still-frame in which he walked away from Leoni with something in his left hand that the deputy believed was a knife. Dickinson maintained that he walked away and did not stab anyone.

DISCUSSION

Assault with a Deadly Weapon Against Leoni

Dickinson contends there was insufficient evidence to support the conviction for assault with a deadly weapon because the evidence he stabbed Leoni was not "reasonable, credible, and of solid value." We disagree.

We review the conviction for substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577 (*Johnson*).) Substantial evidence is evidence that is "reasonable, credible, and of solid value." (*Id*. at p. 578.) We view the whole record in the light most favorable to the judgment and do not reweigh the evidence or reevalute the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) A judgment will be reversed only if there is no substantial evidence to support the verdict under any hypothesis. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Substantial evidence supports an inference that Dickinson stabbed Leoni. Leoni testified that he was walking away from the fight when someone grabbed him from behind and "took a swing" at him. Soon after, he noticed he was bleeding heavily from a stab wound. After watching a video of the incident, Leoni believed Dickinson stabbed him when he was grabbed from behind. Larkin also testified that Dickinson pulled out a small object, walked over, and made stabbing motions. Mecnevin saw the stabbing and identified Dickinson as the assailant at the scene. Additionally, two other witnesses identified Dickinson in an in-field identification, and Dickinson matched the description of the suspect a deputy received earlier. Videos and photograph stills depicting Dickinson grabbing Leoni

from behind and walking away with an object in his hand support these accounts.

Dickinson argues none of the evidence clearly shows he had a knife, but instead "raises only a suspicion of that fact." But a reasonable jury could infer from circumstantial evidence that Dickinson had a knife and stabbed Leoni with it. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1124 [circumstantial evidence can constitute substantial evidence].) The video depicting Dickinson with an object in his hand and the witness accounts of the stabbing constitute evidence of "reasonable, credible, and of solid value" to support the jury's finding that Dickinson stabbed Leoni with a knife. (*Johnson*, *supra*, 26 Cal.3d at p. 578.)

Dickinson also argues that Larkin's testimony was not "'reasonable, inherently credible, [or] of solid value'" because there were inconsistencies. Larkin's statements—that Dickinson left and reentered the fight, that he pulled an object from his right side and switched it to his left hand, and that Leoni immediately went down after being stabbed—were contradicted by a video. However, these inconsistencies do not render the evidence insufficient to support the conviction. "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) While some of Larkin's testimony was contradicted by the video, the main substance of his testimony (i.e., Dickinson holding an object and making a stabbing motion) was corroborated by video evidence, and it was neither physically impossible nor inherently

improbable. Despite the inconsistencies, a reasonable jury could infer from Larkin's testimony that Dickinson stabbed Leoni.

Lastly, Dickinson contends Mecnevin's statement "that's him" is not substantial evidence because a video, which recorded the conversation between the deputy and Mecnevin, shows that Mecnevin never said he saw the stabbing. Our review of the video reveals no such contradiction. In the video, Mecnevin says he "got [the stabbing] all on video," before he directed the officers to Dickinson. It follows that a jury could reasonably infer Mecnevin saw the stabbing.

Substantial evidence supports the assault with a deadly weapon conviction.

Great Bodily Injury Against Miro

Dickinson contends there is insufficient evidence to support the great bodily injury enhancement on the assault conviction against Miro because there was no medical evidence or victim testimony about his injuries. Substantial evidence supports the enhancement.

To support a great bodily injury enhancement, proof of a "significant or substantial physical injury" is required. (§ 12022.7, subd. (f).) A great bodily injury is "commonly established by evidence of the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the injury." (*People v. Cross* (2008) 45 Cal.4th 58, 66 (*Cross*).) Although there must be "substantial injury beyond that inherent in the offense itself," the victim does not have to suffer permanent or protracted "disfigurement, impairment, or loss of bodily function." (*People v. Escobar* (1992) 3 Cal.4th 740, 746-747, 750, italics omitted (*Escobar*); *Cross*, at p. 64 [injury does not need to be so grave as to cause the victim permanent, prolonged,

or protracted bodily harm].) An injury that is more than "'transitory and short-lived bodily distress'" will qualify as great bodily harm. (*People v. Mixon* (1990) 225 Cal.App.3d 1471, 1489 (*Mixon*).)

Whether the victim suffered physical harm amounting to great bodily injury is a question of fact for the jury to decide. (*Cross*, *supra*, 45 Cal.4th at p. 64.) We review the jury's finding for substantial evidence. We draw all reasonable inferences in favor of the judgment to determine whether a reasonable jury could find the great bodily injury enhancement to be true. (*Escobar*, *supra*, 3 Cal.4th at p. 750.)

