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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RONALD GOMEZ, Defendant and Appellant.	B275696 (Los Angeles County Super. Ct. No. KA111430)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Reversed and remanded with directions.

Christopher L. Haberman, 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, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Ronald Gomez of assault on a peace officer by force likely to produce great bodily injury and resisting an executive officer by use of force and violence. The jury also found true the allegation Gomez personally inflicted great bodily injury on the officer. Gomez contends the trial court erred in answering a jury question during deliberations and in failing to give a unanimity instruction at that time. Regarding the enhancement, Gomez argues substantial evidence does not support the jury's finding he personally inflicted great bodily injury on the officer, and the trial court committed instructional error by giving a modified definition of great bodily injury.

We conclude counsel for Gomez's affirmative agreement to the response to the jury's question at trial forfeited the issue on appeal. We also conclude there was substantial evidence to support the jury's finding that Gomez personally inflicted an injury on the officer. We agree with Gomez, however, that the trial court's modified jury instruction on great bodily injury was erroneous and prejudicial. Therefore, we reverse the judgment with directions for a new trial on the great bodily injury enhancement only.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Gomez Is Involved in a Physical Altercation With a Police Officer*

Gomez, who is five feet six inches tall and weighs 130 pounds, was sleeping one morning on his mother's front porch because he was homeless and had nowhere else to go. He knew a

court had ordered him to stay away from his mother's house, but he wanted somewhere safe to stay.

A family member called the police and reported that Gomez was sleeping on the porch in violation of the court order. At 9:00 a.m. Officer Edward Lee of the Pomona Police Department, who is six feet tall and weighs 240 pounds, went to the house. Officer Lee found Gomez asleep on the front porch, which was elevated four to six feet above the ground and was surrounded by a three- to four-foot ledge. Officer Lee climbed the porch steps and spoke to Gomez, who gave the officer his name and admitted he was on parole.

The two men described what happened next differently.

According to Officer Lee's testimony, Gomez stood up and began moving away from him, and the officer grabbed Gomez's right forearm or wrist to detain him. In response, Gomez grabbed Officer Lee's wrist and jumped over the ledge of the porch, pulling the officer with him. Officer Lee fell over the ledge and landed on his head on hard dirt, which forced his neck to snap back and caused him to lose consciousness for 15 to 30 seconds. When he regained consciousness, he was in a "foggy haze," and he had pain in his head, neck, and elbow.

According to Gomez's testimony, Officer Lee instructed Gomez to stand and put his hands behind his back so the officer could handcuff him. Gomez complied, but after he turned his back to the officer and faced the porch ledge, he decided to jump off the porch and make a run for it because he believed there was a warrant for his arrest and was scared of going to jail. As Gomez was hurdling the porch ledge, he felt Officer Lee grab his shoulder to try to stop him. They both fell over the ledge onto the ground. Gomez claimed he "was completely in flight mode" at

that point and he never touched the officer or tried to pull him over the ledge. Gomez, uninjured from the fall, got up and ran away without looking back.

Gomez's sister, Desiree Clark, testified she came out of the house when she heard the officer's voice and other noises on the porch, and she saw Officer Lee "going over the ledge" and Gomez "across the street running." Clark said she went down the steps to check on Officer Lee and, when she reached him several seconds later, found him conscious and moving but disoriented. She asked Officer Lee if he was injured. The officer said he "wasn't expecting that," but was fine and needed a moment to recover.

Officer Lee hit the emergency button on his radio and requested backup. Officer Joe Hernandez, the first officer on the scene, testified that when he arrived Officer Lee was standing in the front yard, covered in dirt and debris. His forehead was red and beginning to swell, and he seemed confused. He told Officer Hernandez that Gomez pulled him over a wall, causing him to hit his head on the ground.

Officer Hernandez, using a police canine, subsequently found Gomez hiding in a neighbor's yard under some chairs and a blanket. After warning Gomez several times he would unleash the dog if Gomez did not come out, Officer Hernandez gave the dog a command to bite. The dog latched on to Gomez's leg, but Gomez remained motionless. When Officer Hernandez removed the blanket, Gomez sat up, and Officer Hernandez punched him in the face to create distance between them. Officer Hernandez testified that Gomez kicked toward him and punched the dog until eventually the dog released Gomez's leg, and the dog bit Gomez's arm instead. Gomez testified that, when the dog

started chewing on his leg he was initially in shock, and, when he moved his arms up to surrender, the dog bit his arm. Once the dog bit his arm, Gomez surrendered.

