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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. PAUL S. TIWANA, Defendant and Appellant.	B268493 (Los Angeles County Super. Ct. No. MA065932)

APPEAL from a judgment of the Superior Court of Los Angeles County. Eric Harmon, Judge. Affirmed.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and David D. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Paul S. Tiwana (defendant) appeals from the judgment entered following a jury trial in which he was convicted of one count of domestic violence. (Pen. Code, § 273.5, subd. (a).)[1] The jury also found true the allegation that defendant inflicted great bodily injury. (§ 12022.7, subd. (e).) The trial court sentenced defendant to a total term of 15 years in state prison. On appeal, defendant contends the trial court erred when it instructed the jury on mutual combat with CALCRIM No. 3471, and in failing to provide the dictionary definitions of the terms "great vs. moderate" in response to the jury's request. Defendant also contends there was insufficient evidence to support the finding he inflicted great bodily injury. We affirm the judgment of conviction.

BACKGROUND

In April 2015, defendant and his girlfriend, Karron Smith, drove to a friend's house. While at the house, Smith learned that defendant was sleeping with another woman and became upset, took the car keys, left defendant, and drove to the home of Deliashawn Haley.

According to Haley, about 10 minutes after Smith arrived, defendant banged on her door. When Haley opened the door, defendant barged through and pushed Smith onto the couch and started hitting her. Smith swung back a couple of times and hit defendant, but her punches were not "effective." Defendant then threw Smith on the floor and "socked her" and she was "knocked out." While Smith was lying on the floor unconscious, defendant kicked her with enough force to wake her up. Haley saw that Smith's "nose was busted" and "[h]er face was crooked."

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[1] Unless otherwise stated, all further statutory references are to the Penal Code.

Smith recalls "tussling" with defendant over car keys inside Haley's house. She testified she may have hit defendant first. She remembers swinging but does not know if she injured defendant. At some point, she got hit in the nose and "blood shot out" and she was in "shock." She also "blacked out"; and, after she regained consciousness, she continued fighting with defendant. Smith remembers being "put on a stretcher" and taken to the emergency room the night of the fight where she was given "some medicine." She suffered a fractured nose. At the time of the trial, Smith claimed her nose had healed and that she did not suffer any residual effects from her broken nose.

A Los Angeles County Sheriff's Department deputy responded to the 911 call and was able to speak with Smith for approximately five to seven minutes before she was taken by ambulance to the hospital. Smith told the deputy she had been punched several times by defendant, but could not remember the number of times because she had blacked out. The deputy observed that Smith's face was swollen, her nose was injured, and her speech was "slightly lispy and mumbled." The deputy also spoke with Haley, who stated Smith was at her house when defendant came over and "they began to argue over the car, over [Smith] wanting to break up with him, and then [defendant] attacked [Smith]." Haley also stated that it appeared Smith lost consciousness during the fight.

That same night, the deputy was able to locate defendant, at which time he was taken into custody. The deputy read defendant his *Miranda* rights.[2] In the questioning which followed, defendant initially did not

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[2] We note that defendant challenged the *Miranda* waiver at trial and, after an evidentiary hearing was conducted outside the presence of the jury, the trial court ruled that defendant had understood and voluntarily waived his *Miranda* rights. Because this issue was not raised on appeal, we do not

acknowledge knowing who Smith was. Then defendant stated nothing had happened. The deputy also asked defendant whether he had seen Smith that night. Defendant responded that Smith had been at his residence, then left, and returned with a bandage on her face. Smith would not tell defendant what happened.

While in custody, defendant called his mother and when she asked what had happened, he stated "something with [Smith] that I slapped her." He further explained that "[Smith] started getting violent with me like she always does tries to push me and I hit, sma . . . kinda hit, kinda put my hand up to stop her from coming forward and my finger went to the corner of her eye."

