Filed 3/13/15 P. v. Coronado CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE RAMON CORONADO, Defendant and Appellant.	B255295 (Los Angeles County Super. Ct. No. GA087034)

APPEAL from judgment of the Superior Court of Los Angeles County, Jared D. Moses, Judge. Affirmed.

Wallin & Klarich and Stephen D. Klarich, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jose Ramon Coronado appeals from a judgment entered after a jury convicted him on one count of assault by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(4).)[1] The jury found true the allegation that appellant personally inflicted great bodily injury on the victim. (§ 12022.7, subd. (a).) Appellant was sentenced to 16 years in prison.

In this appeal, appellant contends that (1) there was insufficient evidence to support the great bodily injury enhancement, (2) the court failed to properly instruct the jury that it must return a unanimous verdict, (3) the court failed to give a lesser included offense instruction as to simple assault, and (4) the cumulative effect of the errors resulted in a violation of appellant's right to due process. Finding no errors, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

On the night of July 19, 2012, appellant and four others arrived at the Park Bar and Grill. They were approached by Anthony Martinez, who wanted to play pool with the group. Appellant and Martinez wagered $10 and started to play. Martinez "scratched"—i.e., shot his cue ball into the cup—and lost the game. He demanded his money back, stating that they were not playing a "regulation match." When appellant looked up the rules on his phone and attempted to show them to Martinez, Martinez said he could not read. Appellant and his companions tried to read the rules to Martinez, but Martinez became angry and started cursing at appellant. Martinez then reached for some pool balls and clenched them in his hands, staring "hard" at appellant "like he wanted to hit him." Appellant picked up a bar stool in response, but set it down once one of his companions interfered. The bartender asked appellant, his companions, and Martinez to leave the bar.

Once appellant and Martinez went outside, appellant again tried to explain the rules of pool to Martinez, who continued to insist that he did not know how to read. At some point, appellant returned the $10 to Martinez, put his hand on Martinez's shoulder, and told Martinez he was too stupid to bet because he could not read. According to appellant, Martinez responded by stating, "I just fucked you out of $10 and I'm going to

---

[1] Subsequent statutory references are to the Penal Code.

fuck your mom." Appellant threw a punch at Martinez, and testified that he did so because he feared he was about to be "sucker punched." The manner in which Martinez fell caused a heavy bench to land on top of him, though no witness could describe exactly how that happened. Miguel Villalta, one of appellant's companions, testified that he saw appellant make a kicking motion after Martinez fell onto the ground.[2] Appellant and his companions fled the scene.

Martinez was hospitalized for five days and was in recovery for two and a half months. He has no recollection of the incident. He suffered a broken jaw, memory loss, nerve damage on his right arm and hand, a lost tooth, and a cracked tooth.

Appellant was charged with assault by means likely to produce great injury (§ 245, subd. (a)(4)), with an enhancement for personally inflicting great bodily injury within the meaning of section 12022.7, subdivision (a). In its verdict, the jury returned a conviction and found the enhancement allegation to be true. In a bench trial, the trial court sustained the allegation that appellant had suffered a prior serious or violent felony conviction, and sentenced him to 16 years in prison.

This timely appeal followed.

DISCUSSION

I

Appellant contends the evidence is insufficient to support the jury's finding on the great bodily injury enhancement under section 12022.7, subdivision (a). He argues an intervening cause—Martinez's falling against the bench after being struck by appellant—caused his injuries and thus, they cannot be attributed to appellant.

