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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAMON KEITH GRIFFIN, Defendant and Appellant.	B226746 (Los Angeles County Super. Ct. No. MA041196)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. Affirmed as modified.

Lise M. Breakey, 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, Stacy S. Schwartz and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

In this appeal, we affirm the conviction and sentence for assault with a deadly weapon, but modify the judgment by striking the conviction for assault by means of force likely to produce great bodily injury and by striking the great bodily injury enhancement as to the mayhem conviction.

PROCEDURAL BACKGROUND

Appellant Damon Keith Griffin was charged with three felony offenses: mayhem (Pen. Code, §203;[1] count 1), assault with a deadly weapon (§ 245, subd. (a)(1); count 2), and assault by means likely to produce great bodily injury (§ 245, subd. (a)(1); count 3). As to counts 2 and 3, the information alleged that appellant personally inflicted great bodily injury within the meaning of section12022.7, subdivision (a). It was further alleged that appellant had suffered three prior serious or violent felony convictions within the meaning of sections 667 subdivisions (b)-(i) and 1170.12, subdivisions (a)-(d), and two prior serious felony convictions (§ 667, subd. (a)(1)).

Appellant was tried twice by jury. In the first trial, the jury was unable to reach a verdict as to any of the three counts, and the trial court declared a mistrial. In the retrial, the second jury convicted appellant of all three counts as charged. The sentence enhancement allegations were found to be true. The court found appellant's prior convictions to be true but struck a juvenile conviction.

The trial court sentenced appellant on count 2 to 25 years to life plus three years pursuant to section 12022.7, subdivision (a) and plus 10 years pursuant to section 667, subdivision (a)(1). The court stayed the sentence on counts 1 and 3 pursuant to section 654. The sentence for count 1 included a three-year enhancement pursuant to section 12022.7(a). The trial court also ordered a restitution fine of $10,000 under section 1202.4, subdivision (b), and stayed a parole revocation fine of $10,000 under section 1202.45.

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[1] All further references are to the Penal Code unless otherwise noted.

FACTS

Clifford Leon lived in and was the manager of an alcohol recovery home in Lancaster. Three other occupants lived in the home with Leon, including Ernestine Wright (Ernestine). Ernestine is the mother of appellant. Leon testified that he had no relationship with Ernestine. He also stated that he and appellant "just knew of each other" because appellant had previously come to see his mother in the home. Appellant had always been in a wheelchair but would sometimes stand up. When he did, he did not have a very strong gait or a very strong walk. His medical condition also limited mobility in his neck, hips, and lumbar region.

On July 26, 2007, Leon arrived home at approximately 5:00 p.m., went up to his room, and heard "some hollering, some whooping it up." He came out of his room and saw appellant and his mother with a bottle of alcohol, making a lot of noise. The rules of the home forbade drugs and alcohol. Leon calmly stated that they needed to stop drinking and that appellant needed to leave. Ernestine then became belligerent and engaged in a two-minute argument with Leon. Ernestine had often screamed in the home before. The argument was not violent or physical. During the argument, appellant went out of sight without saying anything.

Suddenly, Leon felt something wet and looked towards his stomach. He saw a lot of blood and a two-pronged barbecue fork sticking out of him, pushing out his liver, kidneys, and intestines. The fork had been stabbed through the back of Leon's right side and out his abdomen. Leon then looked over his right shoulder, saw appellant standing one to two feet behind him, and said, "I can't believe you did this to me." Leon testified that Ernestine was definitely in front of him prior to the stabbing. He was certain it was appellant who had stabbed him from behind.

Leon ran out the side door of the home, clutching his internal organs. He was afraid that if he passed out where he was, he "might not make it out." No more than a minute and a half later, Leon lost consciousness. He woke up in a helicopter and was transported to a hospital.