At trial, defendant called an expert witness, Dr. Ryan O'Connor, an emergency medical physician who had reviewed Smith's medical records (and who had not treated Smith). Based on the hospital medical records, Dr. O'Connor testified that Smith was evaluated at the emergency room and had bruises on her nose and left cheek area. Smith also complained of pain and swelling in those areas. The emergency room doctor described Smith's degree of pain as moderate and her degree of bleeding as minor. She received two pills of Norco, an oral pain medication. Dr. O'Connor further testified that a CAT scan of Smith's head, brain and face revealed a "nasal bone fracture" and a "hairline fracture to the cheek on the left." Because Smith's nose was crooked from the fracture, the emergency room doctor "grabbed it and straightened it out." Smith also suffered a cut in the corner of her eye. Based on his experience, Dr. O'Connor testified that a hairline fracture heals

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address the trial court's ruling. (*See Long v. Cal.-Western States Life Ins. Co.* (1955) 43 Cal.2d 871, 883 [grounds for appeal not mentioned in brief deemed abandoned].)

within four weeks, while a nasal fracture heals within six weeks. Given that Smith did not suffer any cosmetic or functional impairment, Dr. O'Connor opined that medically Smith's injuries were "not greater than moderate injur[ies]."

The jury convicted defendant of one count of domestic violence. (§ 273.5, subd. (a).) The jury also found true the allegation that defendant inflicted great bodily injury. (§ 12022.7, subd. (e).) Outside the presence of the jury, defendant admitted he had suffered a prior conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)).

The trial court sentenced defendant to a total term of 15 years in state prison, comprised of the midterm of three years for the domestic violence conviction, which was doubled as a result of defendant's prior strike, plus four years for the great bodily injury enhancement, and an additional five years pursuant to section 667, subdivision (a) for the prior serious felony conviction. Defendant filed a timely notice of appeal.

DISCUSSION

A. The Trial Court Did Not Err in Instructing the Jury on Mutual Combat Under CALCRIM No. 3471

Defendant argues it was error to instruct the jury on mutual combat under CALCRIM No. 3471 because "there was no evidence that the parties mutually agreed to fight." According to defendant, Smith testified that she threw the first punch, which was corroborated by his jail phone call to his mother. Defendant further argues the instructional error was prejudicial because "the jury was erroneously required to reject [defendant's] claim of

self-defense unless he communicated an intent and desire to break off the engagement prior to using force."[3]

"A trial court must instruct the jury, even without a request, on all general principles of law that are "'closely and openly connected to the facts and that are necessary for the jury's understanding of the case." [Citation.]'" (*People v. Burney* (2009) 47 Cal.4th 203, 246.) "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." **(***People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) An instructional error that is a correct statement of law is reviewed under the *Watson* test.[4] (*Guiton,* at p. 1130.) Under *Watson*, an error warrants reversal only if, "'after an examination of the entire cause, including the evidence'" it appears "reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*Watson*, at p. 836.) "[S]uch an error is usually harmless, having little or no effect 'other than to add to the bulk of the charge.' [Citation.] There is ground for concern only when an abstract or irrelevant instruction creates a substantial risk of misleading the jury to the defendant's prejudice." (*People v. Rollo* (1977) 20 Cal.3d 109, 123, disapproved on another ground by *People v. Castro* (1985) 38 Cal.3d 301, 308.)

We agree with defendant that the evidence here is insufficient to establish mutual combat.[5] Under CALCRIM No. 3471, the term "'mutual

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[3] There is no dispute the jury was properly instructed on self-defense under CALCRIM No. 3470.

[4] *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).

[5] The trial court read CALCRIM No. 3471 to the jury, despite objections from both parties, as follows: "A person who engages in mutual combat or who starts to fight has a right to self defense only if: [¶] One, he actually

combat' means not merely a reciprocal exchange of blows but one *pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities*." (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1045, original emphasis.) There "must be evidence from which the jury could reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose.*" (*Id.* at p. 1047, original emphasis.) Here, there is no evidence that Smith and defendant prearranged or mutually agreed to fight before arriving at Haley's house. Instead, Smith recalls "tussling" with defendant over car keys inside Haley's house. At most, Smith's testimony implies a willingness to fight, but "'want[ing] to fight' does not make it a case of mutual combat." (*Id.* at p. 1045, fn. 14.)