B. *Gomez Is Tried, Convicted, and Sentenced*

The People charged Gomez with one count of assault on a peace officer by means likely to produce great bodily injury (Pen. Code, § 245, subd. (c)),[1] and one count of resisting an executive officer by the use of force or violence in the performance of his or her duties (§ 69). The People also alleged Gomez personally inflicted great bodily injury on the officer within the meaning of section 12022.7, subdivision (a). The People alleged Gomez had a prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667 subds. (b)-(j), 1170.12), a prior serious felony conviction (§ 667, subd. (a)(1)), and served a prior prison term for a felony (§ 667.5, subd. (b)).

The jury convicted Gomez of both crimes and found true the great bodily injury allegation on both counts. After Gomez admitted the prior conviction allegations, the trial court sentenced him to a prison term of 14 years, consisting of the lower term of three years on count 1, doubled under the three strikes law, plus five years for the prior serious felony conviction and three years for the great bodily injury enhancement. The court imposed and stayed execution of the one-year enhancement for the prior prison term.[2] On count 2 the court imposed and

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1 Statutory references are to the Penal Code.

2 The trial court erred by imposing and staying the one-year prior prison term enhancement because the court cannot impose enhancements under both section 667 and 667.5. (See *People v. Langston* (2004) 33 Cal.4th 1237, 1241 ["[o]nce the prior prison

stayed a term of 10 years (the upper term of three years, doubled, plus three years for the enhancement and one year for the prior prison term enhancement). Gomez timely appealed.

DISCUSSION

A. *Gomez Forfeited His Argument the Trial Court's Response to the Jury's Question Was Erroneous*

During deliberations, the jury submitted the following question: "What is the alleged act in count 1 that constitutes as the assault? [¶] Is it the dual grab between Ronald [and] the officer? Or the single grab to the shoulder from the officer to Ronald?"

The trial court and counsel discussed the question off the record and prepared the following written response: "You are the sole and exclusive judges of the facts of this case. [¶] First, you must determine what facts have been proved from the evidence received in the trial and not from any other source. A 'fact' is something proved by the evidence or by stipulation. [¶] In this case you must unanimously agree that the defendant willfully committed an act which by its nature would probably and directly result in the application of physical force on another person. You [are] directed to CALJIC 9.00, page 24 of the instructions. [¶]

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term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken"]; accord, *People v. Lua* (2017) 10 Cal.App.5th 1004, 1020.) On remand, the trial court is to strike the section 667.5, subdivision (b), enhancement as to count 1.

You do not have to unanimously agree as to which act the defendant committed upon another person."

When the court and counsel went back on the record, the court stated, "We prepared a response. The jury will receive their response. . . . All that is agreeable, correct?" The prosecutor and counsel for Gomez replied, "Yes."

Gomez contends the court's response was misleading and erroneous. Gomez argues the court erred in directing the jury to CALJIC No. 9.00, which defined the elements of assault, rather than CALJIC No. 9.20, which addressed assault by means of force likely to produce great bodily injury. As a result, Gomez argues, the jury may have used the lesser level of force required for simple assault, rather than the greater amount of force required for assault by means of force likely to produce great bodily injury. Gomez also argues the last sentence of the response—telling the jurors they did not need to agree unanimously on which act Gomez committed on another person—violated Gomez's right to a unanimous jury verdict and "may well" have led the jurors to believe they could use Gomez's version of events to convict him erroneously.