Approximately a half-hour later, Sergeant Paul Pfrehm and Deputy Ruben Acosta of the Los Angeles County Sheriff's Department arrived at the home in response to a call of assault with a deadly weapon. They entered to check for additional victims and did not find appellant, Ernestine, or any other individuals in the residence. Ernestine has remained missing. Sergeant Pfrehm and Deputy Acosta also did not find any blood in or around the residence. The only blood found was across the street where Leon had been lying. They did not find a barbecue fork in the residence, and their report did not refer to any alcohol bottles. Pfrehm testified at trial that they had been looking for a knife. They had never received a description of the stabbing instrument as a barbecue fork.

As a result of the stabbing, the hospital had to remove Leon's abdominal muscles. He wears an abdominal binder to help him get around. The hospital also had to repair Leon's kidney, liver, and large intestines. The doctors grafted skin from his leg in order to cover the hole they needed to cut in his stomach. Since leaving the hospital, Leon has had digestive problems and trouble eating and using the restroom. He has also been in and out of the hospital two to three times a month due to pain. He regularly takes pain medication. He has not returned to the alcohol recovery home out of fear of being harmed by appellant.

On January 16, 2008, Detective Jeffrey Knittel questioned Leon about the incident. He showed Leon a six-pack lineup, consisting of six individual photos. Leon circled appellant's face and placed his initials by the circle. The entire time Leon maintained that appellant was the individual who had stabbed him. Knittel did not attempt to locate the barbecue fork because it did not seem feasible that it would still be at the residence.

DISCUSSION

A. Exclusion of third party culpability evidence

Appellant contends that the trial court abused its discretion when it excluded evidence of Ernestine's continued flight. At trial, defense counsel made an offer of proof that investigators had been unable to find Ernestine despite their best efforts to do so. The defense maintained that such proof—combined with the fact that Ernestine had been

present in the home, arguing with Leon—could lead the jury to conclude that she was the one who had stabbed him. The trial court excluded the evidence under Evidence Code section 352 because it did not directly link Ernestine to the stabbing and thus presented a potential danger and prejudice in confusing and misleading the jury.

We will not disturb a trial court's assessment of evidence under Evidence Code section 352 unless we find that the court abused its discretion. (*People v. Robinson* (2005) 37 Cal.4th 592, 625.) A showing is required that the trial court "'"exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice."'" (*People v. Geier* (2007) 41 Cal.4th 555, 585.) Under Evidence Code section 352, evidence of third party culpability must be capable of raising a reasonable doubt of the defendant's guilt by directly or circumstantially linking the third party to the actual perpetration of the crime. (*People v. Hall* (1986) 41 Cal.3d 826, 833 (*Hall*); *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1175.) Mere evidence of motive or opportunity is not enough. (*Hall*, at p. 832.) The probative value of the evidence must also outweigh the probability of any undue delay, prejudice, or confusion that might result from its presentation. (*Id.* at p. 834.) For example, in *Hall*, the Court held that the trial court abused its discretion when it excluded evidence that connected a specific third party to the facts concerning the actual commission of the crime. (*Id.* at p. 833.) The third party knew intimate details about the murder that the defendant had never mentioned; while the defendant was right-handed, forensic evidence suggested that the perpetrator, like the third party, was left-handed; and footprints of the same type of shoes that the third party wore were found in the victim's bedroom. (*Ibid.*) Furthermore, in *People v. Geier*, *supra*, 41 Cal.4th 555, the Court upheld the exclusion of evidence blaming a third party who was documented to be in a hospital 160 miles away from the scene of the murder. (*Id.* at p. 582.) While the evidence was not sufficient to point the third party towards the commission of the crime, the Court further noted that the evidence "would have necessitated a minitrial on the question of [the party's] whereabouts on the night of the murder thus creating the possibility of 'confusing the issues, or of misleading the jury.'" (*Ibid.*)

In the present case, evidence that Ernestine fled the scene and that investigators have not been able to find her does not directly or circumstantially suggest that she was the one who did the stabbing. In *Hall*, the evidence did connect the third party to the murder. In addition to illustrating that the third party had been present in the victim's home, the evidence suggested that the perpetrator and the third party were both left-handed and that the third party had knowledge about the murder that the defendant did not. Here, although the fact that investigators simply cannot locate Ernestine may indeed establish that she is scared or guilty of *something*, it does not show that she was the stabber. If anything, it suggests that she does not want to testify against her son or, as the trial court noted, that she is afraid of being perceived as an accessory to the assault. It could be that she is missing because she is dead. Ultimately, the specific reason why investigators have not been able to locate Ernestine is irrelevant to respondent's evidence of appellant's guilt. Digging into the reasons behind Ernestine's absence would only confuse and mislead the jury away from the case at hand rather than exculpate appellant in any way. We thus cannot say that the trial court acted beyond its discretion when it denied defense counsel's offer of proof.

