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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

GERREL LOONEY,

Defendant and Appellant.

B254907

(Los Angeles County
Super. Ct. No. LA72677)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Michael V. Jesic, Judge. Affirmed, in part, reversed, in part, and remanded with instructions.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Yun K. Lee and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Gerrel Looney (defendant) guilty of the assault and battery of two victims based on an altercation in a college library. On appeal, defendant contends that there was insufficient evidence to support the findings that he inflicted great bodily injury (Penal Code section 12022.7¹) and serious bodily injury (section 243, subdivision (d)) in connection with the assault and battery of the male victim. Defendant also contends that the trial court committed sentencing error when it sentenced him to consecutive sentences on the two assault counts because the court mistakenly believed it lacked discretion to impose concurrent sentences.

We hold that the findings that defendant inflicted great and serious bodily injury on the male victim were supported by substantial evidence. We further hold that because it appears that the trial court mistakenly believed that consecutive sentences were mandatory on the two assault counts and that it had no discretion to impose concurrent sentences, the matter must be remanded to allow the trial court to exercise its discretion on the issue of whether to sentence defendant concurrently or consecutively on the two assault counts.

FACTUAL BACKGROUND

A. Prosecution's Case

1. *Tarlan Hendi's Testimony*

On the morning of November 27, 2012, Tarlan Hendi was at Pierce College in Woodland Hills. She went to the computer lab in the library to type a paper. She found a seat but, as she sat down, her backpack accidentally hit the back of the chair in which defendant was seated. Defendant said, "Watch where you're going" or "Watch what you hit." When Hendi apologized, defendant responded, "I'm just saying" and then raised his voice and said, "Watch what you hit." Hendi again apologized and then asked, "So why

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

are you basically continuing this?” Hendi also asked defendant to lower his voice, and he replied, “I can do what I want . . . bitch.” Hendi became angry and called defendant’s mother a bitch. Defendant” grabbed” Hendi’s cup of coffee and “spilled it all over her face.” Hendi stood up, shocked and angry. Her face burned from the hot coffee.

When defendant stood up, Hendi moved toward him, “cussing him out.” Defendant punched Hendi on the left side of her face, chipping her tooth, and then punched her on the right side of her chin. Hendi heard her classmate say, “Hey you hit a girl,” and saw him move between defendant and Hendi. An altercation then ensued between defendant and Hendi’s classmate. Hendi saw defendant on top of her classmate punching him, causing him to bleed. Defendant stopped punching the classmate and left the library. Hendi followed defendant and tried to stop him from leaving. Security personnel arrived and detained defendant.

After the incident, Hendi could not open her jaw for two weeks and “it was very, very painful.” Hendi made a dentist appointment to have her tooth repaired.

2. Pouria Mohkami’s Testimony

On the morning of November 27, 2012, Pouria Mohkami and his friend, Hendi, were at Pierce College working on a class project together. They went to the library to use a computer. While they were looking for a place to sit, they passed by defendant who said, “You touched me.” Hendi apologized, but then she and defendant began arguing and “cussing each other out.” Defendant became upset and threw a cup of coffee in Hendi’s face. When Hendi, who was upset, moved toward defendant, Mohkami observed defendant punch her twice on the side of her face.

Mohkami tried to “stop the whole thing,” but defendant punched him in the face “a couple of times.” Mohkami tried to punch defendant and then took him to the ground, at which point bystanders separated the two men.

After the altercation, Mohkami had a “couple of bruises” and a one-inch cut that he “got from the punch.” Police officers photographed the cut, and, at trial, Mohkami had a scar on his face from the cut. Mohkami received treatment at the campus nurse’s

office and was advised to go to the hospital to have the cut stitched and to be examined for a concussion.

3. *Susan Mollasalehi's Testimony*

On the morning of November 27, 2012, Susan Mollasalehi was in the computer lab in the Pierce College library. When she arrived, she went to the first row of computers and saw defendant sitting at the first computer. The chair and computer next to defendant were unoccupied, but Mollasalehi sat at the third computer. Defendant was “watching a video or something” and “was just mesmerizing [sic] to himself.” Sometime after Mollasalehi sat down, a man and a woman arrived and the woman pulled out the chair in front of the second computer next to defendant. She had a backpack on her left shoulder and, when she tried to put her backpack down, she “hit” defendant with it. The woman immediately apologized, but that created tension between the woman and defendant, who appeared to be upset. Defendant was talking to himself saying, “You should be more careful.” Mollasalehi heard the woman apologize “a couple of times.” She next heard defendant call the woman a bitch and observed him take the hot coffee that was in front of the woman and “pour[] it on her face.” The woman became upset and called defendant’s mother a bitch, at which point defendant stood up and turned toward the woman, who also stood up. As the woman and defendant were facing each other, Mollasalehi saw defendant punch “her in the face with both hands.”