Gomez, however, forfeited these arguments because his trial counsel expressly consented, on the record, to the court's response. A defendant forfeits an argument the trial court erred in responding to a jury question where the defendant's trial counsel approved the response. (See *People v. Salazar* (2016) 63 Cal.4th 214, 248 ["[c]ounsel's affirmative agreement with the court's reply to a note from the jury forfeits a claim of error"]; *People v. Debose* (2014) 59 Cal.4th 177, 207 [counsel for defendant forfeited the argument the court erred in responding to a jury question "by affirmatively agreeing with the court's actions"];

People v. Rogers (2006) 39 Cal.4th 826, 877 ["counsel's acquiescence in the trial court's response forfeits the claim of error on appeal"]; *People v. Roldan* (2005) 35 Cal.4th 646, 729 ["[w]hen a trial court decides to respond to a jury's note, counsel's silence waives any objection under section 1138"], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; cf. § 1259 [objection at trial not necessary to preserve issue of instructional error on appeal].) By affirmatively stating, in direct response to the trial court's inquiry, that the response prepared by the court and counsel was acceptable, Gomez forfeited his challenge to the wording of the response.

Gomez argues he preserved the issue for appellate review because he raised it in his motion for a new trial. Gomez relies on section 1181, subdivision (5), which provides that a trial court may grant a new trial where the court "has erred in the decision of any question of law arising during the court of the trial." Raising an objection to the court's response to a jury question for the first time in a motion for a new trial, however, does not preserve the issue for appeal. (See *People v. Williams* (1997) 16 Cal.4th 635, 686-687 [defendant forfeited the argument in his motion for new trial that the court's admonition to the jury was erroneous where the "defendant never objected to the statement when it was made"]; see also *People v. Cowan* (2010) 50 Cal.4th 401, 486 [the filing of a motion for new trial does not revive arguments that have "not been preserved by a timely and specific objection".)[3]

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[3] Gomez also argues for the first time in his reply brief that, if his trial counsel's agreement to the response to the jury's question forfeited his challenge to the response, his trial counsel rendered ineffective assistance. This argument, which Gomez

B. *Substantial Evidence Supported the Jury's Finding Gomez Personally Inflicted Officer Lee's Injury*

Gomez argues substantial evidence does not support the jury's finding that he caused Officer Lee's injuries, because, at least in Gomez's version of events, Officer Lee hurt himself accidentally when he tried to grab Gomez mid-flight and fell over the ledge in the process. Gomez argues "the jury may have based the conviction on [Gomez] being grabbed by the officer as he was fleeing," which "would mean [Gomez] was guilty of the assault, but did not personally inflict the injury."

"When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] Our review must presume in

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could have anticipated because there was no objection to the court's response during trial and trial counsel for Gomez stated at the hearing on Gomez's motion for a new trial that she "realized" the issue when she "went back and . . . looked at the question again" after the jury returned with its verdict, is also forfeited because Gomez did not make it until his reply brief. (See *Peopl v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9 [defendant forfeited ineffective assistance of counsel argument by raising it for the first time in his reply brief]; *People v. Harris* (2008) 43 Cal.4th 1269, 1290 [defendant's response "to the Attorney General's waiver argument by suggesting for the first time in his reply brief that the failure to object amounted to ineffective assistance of counsel" was "as meritless as it is belated"]; see also *People v. Bonilla* (2007) 41 Cal.4th 313, 349-350; *People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26.)

support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44; see *ibid*. ["the relevant inquiry on appeal is whether, in light of all the evidence, '*any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt'"].) "'"Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict.'" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) The same standard applies to an enhancement. (*People v. Gonzales* (2011) 51 Cal.4th 894, 941; *People v. Bryant* (2011) 191 Cal.App.4th 1457, 1472.) If substantial evidence does not support the jury's true finding on a nonrecidivist enhancement allegation, double jeopardy bars a retrial on the enhancement. (See *People v. Seel* (2004) 34 Cal.4th 535, 549-550.)

Officer Lee testified Gomez caused his injuries by grabbing his arm and pulling him off the porch. Officer Lee's testimony was substantial evidence that Gomez personally inflicted injury on the officer. (See *People v. Jones* (2013) 57 Cal.4th 899, 963 ["'unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction'"]; accord, *People v. Guillen* (2014) 227 Cal.App.4th 934, 986.)