Section 12022.7, subdivision (a) provides that "[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years." In addressing a challenge to the

---

[2] Another witness, Joshua Banaga, previously had told the investigating detective that he had seen appellant kick Martinez after he went down. Banaga retracted this statement at trial.

sufficiency of the evidence supporting the jury's great bodily injury finding, "we view the evidence in the light most favorable to the judgment to determine whether it discloses substantial evidence, i.e., evidence that is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the essential elements of the charged crime or allegation proven beyond a reasonable doubt [Citations.]" (*People v. Elder* (2014) 227 Cal.App.4th 411, 417.) "[W]e review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Appellant relies on *People v. Cole* (1982) 31 Cal.3d 568, to support his theory that he did not personally inflict great bodily injury on Martinez. That case, however, dealt with whether an accomplice who "directed the attack and blocked the victim's escape, [but] did not actually strike the victim," was subject to the section 12022.7, subdivision (a) enhancement. (*Id.* at p. 572.) When the court stated that the "enhancement applies only to a person who himself inflicts the injury" (*ibid.*), it was referring to the defendant's status as an accomplice who did not actually strike the victim. *Cole* has no direct application outside of the context of accomplice liability, "though it does provide a definition of '"personally,"' for which the court adopts the dictionary definition of '"done in person without the intervention of another; direct from one person to another."' [Citation.]" (*People v. Warwick* (2010) 182 Cal.App.4th 788, 793.)

Appellant cannot deny the applicability of the enhancement when he directly caused Martinez to fall in such a way as to result in great bodily injury. A similar challenge was raised and rejected in *People v. Guzman* (2000) 77 Cal.App.4th 761. In that case, defendant was driving under the influence of alcohol when he made an unsafe left turn in front of another vehicle. (*Id.* at p. 763.) The other vehicle collided into defendant's vehicle, injuring the passenger in defendant's car. (*Ibid.*) Defendant challenged the section 12022.7, subdivision (a) enhancement, contending that, although he did make an unsafe left turn in front of the other vehicle, he did not "*personally* inflict the great bodily injury on [his passenger]" since it was "the other driver involved in the

accident . . . who directly performed the act that caused the injury." (*Id.* at p. 764.) Rejecting this argument, the court stated: "Here, appellant turned his vehicle into oncoming traffic. This volitional act was the direct cause of the collision and therefore was the direct cause of the injury. Appellant was not merely an accomplice. Thus, appellant personally inflicted the injury on [the passenger]. Further, the accidental nature of the injuries suffered does not affect this analysis. The 1995 amendment to section 12022.7 deleted the requirement that the defendant act 'with the intent to inflict the injury.'" (*Ibid.*)

The same reasoning applies here. Here, appellant engaged in a felony—punching Martinez in the face so hard that he fell backward—which directly caused great bodily injury to Martinez. The fact that the immediate cause of the injuries was Martinez's contact with the bench, not the direct punch delivered by appellant, is of no consequence. The fact that appellant did not intend to cause such serious injuries also is immaterial. Section 12022.7, subdivision (a) is concerned only with whether appellant *personally* inflicted great bodily injury on another. Appellant was the direct cause of Martinez's fall and thus, was the direct cause of Martinez's injuries. As undisputed testimony reveals that appellant delivered the punch that knocked Martinez down, substantial evidence exists in the record to support the jury's true finding on the great bodily injury enhancement.

II

Appellant challenges the trial court's failure to give a sua sponte jury instruction on unanimity.

"As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty. [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 679.)

The prosecution presented evidence to show that appellant both punched and kicked Martinez. Appellant contends the prosecutor's closing argument led the jury to

believe it could convict appellant of assault based either on the punch or the alleged kicks. Specifically, appellant finds issue with the prosecutor's statement that "[appellant] avenged his wounded pride by punching Anthony Martinez in the face and kicking him while he was down." Read in context, however, the statement was made to refute appellant's claim of self-defense. Whenever the alleged kicking was mentioned, it was in order to discredit appellant's claim that he punched Martinez in self-defense.[3] The prosecutor never argued the alleged kicking was the basis for appellant's assault charge.