Loss of consciousness and a concussion constitute serious bodily injury. (§ 243, subd. (f)(4) [serious bodily injury means any serious impairment of a physical condition, including a "loss of consciousness" and a concussion]; *People v. Burroughs* (1984) 35 Cal.3d 824, 831 ["serious bodily injury" is "essentially equivalent" to "great bodily injury"], abrogated on other grounds in *People v. Bryant* (2013) 56 Cal.4th 959.)

Substantial evidence supports a finding that Miro suffered a loss of consciousness which constituted great bodily injury. Leoni said that Miro "seemed unconscious" and that he "crumpled" to the ground after the hit. Another witness said that Dickinson hit him with an "overhand right haymaker" punch "with such force he had knocked him out cold." When Miro got up, he was "really out of it" and his "eyes were all over the place." Miro believed he suffered a concussion and said that the incident was a blur. A reasonable jury could infer from this evidence that Dickinson inflicted great bodily injury on Miro.

Similar types of injuries have constituted a great bodily injury. For example, in *Mixon*, *supra*, 225 Cal.App.3d at

pages 1487-1489, there was substantial evidence to support a great bodily injury enhancement where the victim lost consciousness after being choked and hit on the head. In *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1755 (*Bustos*), there was great bodily injury where the victim was struck on the head and face with such force it knocked her to the floor.

Dickinson argues that laymen's testimony regarding Miro's injuries, without any medical evidence or victim testimony of the resulting injury or pain and suffering, is insufficient to prove great bodily injury. He distinguishes this case from *Mixon* and *Bustos* because in those cases, there were medical records and victim testimony, in addition to evidence that the victim lost consciousness. (*Mixon*, *supra*, 225 Cal.App.3d at p. 1489 [victim's testimony regarding her pain and evidence of blood and bruising]; *Bustos*, *supra*, 23 Cal.App.4th at p. 1755 [medical evidence showing she had contusions, lacerations, and abrasions to her face and body].) Although proof of a great bodily injury is "commonly" established by such evidence, Dickinson does not cite to any legal authority that states such proof is required. (See *Cross*, *supra*, 45 Cal.4th at p. 66.) Any evidence of "reasonable, credible, and of solid value" is substantial evidence. (*Johnson*, *supra*, 26 Cal.3d at p. 578.) Substantial evidence of Miro's injury supports the jury's finding on the great bodily injury enhancement.

Prior Misconduct Evidence

Dickinson argues the trial court erred in admitting a video recording of a fight Dickinson and Terrones had earlier the same day because it was used to show propensity. (Evid. Code, § 1101, subd. (a).) He also argues the court abused its discretion when it found the evidence more probative than prejudicial.

(Evid. Code, § 352.) The Attorney General argues that Dickinson forfeited the claims when his counsel withdrew his objection. Dickinson did not forfeit the claims, but it lacks merit.

A claim on appeal is forfeited if a party expressly withdraws an objection that was previously raised. (See *People v. Jones* (2003) 29 Cal.4th 1229, 1255; *People v. Robertson* (1989) 48 Cal.3d 18, 44.) But Dickinson did not expressly withdraw his objection. Defense counsel initially objected to the admission of the video and the court "reserve[d] on that issue." Days later, defense counsel objected to the video being played in the opening statement, since the court had not resolved whether it was admissible. Defense counsel said the prosecution "can play it in his case in chief, if the [c]ourt rules that way. I have no objection in the case in chief video, because those are the heart of the matter." In context, counsel's statements reveal he did not expressly withdraw his objection, but only conceded it could be played if the court overruled the objection.

The video of Dickinson's earlier fight was admissible to disprove self-defense. Generally, evidence of a defendant's prior uncharged misconduct is inadmissible when offered to prove their conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) But, it is admissible if it is "relevant to prove some fact" other than propensity, such as intent, motive, or the absence of mistake or accident. (Evid. Code, § 1101, subd. (b).) The trial court did not err in admitting the prior fight video because it was relevant to negate self-defense. Self-defense was an issue in dispute because the absence of self-defense was an element of each of the charged crimes and Dickinson told officers that he was fighting in self-defense.

The similarity between the prior misconduct to the charged offense is an important consideration. "'[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402, superseded by statute on other grounds in *People v. Robertson* (2012) 208 Cal.App.4th 965, 991.) The fight between Dickinson and Terrones earlier the same evening was similar to the charged offense. In both instances, Dickinson used a left-handed punch to hit his opponent, knocking him to the ground. Such a recurrence of similar conduct tends to show that Dickinson was not acting in self-defense.