At that point the man who came into the library with the woman intervened. Defendant and the man began fighting and defendant pulled the man to the floor, knocking down a whiteboard. She then saw defendant on top of the man “punching him in the face and chest.”

Bystanders began “yelling” and somebody called security. Defendant took off his shirt and tried to run out, but the female victim ran after him telling him he could not leave.

B. Defendant's Case

Defendant, who represented himself at trial, testified on his own behalf as follows. On the day of the incident, defendant had an appointment with a counselor. He was in the library seated at the "last seat . . . in the computer room." He had head phones on and therefore could not hear because of the music to which he was listening. He still had his backpack on. The female and male victims came in. When the female took her backpack off, she hit defendant. Defendant turned to her and said "'Can you please say 'excuse me?'" Defendant then asked the female to "please scoot [her] chair" because she was "inside [his] space." Defendant felt as if the female was "trespassing" and invading his space. The female replied, "Scoot your fucking chair forward. Then you won't have that problem." Defendant responded, saying, "Are you going to leave it alone," because the female "kept on going." During his verbal exchange with the female, defendant did say the word "bitch," but he was "talking to himself."

Defendant threw the cup of coffee because the female was "yelling" at him and had not apologized. But he did not "directly throw the cup of coffee at her. [He] just threw it. It had no force. [He] just threw it." The coffee "got on her and got on [defendant]." The female then "hopped up" and attacked defendant. The attack made defendant "get up and throw punches." He only hit the female twice and neither punch was "hard enough to numb or chip a tooth." Defendant did not hit the female in the front of her mouth. No one intervened, defendant just stopped hitting her "on [his] own."

At that point, the female's male companion became involved, saying "Oh, so you just going to hit her?" The male then attacked defendant swinging at him and then grabbing him. Defendant broke free and threw punches at the man because he had thrown punches at defendant. During the altercation, defendant suffered a scratched lip. Other people then came around and pushed defendant back into the male causing them both to fall to the ground. People were pulling at defendant's backpack as he wrestled with the male. Defendant was trying to break up the fight and was defending himself because he felt "unsafe from all of them." Defendant "then . . . left it alone. [He] put on

[his] shirt, [his] backpack, and then [he] left.” The female pulled defendant and tried to prevent him from going downstairs. He grabbed her hands and pushed her off him. As he walked downstairs, the female came back and tried to push him down the stairs. Because defendant had forgotten his earphones, he went back upstairs to retrieve them, and then went back downstairs and began walking to the “counselor building.” At that point, security personnel arrived to investigate the incident. Defendant was arrested and taken to jail.

PROCEDURAL BACKGROUND

In an amended information, the Los Angeles County District Attorney charged defendant in count 1 with assaulting Hendi with a deadly weapon in violation of section 245, subdivision (a)(1); in count two with assaulting Hendi by means likely to produce great bodily injury in violation of section 245, subdivision (a)(4); in count three with assaulting Mohkami by means likely to produce great bodily injury in violation of section 245, subdivision (a)(4); in count four with the battery of Hendi with serious bodily injury in violation of section 243, subdivision (d); and in count five with the battery of Mohkami with serious bodily injury in violation of section 243, subdivision (d). The District Attorney alleged as to counts two and three that defendant personally inflicted great bodily injury upon Hendi and Mohkami within the meaning of section 12022.7, subdivision (a). As to all five counts, the District Attorney further alleged that defendant had suffered a prior conviction of a serious felony as described in section 1192.7 or a violent felony as described in section 667.5, subdivision (c); a prior conviction of a serious felony within the meaning of sections 1170.2, subdivisions (a) through (d) and 667, subdivisions (b) through (i); a prior felony conviction for which a prison term had been served within the meaning of section 667.5, subdivision (b); and a prior conviction of a serious felony within the meaning of section 667, subdivision (a)(1). The defendant pleaded not guilty and denied the allegations.