Notwithstanding the inapplicability of the portion of CALCRIM No. 3471 which concerns mutual combat, it was not error for the trial court to instruct the jury using this instruction. The challenged instruction is written in the disjunctive and is appropriately given either when a person is engaged in mutual combat *or* is the initial aggressor. Here, Haley testified that defendant barged through the door and pushed Smith on the couch and

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and in good faith tried to stop fighting; [¶] Two, he indicated by word or by conduct to his opponent in a way that a reasonable person would understand that he wanted to stop fighting and that he had stopped fighting; and [¶] Three, he gave his opponent a chance to stop fighting. [¶] If the defendant meets these requirements, then he had the right to self defense. I'm sorry. He then had a right to self defense if the opponent continued to fight. However, if the defendant used only non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had a right to defend himself with deadly force and was not required to try to stop fighting or communicate that desire to stop to the opponent. [¶] Fighting is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self defense arose."

started hitting her. Thus, because a jury could reasonably conclude defendant was the initial aggressor in the fight based on Haley's testimony, there was sufficient evidence to support giving the instruction.[6]

We also find any error in the trial court's instruction to be harmless. The trial court read CALCRIM No. 200 to the jury, which provides: "Some of these instructions may not apply, depending on your findings about the facts of the case. After you've decided what the facts are, [follow] all of the instructions that do apply to the facts as you find them." Although there was insufficient evidence of mutual combat, we presume the jury, following the directive of CALCRIM No. 200, disregarded the inapplicable portions of CALCRIM No. 3471. (*See People v. Chavez* (1958) 50 Cal.2d 778 [jury presumed to follow instructions]; *People v. Guiton*, *supra*, 4 Cal.4th at p. 1131 ["The jurors' 'own intelligence and expertise will save them from' the error of giving them 'the option of relying upon a factually inadequate theory.'"].)

The jury was also properly instructed with CALCRIM No. 3474, which provides: "The right to use force in self defense continues only as long as the danger exists . . . or reasonably appears to exist." Thus, even if the jury believed Smith started the fight, as Haley testified, because defendant continued to hit Smith after she blacked out, the jury could have rejected defendant's claim of self-defense, notwithstanding the CALCRIM No. 3471 instruction.[7]

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[6] Defendant's argument that an instructional error regarding mutual combat requires reversal based the holdings of *People v. Ross*, *supra*, 155 Cal.App.4th at p. 1052, and *People v. Rogers* (1958) 164 Cal.App.2d 555, 558, is unavailing. These cases addressed the prior version of the instruction, which did not include the "initial aggressor" language.

[7] Smith also testified she remembered fighting with defendant after she recovered from being blacked out.

Accordingly, it was not reasonably probable that a different outcome would have resulted in the absence of any instructional error.

B. Defense Counsel's Failure to Object to the Trial Court's Response to the Jury's Request Waived the Issue on Appeal

Defendant argues it was prejudicial error for the trial court to fail to provide the dictionary definitions of the terms "great vs. moderate" in response to the jury's request.

"Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.]" (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)[8] "When a trial court decides to respond to a jury's note, counsel's silence waives any objection under section 1138. [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 729, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421.) This is because "'[t]he failure of defendant's counsel to object or move for a mistrial upon the court frankly informing him of the court's action might also be construed to be a tacit approval. Approval of the court's action, even though it might have been a technical violation of section 1138 of the Penal Code, cures any possible error.'" (*Roldan*, at p. 729.)