This case is similar to *People v. Cortes* (2011) 192 Cal.App.4th 873 (*Cortes*), in which evidence of Cortes's three prior fights was admissible to prove intent and lack of self-defense in a prosecution for stabbing someone to death during a fist-fight. (*Id.* at pp. 879, 916.) As with the instant case, the prior fights were "sufficiently similar" to the charged stabbing offense to infer that the defendant "did not act accidentally, inadvertently, in good faith or in self-defense when he attacked the victim." (*Ibid.*)

Dickinson contends that because he never argued self-defense at trial, the video was irrelevant to negate self-defense and served no purpose other than to show propensity. He also argues that *Cortes* is distinguishable because in that case, the defendant argued self-defense at trial. But self-defense and defense of others were still issues in dispute. A plea of not guilty

puts all the elements of the offense in dispute for the purpose of deciding the admissibility of prior misconduct evidence under Evidence Code section 1101, "unless the defendant has taken some action to narrow the prosecution's burden of proof." (*People v. Daniels* (1991) 52 Cal.3d 815, 857-858 (*Daniels*).) Proving that Dickinson did not act in self-defense or the defense of others was an element of each of the charged crimes that the prosecution had the burden of proving beyond a reasonable doubt. The jury was also instructed of this burden. (See CALCRIM Nos. 875, 915, 925 & 960.)

Dickinson did not narrow the prosecution's burden of proving the self-defense and defense of others element of the charged crimes. At pretrial he stated that he did not "think that there's really much of a self-defense issue in the trial," but there was no concession or stipulation. (See *Daniels*, *supra*, 52 Cal.3d at p. 858 [no concession that limited the issues].)

Dickinson forfeited any claim that the evidence was improperly used during closing arguments for a purpose other than to disprove self-defense. He did not object. (*People v. Gunder* (2007) 151 Cal.App.4th 412, 417 [failure to object to the improper use of evidence to show propensity results in forfeiture].)

Furthermore, the court did not err when it concluded the evidence was more probative than prejudicial. Evidence admitted under Evidence Code section 1101, subdivision (b) must be evaluated under Evidence Code section 352 for undue prejudice. The trial court has broad discretion in doing so, and we will not disturb its decision except upon a showing the court exercised its discretion in an arbitrary, capricious or patently

absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

The video of the prior fight was more probative than prejudicial. It was especially probative in light of Dickinson's statements during his police interviews that he acted in self-defense and that he was pushed into a bush and ran away. Moreover, the earlier fight with Terrones was not more inflammatory than stabbing Leoni or punching Miro unconscious. There was no abuse of discretion when the court admitted the video.

Probation Conditions

Dickinson challenges three probation conditions on the grounds they are unreasonable or unconstitutional.

In granting probation, the trial court is given broad discretion to determine terms and conditions that will promote rehabilitation while protecting public safety. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) But a court may not impose unreasonable conditions. (*Id.* at p. 1121.) A condition is unreasonable if it: (1) is not reasonably related to the defendant's crime, (2) relates to conduct that is otherwise legal, and (3) requires or forbids conduct not reasonably related to preventing future criminality. (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).) A party seeking to invalidate a condition must satisfy all three prongs. (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).)

Additionally, due process requires a probation condition that imposes limitations on a person's constitutional rights to be closely tailored to the purpose of the condition. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) A probation

condition that imposes limitations on constitutional rights must not be overbroad or vague. (*Ibid.*)

Generally, we review the court's imposition of probation conditions for an abuse of discretion. (*Olguin*, *supra*, 45 Cal.4th at p. 379.) But we review constitutional challenges to probation conditions de novo. (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723.)

1) Probation Conditions Concerning Residence and Travel

Dickinson challenges the conditions that he "[m]aintain residence approved by Probation and keep the Probation Officer advised of place of residence and employment" and that he "not change place of residence, nor leave the County of Santa Barbara or the State of California without the permission of the Probation Officer." He argues that these conditions are invalid because they are unreasonable and unconstitutionally overbroad. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890; *Lent*, *supra*, 15 Cal.3d at p. 486.)

Dickinson forfeited his contention that the conditions are unreasonable because he did not object below. Generally, a failure to object to a probation condition on the ground that it is unreasonable results in forfeiture on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 237 (*Welch*).) Dickinson argues for the first time on appeal that the residence conditions are unreasonable because they are not reasonably related to his crime or to the prevention of future criminality. Had he objected below, the trial court could have considered these claims, explained its ruling, or if appropriate, modified these conditions.

Dickinson also forfeited his contention that the probation conditions are unconstitutionally overbroad because they interfere with his right to travel and associate but are not

narrowly tailored to the condition's purpose. A claim that a probation condition is unconstitutionally overbroad may be reviewed on appeal without an objection in the trial court if it is capable of correction without reference to the particular sentencing record. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 888-889.) Dickinson purports to make a facial constitutional challenge. However, our determination of the condition's purpose and whether the condition is narrowly tailored to that purpose requires us to refer to the sentencing record to analyze individualized facts and circumstances. We cannot resolve it by reviewing "abstract and generalized legal concepts." (*Id.* at p. 885.) Dickinson was required to object in order to give the trial court the opportunity to address any overbreadth issue with these conditions.