Following trial, the jury found defendant guilty on counts one, two, three, and five and not guilty on the charge alleged in count four—battery with serious bodily injury—but guilty on count four of the lesser included offense of simple battery. Defendant admitted the alleged prior strike conviction. The trial court granted a new trial as to count 1, and that charge subsequently was dismissed.

The trial court sentenced defendant to an aggregate prison term of 11 years comprised of the following: on count 2, a two-year low term, doubled to four years based on the prior strike conviction; on count 3, a consecutive one-third the middle term sentence of one-year, doubled to two years based on the prior strike conviction, plus an additional five-year term based on the prior serious felony conviction under section 667, subdivision (a). The trial court also imposed but stayed punishment on counts four and five, the simple battery of Hendi and the battery of Mohkami with great bodily injury.

DISCUSSION

A. Great and Serious Bodily Injury

1. Standard of Review

Defendant’s challenge to the sufficiency of the evidence in support of the findings of great and serious bodily injury is reviewed under a substantial evidence standard. “‘In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we “examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—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.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] . . . “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.] We do not reweigh evidence or

reevaluate a witness's credibility. [Citation.]' (*People v. Guerra* [(2006)] 37 Cal.4th [1067,] 1129; see *People v. Lindberg* [(2008)] 45 Cal.4th [1,] 27.)" (*People v. Scott* (2011) 52 Cal.4th 452, 487.)

2. Analysis

Defendant contends that there was insufficient evidence to support the findings that defendant inflicted great bodily injury on Mohkami within the meaning of section 12022.7, subdivision (a)—count 3—and serious bodily injury on Mohkami within the meaning of section 243, subdivision (d)—count 5. According to defendant, the cut and bruises Mokhami sustained during the altercation with defendant were not sufficient to meet the definition of great bodily injury in section 12022.7 or the definition of serious bodily injury in section 243.

Section 12022.7, subdivision (f) defines great bodily injury as “a significant or substantial physical injury.” In *People v. Escobar* (1992) 3 Cal.4th 740, the Supreme Court explained that the significant or substantial injury test “contains no specific requirement that the victim suffer ‘permanent,’ ‘prolonged,’ or ‘protracted’ disfigurement, impairment, or loss of bodily function.” (*Id.* at p. 750.) The court in *Escobar* concluded that the evidence in that case—extensive bruises and abrasions to the victim's knees and elbows, injury to her neck, and severe soreness in her vaginal area—were sufficient to support the jury's finding of great bodily injury. (*Ibid.*) According to the court, “[i]t is well-settled that the determination of great bodily injury is essentially a question of fact, not of law. “Whether the harm resulting to the victim . . . constitutes great bodily injury is a question of fact for the jury. [Citation.] If there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding.”” (*Ibid.*)

Section 243, subdivision (f)(4) defines serious bodily injury as follows: “‘Serious bodily injury’ means a serious impairment of physical condition, including, but not limited to, 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.”

When the evidence of Mohkami’s injuries is viewed in a light most favorable to the jury’s finding of great bodily injury in connection with the assault charged in count 3 and its finding of serious bodily injury in connection with the battery charged in count 5, it was sufficient to support those findings. Mohkami testified that as a result of the altercation with defendant, his face was bruised and he had a cut on his cheek that the school nurse said required stitches. The photographic exhibit depicting that cut shows what the prosecutor fairly described as a “gash” and the trial court described as one-inch long. By the time of trial, the cut or gash—which defendant refused to have sutured as recommended by the school nurse—had healed, leaving a visible scar that the jury was able to observe and evaluate. In addition, the school nurse advised Mohkami to go to the emergency room so that he could be evaluated for a concussion.

Given that evidence, which we cannot reweigh or reevaluate on appeal, we conclude that it was sufficient to support the jury’s findings of great and serious bodily injury. Whether Mohkami suffered great or serious bodily injury as those terms are defined by the respective statutes were fact questions within the exclusive province of the jury to resolve based on the evidence of Mohkami’s injuries, evidence which, as described above, could reasonably be construed to meet the statutory definitions. (See, e.g., *People v. Escobar*, *supra*, 3 Cal.4th at p. 750, fn. 3 [““The term “great bodily injury” has been used in the law of California for over a century without further definition and the courts have consistently held that it is not a technical term that requires further elaboration. [Citations.]””].)