Gomez relies on *People v. Rodriguez* (1999) 69 Cal.App.4th 341, where the court reversed a finding the defendant personally inflicted great bodily injury on a police officer because it was undisputed the officer tackled the defendant as the defendant was fleeing and the officer injured himself falling to the ground. As Gomez acknowledges, however, in *Rodriguez* "there was no evidence the defendant had personally acted to cause the injuries to the victim." Here, the evidence was not undisputed: Only Gomez's version matches the facts in *Rodriguez*. Gomez's contention the jury could have chosen to believe his account is precisely the kind of credibility determination the law assigns to a jury, not an appellate court. (See *People v. Manibusan*, *supra*, 58 Cal.4th at p. 87 ["'[w]here the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal'"]; *People v. Jones*, *supra*, 57 Cal.4th at p. 963 ["'[i]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder'"]; *People v. Young* (2005) 34 Cal.4th 1149, 1181 ["[i]n deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts"].)

C. *The Trial Court's Instruction on Great Bodily Injury Under Section 12022.7 Was Erroneous*

Section 12022.7, subdivision (a), provides a mandatory three-year sentence enhancement for a defendant "who personally inflicts great bodily injury on any person . . . in the commission of a felony." The statute defines "great bodily injury"

as "a significant or substantial physical injury." (§ 12022.7, subd. (f).) The corresponding pattern jury instruction used by the court, CALJIC No. 17.20, stated, in relevant part, "'Great bodily injury,' as used in this instruction, means a significant or substantial physical injury. Minor, trivial or moderate injuries do not constitute great bodily injury."[4] The trial court gave a modified version of CALJIC No. 17.20 that added the following language: "The terms serious bodily injury and great bodily injury are equivalent. [¶] Serious bodily injury means a serious impairment of a physical condition, including but not limited to a loss of consciousness."

The first sentence of the court's modification referred to case law stating the terms serious bodily injury and great bodily injury are essentially equivalent. (See, e.g., *People v. Sloan* (2007) 42 Cal.4th 110, 117 [""[s]erious bodily injury" is the essential equivalent of "great bodily injury""]; *People v. Knoller* (2007) 41 Cal.4th 139, 143, fn. 2 ["[t]he two terms are "'essentially equivalent'" [citation], and although there are some differences in the statutory definitions . . . those differences are immaterial here"].) The second sentence apparently came from the definition of battery with serious bodily injury in section 243, subdivision (f)(4), which states: "'Serious bodily injury' means a serious impairment of physical condition, including, but not limited to,

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[4] Although "[t]he use of the CALCRIM instructions rather than the CALJIC instructions is strongly encouraged" (*People v. Reyes* (2008) 160 Cal.App.4th 246, 251), the trial court used CALJIC instructions. The corresponding CALCRIM instruction, CALCRIM No. 3160, is similar and also does not include a list of specific injuries: "*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm."

the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement."

Gomez contends the court erred in instructing the jury that great bodily injury and serious bodily injury are equivalent, and that serious bodily injury includes loss of consciousness. Gomez argues this instruction removed from the jurors' consideration whether the officer's physical injuries were significant or substantial within the meaning of section 12022.7, which was "tantamount to a directed verdict" on the great bodily injury enhancement.

1. *Gomez Did Not Forfeit His Argument of Instructional Error*

The People contend Gomez forfeited his argument the court's instruction on great bodily injury was erroneous because his trial counsel did not object—at least on the record—to the instruction. The reporter's transcript indicates the court and counsel discussed the jury instructions off the record "at length" and "a little rewrite was done on some of them," but there was no discussion of CALJIC No. 17.20 on the record. When the court gave the prosecutor and counsel for Gomez the opportunity to object to any instruction on the record, both declined.

However, instructional error is preserved for appeal to the extent it effects the defendant's substantial rights, notwithstanding counsel's failure to object at trial. (See § 1259 [appellate court may "review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"];

accord, *People v. Townsel* (2016) 63 Cal.4th 25, 59-60; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220, fn. 24, disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. D'Arcy* (2010) 48 Cal.4th 257, 302.) And an appellate court must "consider the merits of [the appellant's] contention" to assess whether defendant's substantial rights were effected, because "there is no other way of determining whether the instruction was reversibly erroneous." (*People v. Cruz* (2016) 2 Cal.App.5th 1178, 1183; see *People v. Olivas* (2016) 248 Cal.App.4th 758, 772.) Therefore, we review the merits of Gomez's argument to determine whether the purported instructional error affected his substantial rights.