Here, after the jury commenced deliberations, they sent a note asking: "Can we have dictionary definitions of Great and Moderate, as we, The Jury,

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[8] Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

are struggling with the terms Great vs. Moderate?" Outside the presence of the jury, the trial court read the note to counsel for both parties and proposed the following response: "The jurors are not allowed to use a dictionary in any way, either on their own or as a group. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings." The trial court then asked if "[e]ither side wish[ed] to be heard?" The prosecution requested the trial court provide further guidance, to which the court responded, "I'd be open to it later." The defense counsel remained silent.

Defendant argues it would have been futile to object "in light of the fact that [the] prosecutor unsuccessfully requested that the court provide further guidance." However, the extract of the record quoted above reveals that the trial court did not categorically deny the prosecutor's request, but was open to an alternative response at the appropriate time. It was incumbent on defendant's trial counsel to object and explain why a different response to the jury's inquiry was then appropriate. Because defense counsel failed to make a timely objection to the trial court's proposed response to the jury's request, this issue has been waived on appeal.

C. Substantial Evidence Supports the Jury's Finding that Defendant Inflicted Great Bodily Injury

Defendant argues the jury's finding on the "great bodily injury enhancement" violates his due process guarantees of the U.S. Constitution and California Constitution because the jury's finding was based on "less than substantial evidence." Defendant contends Smith's injuries did not result in "cosmetic or functional impairment" and therefore were "moderate." We disagree.

In assessing the sufficiency of evidence supporting a sentence enhancement, we ""must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."" (*People v. Osband* (1996) 13 Cal.4th 622, 690.) "If we determine that a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15, of the California Constitution [citation]." (*Ibid.*)

Section 12022.7, subdivision (f) defines "great bodily injury" as "a significant or substantial physical injury." This standard "contains no specific requirement that the victim suffer 'permanent,' 'prolonged' or 'protracted' disfigurement, impairment, or loss of bodily function." (*People v. Escobar* (1992) 3 Cal.4th 740, 750.) "Proof that a victim's bodily injury is 'great'—that is, significant or substantial within the meaning of section 12022.7—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.) "Thus, pain or disfigurement or suturing or organ or bone impairment can be great bodily injury" if "the injury is of a particular quality or intensity." (*People v. Nava* (1989) 207 Cal.App.3d 1490, 1497.)

Defendant relies on *People v. Nava* for the proposition that "a broken bone does not necessarily amount to great bodily injury." In *Nava*, the defendant struck the victim in the face, fracturing her nose. (207 Cal.App.3d at p. 1493.) The doctor determined the victim's nose needed to be reset, but that surgery was unnecessary. (*Ibid.*) The jury convicted defendant of

assault and found true the allegation that he inflicted great bodily injury. (*Ibid.*) The Court of Appeal reversed the great bodily injury enhancement, finding it was error for the trial court to instruct the jury that a bone fracture was a substantial and significant injury within the meaning of section 12022.7. (*Nava,* at p. 1498.) In so ruling, the Court of Appeal concluded, "While a jury could very easily find the harm here to be great bodily injury, a reasonable jury could also find to the contrary." (*Id.* at p. 1499.) Thus, while *Nava* holds that it is error as a matter of law to instruct that a bone fracture constitutes great bodily injury, it also makes clear that a bone fracture, even a facial fracture where no surgery is required, can constitute great bodily injury.

Here, Smith was repeatedly hit by defendant, and with enough force to cause her to black out. Haley, a witness to the fight, testified that defendant then kicked Smith in her face with "enough force to wake her up" after she "[w]ent unconscious." Smith's medical records revealed she suffered a "nasal bone fracture," "a hairline fracture to the cheek on her left," and "a cut in the corner of her eye." Dr. O'Connor, defendant's expert witness, testified that based on his experience, it took "roughly a month and a half, two months" for Smith's fractures to heal. Given the nature and extent of Smith's injuries, we find there was sufficient evidence to support the jury's determination that the infliction of great bodily injury allegation was true. (*People v. Escobar*, *supra*, 3 Cal.4th at p. 750 [""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.""].)

DISPOSITION

The judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

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