The prosecutor did, however, argue unambiguously that it was appellant's punch that served as the underlying basis of appellant's assault charge. In her closing argument, she stated: "When Jose Coronado made the decision to punch Anthony Martinez, he was responsible for what happened when his fist landed. He's responsible for everything that results from his fist making contact with Anthony Martinez'[s] face. . . . Bottom line is that Jose Coronado is responsible for that bench landing on Anthony Martinez." More directly, she stressed that "Jose Coronado's punch was an assault likely to cause great bodily injury." In her rebuttal, the prosecutor's last statement to the jury was: "[W]e ask you to find the defendant guilty of punching Anthony Martinez in the face, of an assault by means likely to produce great bodily injury, and of actually causing great bodily injury . . . ." It was only the punch, not the alleged kicks, that the prosecution sought as the underlying act for appellant's assault charge. As it is clear that "the state . . . select[ed] the particular act upon which it relied for the allegation of the information" (*People v. Jennings*, *supra*, 50 Cal.4th at p. 679), the trial court was not required to instruct the jury on unanimity.

III

Appellant argues the trial court erred in denying his request for an instruction on the lesser included offense of misdemeanor simple assault. (§ 240.)

Simple assault is a lesser included offense of assault by means of force likely to

---

[3] The prosecutor stated: "Kicking someone once they're already on the ground, incapacitated, when they are already bleeding, when they've hit their face on a bench and are lying locked in a still position on the ground, that's not self-defense. That's revenge."

produce great bodily injury. (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 748 (*McDaniel*).) "The trial court has a duty to instruct the jury sua sponte on lesser included offenses when 'substantial evidence rais[es] a question as to whether all of the elements of the charged offense are present.' [Citations.] Absent substantial evidence a court need not give such instructions, even upon request. [Citation.]" (*Id.* at p. 747.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive. [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) "On appeal, we review independently whether the trial court erred in failing to instruct on a lesser included offense. [Citation.]" (*People v. Booker* (2011) 51 Cal.4th 141, 181.)

In this case, the court determined there was insufficient evidence to question whether the punch appellant delivered was likely to produce great bodily injury, so as to justify an instruction on misdemeanor simple assault. We find no error in the court's decision. "Great bodily injury is bodily injury which is significant or substantial, not insignificant, trivial or moderate. [Citation.]" (*McDaniel*, *supra*, 159 Cal.App.4th at p. 748.) "Whether a fist used in striking a person would be likely to cause great bodily injury is to be determined by the force of the impact, the manner in which it was used and the circumstances under which the force was applied. [Citation.]" (*Id.* at pp. 748-749.) It is undisputed that appellant "threw a punch" at Martinez and caused him to fall back. Appellant also admitted that Martinez was rendered unconscious. Punching someone with such vigor that it causes the individual to fall, hit an object, and be rendered unconscious is a use of force likely to produce great bodily injury, and is not "insignificant, trivial or moderate." (*Id.* at p. 748.) Based on undisputed evidence, a reasonable jury could not have found that appellant committed misdemeanor simple assault instead of assault likely to produce great bodily injury. Since the jury impliedly rejected appellant's self-defense theory, the undisputed evidence called for a verdict no less severe than felony assault. (See *id.* at p. 749.)

In his opening brief, appellant argues that witnesses testified as to Martinez's intoxicated state and that the jury could have inferred that it was Martinez's

intoxication—not appellant's punch—that caused him to fall. However, appellant does not point to, nor do we find, evidence suggesting that Martinez was so intoxicated that he was unable to stand upright or that his reflexes were otherwise impaired. As "[s]peculation is insufficient to require the giving of an instruction on a lesser included offense" (*People v. Mendoza* (2000) 24 Cal.4th 130, 174), and no substantial evidence exists to support a verdict for simple assault, the trial court did not err in refusing the instruction.

IV

Finally, appellant argues that "multiple trial errors" during his trial had a cumulative prejudicial effect that violated his due process rights. ~(AOB 22)~ Since we have found no errors, we disagree with appellant's claim that he was prejudiced by their cumulative impact. (*People v. Cook* (2006) 39 Cal.4th 566, 608.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.