2. *The Trial Court's Instruction on Great Bodily Injury Was Erroneous*

"'In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys.'" (*People v. Fiu* (2008) 165 Cal.App.4th 360, 370.) "Challenges to the wording of jury instructions are resolved by determining whether there is a reasonable likelihood that the jury misapplied or misconstrued the instruction." (*People v. Crew* (2003) 31 Cal.4th 822, 848; see *People v. McCarrick* (2016) 6 Cal.App.5th 227, 261 ["[r]eversal is required where there is a 'reasonable likelihood that the jury misapplied or misconstrued' the trial court's instructions or the underlying law"].) To determine if such reasonable likelihood exists, the reviewing court looks to ""'the instructions given, the entire record of trial, and the arguments of counsel.'" (*People v. Johnson* (2016) 243 Cal.App.4th 1247, 1268-1269; see *People v. Houston* (2012) 54 Cal.4th 1186, 1229 ["we view the challenged

instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner"].)

Unlike a reversal for insufficient evidence, which, as discussed, precludes retrial on the enhancement (see *People v. Seel*, *supra*, 34 Cal.4th at pp. 549-550), a reversal for instructional error "'does not constitute a decision to the effect that the government has failed to prove its case'" and does not preclude retrial on the enhancement. (*Id.* at p. 544; see *People v. Hernandez* (2003) 30 Cal.4th 1, 6-7 ["it is well established that if the defendant secures on appeal a reversal of his conviction based on trial errors other than insufficiency of evidence, he is subject to retrial"]; *People v. Anderson* (2009) 47 Cal.4th 92, 123 ["retrial of a penalty allegation on which the jury has deadlocked does not violate federal or state double jeopardy principles, and retrial may be limited to the deadlocked allegation alone"].)

The trial court's instruction in this case was erroneous under *People v. Santana* (2013) 56 Cal.4th 999 (*Santana*). In *Santana*, the Supreme Court examined CALCRIM No. 801 (mayhem). At the time, this instruction included a statement that the prosecution had to prove the defendant caused "serious bodily injury," which the instruction defined pursuant to section 243 as a "serious impairment of physical condition." The instruction stated: "Such an injury may include[, but is not limited to]: (protracted loss or impairment of function of any bodily member or organ/a wound requiring extensive suturing/[and] serious disfigurement)." (*Id*. at pp. 1005-1006, 1009.) The Supreme Court explained the serious bodily injury requirement in CALCRIM No. 801 was added after a Court of Appeal decision holding that great bodily injury was an element

of mayhem. (*Id*. at pp. 1007-1008.) The Supreme Court recognized that, even though courts have described the terms serious bodily injury and great bodily injury as equivalent in certain contexts, "the terms in fact 'have separate and distinct statutory definitions.' [Citation.] This distinction may make a difference when evaluating jury instructions that provide different definitions for the two terms." (*Id.* at pp. 1008-1009.) The Supreme Court in *Santana* held that, although mayhem includes a great bodily injury requirement, it does not include a serious bodily injury requirement. (*Id*. at p. 1009; see *People v. Poisson* (2016) 246 Cal.App.4th 121, 125 [citing *Santana* and rejecting the notion that the terms great bodily injury and serious bodily injury should be used "interchangeably"].) Thus, under *Santana*, a jury instruction that conflates the definitions of serious bodily injury and great bodily injury may be erroneous.[5]

And it was erroneous here. By highlighting a specific example of serious bodily injury, the "jury instruction's precise language" (*Santana*, *supra*, 56 Cal.4th at p. 1009) created a reasonable likelihood the jury could find great bodily injury without finding that Officer Lee's loss of consciousness was a significant or substantial physical injury within the meaning of section 12022.7. The jury reasonably could have found the officer's loss of consciousness was a serious impairment of a physical condition and thus serious bodily injury, which under

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[5] In other contexts, the "general proposition" that the terms serious bodily injury and great bodily injury are "essentially equivalent" may still be true. (See, e.g., *People v. Johnson* (2016) 244 Cal.App.4th 384, 392 [distinguishing *Santana* by noting that, "[i]n the case before us, we are not concerned with the precise language of a jury instruction"].)

the court's instruction was equivalent to a finding of great bodily injury, all without ever finding the officer suffered a significant or substantial injury. (See *People v. Taylor* (2004) 118 Cal.App.4th 11, 24-25 ["[u]nlike serious bodily injury, the statutory definition of great bodily injury does not include a list of qualifying injuries," and "[i]n these circumstances, the jury's finding of serious bodily injury cannot be deemed equivalent to a finding of great bodily injury"].)