B. Consecutive Sentencing on Counts 2 and 3

Defendant, who represented himself at trial, contends that the trial court committed sentencing error because it mistakenly believed that it lacked discretion to impose concurrent, rather than consecutive, sentences on counts 2 and 3, the assault

charges. According to defendant, the trial court's statements during sentencing indicated that the trial court wanted to impose the minimum sentence required by law on counts 2 and 3. Nevertheless, the trial court imposed consecutive sentences on counts 2 and 3, an aggregate sentence that defendant contends demonstrates the trial court's mistaken belief that it lacked discretion to impose concurrent sentences.

1. Background

During a January 17, 2014 hearing, the trial court and the prosecutor had the following exchange: “[The Prosecutor]: And the court also has available you can run those concurrent. They’re not mandatory consec.” The Court: Which ones? [The Prosecutor]: The 2 and 3. The Court: No. I think - - I thought it was because of the strike you had to run it consecutive. [The prosecutor]: It’s only different occurrences and - - The Court: It’s different victims. [The Prosecutor]: That doesn’t matter. It’s only if it’s different locations pursuant to 667(a). And I’ll read it from the code. And that’s 667(c)(6). ‘If there is a current conviction for more than one felony count not committed on the same occasion and not arising from the same set of operative facts the court shall sentence the defendant consecutively.’ So it’s to the court’s discretion whether or not . . . in this case . . . to impose consecutive or concurrent. The Court: Okay.”

Thereafter, at the March 6, 2014, sentencing hearing, the trial court denied defendant’s *Romero*² motion because defendant had not “been out of custody for very long” on a prior felony conviction “before he committed this crime.” The trial court then made the following statements: “The Court: . . . I’m going to attempt to give the defendant the least amount of time I can because I really wish he would have taken [plea offer of] the 4 years. And if he hadn’t represented himself and listened to advice of counsel, I think that he would have been in a much better position than he is now. [¶] And it makes this process very difficult, Mr. Looney, for me to do what I have to do now

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

because I know that you have mental issues. And I believe it's the issues you're having that are causing you to act the way you are. But the problem is, is that part of your issue comes from you refusing to take the medications that will stabilize you. And I don't have a choice, but that - - if I can't count on you to be stable and because of that I have to protect the community. And so although I'm giving you the minimum amount I can, it's still more time than -- it's more time than I wish I could give you. I wish I could give you less. But under the circumstances I can't." Following the trial court's comments, it sentenced defendant to consecutive terms on counts two and three.

2. *Analysis*

Under the "Three Strikes" law, consecutive sentences are mandatory for any current felony convictions "not committed on the same occasion, and not arising from the same set of operative facts." (667, subd. (c)(6); *People v. Lawrence* (2000) 24 Cal.4th 219, 222-223.) But consecutive sentences are not mandated if the current felony convictions are committed on the same occasion or arise from the same set of operative facts. (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) Moreover, if the record shows that a trial court mistakenly believed it was required to impose consecutive terms, and lacked discretion to impose concurrent terms, the matter must be remanded to allow the trial court to "impose sentence with full awareness of its discretion." (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944.)

Notwithstanding that the prosecutor had previously informed the trial court that it had discretion to impose concurrent sentences on counts two and three, the record of the sentencing hearing strongly suggests that the trial court thereafter sentenced defendant under the mistaken belief that it could not impose concurrent terms because consecutive terms were mandatory. The trial court first said that consecutive sentences were mandatory. When informed otherwise by the prosecutor, the trial court said "ok." But during sentencing seven weeks later, the trial court appeared to have thought it had no discretion to sentence concurrently. If, as the trial court repeatedly stated, the court's intention was to impose the minimum sentence required by law, the court would not have

imposed consecutive sentences on counts 2 and 3 unless it believed such sentencing was required by law. Because the Attorney General agrees that the trial court had discretion to impose concurrent sentences, the matter must be remanded so that the trial court can impose sentence on counts 2 and 3 “with full awareness” of its discretion to impose concurrent sentences.

DISPOSITION

The judgments of conviction on counts 3 and 5 are affirmed, but the sentences on counts 2 and 3 are reversed and the matter is remanded to the trial court to allow it to impose sentence on those counts with full awareness of its discretion to impose either consecutive or concurrent sentences on those counts.

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MOSK, Acting P. J.

We concur:

KRIEGLER, J.

GOODMAN, J.*

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