Even if the trial court had abused its discretion by excluding evidence of Ernestine's absence, any error was harmless. Introducing evidence that Ernestine was still missing would not affect Leon's prior testimony that the barbecue fork had entered through his back, that appellant had been the only person standing behind him, and that he was absolutely certain appellant was the sole perpetrator. Appellant did not testify or refute these statements in any way. Sergeant Pfrehm had testified that when he arrived at the scene, no one was there. Introducing evidence that Ernestine was still not around would not change a reasonable jury's consideration of the existing evidence that appellant was the one who had stabbed Leon. There is no prejudicial error.

B. <u>Lack of flight instruction as to Ernestine</u>

Appellant argues that the jury's questions indicate that it was prepared to consider Ernestine as the individual who stabbed Leon. During jury deliberations, the jury first asked, referring to appellant, "What hand is the dominant (right or left?)." It also

requested a copy of the court reporter's transcript in order to review the prosecution's direct examination of Sergeant Pfrehm and his arrival at the scene. The jury's last request was to hear Leon's testimony of when he was stabbed and when he saw his guts on the fork; however, the jury later rescinded this request. The jury asked no other questions. Accordingly, appellant maintains that the trial court erred when it refused to provide the jury with a modified third party flight instruction as to Ernestine. Appellant further contends that his failure to request the instruction from the trial court does not affect his right to assert such error on appeal. We disagree. A defendant who fails to request a modification to a jury instruction in the trial court forfeits the right to protest those errors on appeal. (*People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1163). Even if appellant had preserved his claim by objecting earlier, we nonetheless do not see how the jury's requests indicate that it would have ever considered Ernestine, rather than appellant, as the perpetrator.

Certainly jury deliberations may indicate that a different jury verdict is plausible (*People v. Cardenas* (1982) 31 Cal.3d 897, 907 [where 12 hours of jury deliberation illustrated the closeness of the case]). However, to demonstrate that the jury would have changed its mind but for an error made by the trial court, jury questions and deliberations must expressly indicate that the jury had discussed a different verdict. (See *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295). A considerable amount of evidence must also exist to support the alternative verdict. (*Ibid.*)

Here, neither the evidence nor the jury manifested any express consideration of Ernestine's culpability. It is fair to assume that if the jury had really been prepared to consider Ernestine as the perpetrator, its requests would have indicated so. However, the jury did not allude to or make any mention of Ernestine at all. As such, we cannot see how the jury would have changed its mind or benefitted from a third party flight instruction. We have already established that there was no prejudicial error in excluding evidence of Ernestine's flight. Accordingly, we reject the defense's contention that the trial court committed any further prejudicial error in refusing to provide the jury with a third party flight instruction.

C. Modification of the judgment

The Attorney General concedes that (1) appellant cannot be convicted both of assault with a deadly weapon (count 2) and assault by means like to produce great bodily injury (count 3). (*See In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5.) The Attorney General also concedes that appellant's contention is correct that the trial court erred in imposing and staying a three-year sentence for great bodily injury, enhancing the sentence pursuant to section 12022.7 as to count 1 (mayhem). The information did not allege such an enhancement, nor did the jury find such an enhancement allegation to be true. Accordingly, the Court will modify the judgment as to count 3 by striking that count and as to count 1 by striking the great bodily injury enhancement.

DISPOSITION

The judgment is modified to strike appellant's conviction as to count 3 and the great bodily injury enhancement as to count 1. Otherwise, the judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.