The trial court's modification of CALJIC No. 17.20 also inadvertently resurrected a definitional problem the Legislature sought to eliminate in enacting section 12022.7. Section 12022.7, as originally enacted in 1976, provided: ""[G]reat bodily injury" means a serious impairment of physical condition, which includes any of the following: [¶] (a) Prolonged loss of consciousness. [¶] (b) Severe concussion. [¶] (c) Protracted loss of any bodily member or organ. [¶] (d) Protracted impairment of any function of any bodily member or organ or bone. [¶] (e) A wound or wounds requiring extensive suturing. [¶] (f) Serious disfigurement. [¶] (g) Severe physical pain inflicted by torture.'" (*People v. Caudillo* (1978) 21 Cal.3d 562, 581, overruled on another ground in *People v. Martinez* (1999) 20 Cal.4th 225; see *People v. Escobar* (1992) 3 Cal.4th 740, 747.) Before this version of the statute became effective on July 1, 1977, however, the Legislature introduced "urgency legislation" to delete the enumerated list of injuries, including the "[p]rolonged loss of consciousness," from the statute. (See *Escobar*, at p. 747.)[6] One week later, the proposed

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[6] "[I]t appears that the intent was to preclude the possibility that the specific examples set forth therein would be construed as exclusive of other types of injury not expressly enumerated." (*Escobar*, *supra*, 3 Cal.4th at p. 747.)

amendment was further amended to change the language "serious impairment of physical condition" to the current definition, "a significant or substantial physical injury." (*Ibid*.) Thus, by modifying the pattern instruction, the trial court essentially reintroduced the phrase "serious impairment of physical condition" that the Legislative had decided not to include in the statute, and added one of the enumerated kinds of great bodily injury the Legislature had deleted from the statute. (See *id.*, at p. 748 ["the legislative history of section 12022.7 reveals a clear legislative intent to *discard* the original, detailed definition of great bodily injury and substitute the more general standard"].)

3. *The Error Was Not Harmless*

As the People concede we review an error in the trial court's instruction on the great bodily injury allegation under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 328; see *People v. Hill* (2015) 236 Cal.App.4th 1100, 1122 ["[a] trial court's misinstruction on an element of an offense is subject to federal harmless error analysis under *Chapman*"].) Under this standard, "'we ask whether it appears '"'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'"'" (*People v. Wilkins* (2013) 56 Cal.4th 333, 350; see *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) The People have the burden of proving "the error was harmless beyond a reasonable doubt." (*People v. Reese* (2017) 2 Cal.5th 660, 671.) "To determine whether the People have carried their burden, we examine the entire record and must reverse if there is a '"reasonable probability"' that the error contributed to the verdict." (*Ibid*.)

"'"To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" (*People v. Pearson* (2013) 56 Cal.4th 393, 463.) "'[T]he focus is on what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is "whether the . . . verdict actually rendered in this trial was surely unattributable to the error."'" (*Ibid*.) For an instructional error to be harmless under *Chapman*, the evidence must be "'of such compelling force as to show beyond a reasonable doubt' that the erroneous instruction 'must have made no difference in reaching the verdict obtained.'" (*People v. Harris* (1994) 9 Cal.4th 407, 431.)

Whether Officer Lee lost consciousness, and for how long, was a central issue at trial. Officer Lee testified he lost consciousness for up to 30 seconds and woke dazed and disoriented. On the other hand, Clark testified she saw Officer Lee within three to four seconds after his fall and he was "definitely coherent" and "conscious." Counsel for Gomez argued the prosecution had not met its burden of proving loss of consciousness: "Did Officer Lee lose consciousness when he fell? . . . The D.A. has failed to prove this to you." The prosecutor responded, "Officer Lee is the only one that can say whether he lost consciousness or not."