2) Probation Condition Concerning Gang Insignia and Clothing

Dickinson challenges the condition that prohibits him from "own[ing] or possess[ing] any gang insignia or clothing to represent membership in a gang." He argues that the condition is invalid because it is unreasonable and unconstitutionally vague. He asks us to modify the condition to prohibit him from "wearing" (rather than "own[ing] or possess[ing]") items he knows to be gang insignia or clothing. We modify the condition to include an explicit knowledge requirement.

Because a failure to object to a probation condition generally results in forfeiture, Dickinson's claims that the condition is unreasonable and should be limited to "wearing" gang-related items are forfeited. (*Welch*, *supra*, 5 Cal.4th at p. 237.) However, his contention that the condition is unconstitutionally vague for lack of a knowledge requirement is

not forfeited because this is a facial constitutional challenge that we can resolve without reference to the record. (*Sheena K., supra*, 40 Cal.4th at pp. 888-889.)

To withstand a constitutional challenge on the ground of vagueness, a probation condition must be "sufficiently definite" for the probationer to know what conduct is required or prohibited, and to allow the court to determine whether the condition has been violated. (*People v. Hall* (2017) 2 Cal.5th 494, 500 (*Hall*).)

We are not limited to the text of the condition to determine whether it is sufficiently definite. (*Hall*, *supra*, 2 Cal.5th at p. 500.) We consider "other sources of applicable law." (*Ibid.*) A condition is not vague if its terms may be made reasonably certain by ""other definable sources"' that make sufficiently clear the condition['s] scope. [Citation.]" (*Id.* at p. 501.)

For instance, in *Hall*, existing laws that prohibited possession of firearms and illegal drugs rendered the scope of conditions sufficiently definite. (*Hall*, *supra*, 2 Cal.5th at p. 501.) Although the probation conditions did not include an explicit knowledge requirement, existing law required proof of knowledge of the presence and the restricted nature of prohibited items. (*Ibid.*)

Similarly, in *In re Oswaldo R.* (2017) 11 Cal.App.5th 409, 414, 417, a probation condition prohibiting the minor from "participat[ing] in any gang-related activity" was sufficiently definite in scope because "gang-related activity" was defined by other sources of law (i.e., § 186.22, subd. (e)).

In contrast, in *Sheena K.*, reference to other definable sources could not make clear the scope of a condition that

prohibited the minor from associating with "anyone disapproved of by probation." (*Sheena K., supra*, 40 Cal.4th at p. 889.) The condition was therefore unconstitutionally vague because it failed to notify her in advance with whom she might not associate. (*Id.* at pp. 890-891.) The court modified the condition to prohibit association with "anyone 'known to be disapproved of' by a probation officer." (*Id.* at p. 892.) *Hall* recognized the distinction made in *Sheena K.*, noting that the modification in that case made clear "*which persons* the probation officer had disapproved of," rather than "articulat[ing] the requisite scienter." (*Hall*, *supra*, 2 Cal.5th at pp. 502-503; see also *People v. Brooks* (Aug. 25, 2017, D070918) __ Cal.App.5th __ [2017 Cal.App. Lexis 739] [probation condition ordering participation "in a counseling/educational program as directed by the probation officer" deemed vague and was modified to specify what type of program (alcohol and drug program)].)

This case is similar to *Sheena K.* because reference to other definable sources does not make "gang insignia" or "gang clothing" "sufficiently definite." We do not find, and the Attorney General does not direct us to, any legal authority or other sources that define these terms. Nor does the record indicate Dickinson would know in advance the types of items he is prohibited from owning or possessing. Given the lack of definable sources in existing law and in the record, an explicit knowledge requirement would make clear the scope of the condition.

Our modification of the probation condition is like the one made in *People v. Leon* (2010) 181 Cal.App.4th 943, 950-951. The *Leon* court found vague a condition that prohibited the defendant from possessing gang paraphernalia "'which is evidence of affiliation with or membership in a gang.'" (*Id.* at

p. 950.) To avoid vagueness and to clarify the scope of prohibited items, the court modified the condition to prohibit gang paraphernalia "that [the probationer] knows or that the probation officer informs" him is evidence of gang membership. (*Ibid*.) Such a modification sufficiently defines what conduct is prohibited.

DISPOSITION

The sentencing and probation order is modified. Probation condition 38 shall read: "Do not associate or affiliate with any known gang members. Do not own or possess any gang insignia or clothing that you know or the probation officer informs you to represent membership in a gang." As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Pauline Maxwell, Judge

Superior Court County of Santa Barbara

Elizabeth K. Horowitz, 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, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.