In their closing arguments, both attorneys focused on whether Officer Lee suffered great bodily injury under the court's instruction. The attorneys discussed the erroneous portions of the instruction, repeating for the jury the incorrect definition and its example of loss of consciousness. (See *People v. Flores* (2016) 2 Cal.App.5th 855, 881 [reviewing court considers closing

arguments in evaluating prejudice]; *People v. Chavez* (2004) 118 Cal.App.4th 379, 388 ["closing arguments to the jury are relevant in evaluating prejudice"]; see, e.g., *Wilkins*, *supra*, 56 Cal.4th at p. 351 [instructional error was not harmless where "[n]othing in counsel's arguments at trial helped to clarify the law for the jury"].) The prosecutor highlighted the erroneous modification, emphasizing that the jury could find great bodily injury based on a "loss of consciousness" and a "serious impairment of physical condition," i.e., a finding of serious bodily injury as defined by section 243. The prosecutor told the jury the instruction "tells you that [great bodily injury is] the same thing as serious bodily injury, which has been defined. And serious bodily injury has been defined as a serious impairment of physical condition, which includes loss of consciousness. So for you, what you have to determine is whether or not you believe that Officer Lee lost consciousness, and if that was a serious impairment of his physical condition." The prosecutor subsequently referenced the definition of serious bodily injury rather than great bodily injury again, stating, "Loss of consciousness is a substantial impairment to your physical condition, especially in his case where he was disoriented." The prosecutor argued, "Officer Lee suffered great bodily injury that day by losing consciousness." Counsel for Gomez similarly told the jury that great bodily injury meant "significant or serious bodily injury. What this means is not any injury falls into that category. It has to be very specific things. And in this case, it's the loss of consciousness is what's at issue."

Officer Lee's loss of consciousness was one of the main issues at trial, and the primary way the prosecutor sought to prove great bodily injury. We cannot say the court's erroneous

definition of great bodily injury, which highlighted for the jury "loss of consciousness," was "unimportant in relation to everything else the jury considered on the issue" of great bodily injury. (See *Pearson*, *supra*, 56 Cal.4th at p. 463.) Therefore, the instructional error was not harmless.

The People argue any error was harmless because the jury could have found great bodily injury based on Officer Lee's other injuries, which he testified included a contusion and swelling on his forehead, neck and back pain, and a fractured elbow. The People cite to cases where similar injuries amounted to "great bodily injuries." (See *People v. Escobar*, *supra*, 3 Cal.4th at p. 752; *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1755; *People v. Jamarillo* (1979) 98 Cal.App.3d 830, 836-837.) Those cases address whether such injuries supported a jury's finding of great bodily injury, not whether those injuries necessarily compelled a finding of great bodily injury. (See *Escobar*, at p. 752; *Bustos,* at p. 1755; *Jamarillo*, at pp. 836-837.) Although the jurors in this case could have found the great bodily injury allegation true even if the court had not erroneously instructed the jury that great bodily injury and serious bodily injury were equivalent, and included loss of consciousness as an example, the People have not established beyond a reasonable doubt that the instructional error """"did not contribute to the verdict obtained."""" (*Wilkins*, *supra*, 56 Cal.4th at p. 350.) Indeed, the jury could have just as reasonably found the officer's injuries did not constitute "significant or substantial physical injury." (See *Hudson*, *supra*, 38 Cal.4th at p. 1014 [erroneous instruction on an element of the offense was not harmless because the jury "could have found" that element was not met "under the circumstances"]; *People v. Taylor*, *supra*, 118 Cal.App.4th at p. 25 ["the jury's finding that

the bone fracture fell within the definition of serious bodily injury was not equivalent to a finding of great bodily injury"]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1499 ["[w]hile a jury could very easily find [a broken nose] to be great bodily injury, a reasonable jury could also find to the contrary"].)

DISPOSITION

The judgment is reversed and remanded with directions for a new trial on the allegation that Gomez personally inflicted great bodily injury on the officer. The trial court is directed to modify the judgment to strike the one-year enhancement under section 667.5, subdivision (b), as to count 1.

SEGAL, J.

We concur:

PERLUSS, P. J.

BENSINGER, J. *

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