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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL KANG,

Defendant and Appellant.

B240258

(Los Angeles County  
Super. Ct. No. BA364105)

APPEAL from a judgment of the Superior Court of Los Angeles County. Clifford L. Klein, Judge. Modified and affirmed with directions.

Law Offices of Dennis W. Chang, Dennis W. Chang and William Kang for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, and Esther P. Kim, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant Michael Kang appeals from the judgment entered following a court trial in which he was convicted of battery with serious bodily injury and assault by means of force likely to produce great bodily injury, with a finding defendant personally inflicted great bodily injury. Defendant contends insufficient evidence supports the court's finding that he personally inflicted great bodily injury. We affirm, but stay the sentence on one count and direct correction of the abstract of judgment.

### **BACKGROUND**

About 1:30 a.m. on October 15, 2009, Kwang Hong drove into a gated parking lot beneath the apartment building in which his friend, Ms. Song, lived. Hong phoned Song from the parking lot, then walked around while waiting. Hong noticed Jyungwook Eom lying on the ground in the lot while defendant attempted to get Eom to stand up. Both defendant and Eom appeared to be inebriated. The gate closed and Hong wondered aloud to himself how he could get out. Defendant approached Hong and asked what he had said. Hong denied saying anything, but defendant insisted Hong had said something to defendant and demanded to know what he had said. Hong told defendant he had said, to himself, "How can I get out?" Defendant and Hong argued, and defendant asked Hong if he wanted to fight. Hong said he did not, but defendant said, "I want to fight." Hong pushed defendant away, and defendant raised his fists and adopted a boxing stance. Defendant said he was a gang member and Eom was "a bigger gang member" and a "very scary guy." Defendant punched at Hong's face, but Hong ducked. Hong and defendant then threw punches at one another, with Hong the first to land a blow. Hong told defendant he did not want to fight and urged defendant to take care of his friend. They argued and threw more punches, with Hong again striking defendant.

Eom moved up behind Hong, who thought Eom was trying to grab him. Hong punched backward and struck Eom around his mouth. Eom fell, and defendant and Hong "danced around" each other and continued to argue. Eom got up and approached Hong. Hong feared fighting both men, so he ran, but tripped, possibly on a curb or median. Defendant and Eom approached and repeatedly punched and kicked Hong. Hong covered

his face and head with his arms and did not see whether it was Eom or defendant or both who kicked and punched him as he lay on the ground, but defendant and Eom were together as Hong was beaten and the blows were continuous. Hong's face, neck, head, and body were struck. There were so many punches and kicks to his head he felt he was losing consciousness. Portions of the fight and attack were captured on the surveillance cameras in the garage, and recordings of the attack from three camera angles were played repeatedly at trial. Hong heard one man say to get his wallet and copy his name and address, then something about not reporting. Defendant helped Hong to his feet and told him to go home. Song arrived outside the garage, then the police arrived.

Apartment building security guard Francis Lorenzo was watching the output from the surveillance cameras and saw Eom and defendant beating Hong. Lorenzo called 911. Los Angeles Police Officers Andy Chang and Denny Jong arrived about 2:25 a.m. Hong was lying on the ground, unresponsive. Chang observed swelling and bruising on Hong's face and lacerations on his hand, knuckle, elbow, both arms, and tongue. An ambulance transported Hong to a nearby hospital, then he was transferred to UCLA Medical Center, where he remained for two days. He suffered an acute subdural hemorrhage, that is bleeding on the surface of and inside the brain, as a result of the beating. This condition was potentially life-threatening and created the risk of future seizures, memory problems, dementia, and headaches. Hong experienced headaches and insomnia after he left the hospital, and for six months he could not work due to headaches, dizziness, nausea, and vomiting.

Defendant presented no evidence in his defense.

Defendant and Eom were tried together after waiving a jury trial. The court convicted defendant and Eom of battery with serious bodily injury and assault by means of force likely to produce great bodily injury. With respect to the latter charge, the court found that both defendant and Eom personally inflicted great bodily injury on Hong. (Pen. Code, § 12022.7, subd. (a); undesignated statutory references are to the Penal Code.) At sentencing, defendant argued that the court's finding that defendant personally

inflicted great bodily injury was not supported by sufficient evidence, and he asked the court to strike it or not use it to enhance his sentence. After reviewing portions of the surveillance recording and the trial testimony, the court held that the evidence was sufficient to support the enhancement allegation because defendant “applied substantial force,” and “the physical force that the defendant used” on Hong was “sufficient in combination with the force used by” Eom “to cause the victim to suffer great bodily injury.” The court nonetheless declined to impose any time for the enhancement, stating it was “striking the great bodily injury allegation” “[f]or purposes of sentencing only.” It sentenced defendant to prison for the low term of two years for each count. The court recognized “a 654 problem” and made the terms concurrent.

## **DISCUSSION**

### **1. Sufficiency of evidence**

Defendant contends that the trial court’s finding that defendant personally inflicted great bodily injury on Hong was not supported by sufficient evidence. To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable trier of fact could find the enhancement allegation true beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

Section 12022.7, subdivision (a), provides a three-year enhancement for “[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 . . . .”

Defendant argues he is “an extremely thin and underweight young man,” whereas Eom is “well built, muscular and an extremely skilled and talented fighter”; the surveillance recording shows Eom was “the primary and fundamental aggressor,” whereas defendant attempted to stop Eom from beating Hong; and “both the video and the fundamental physical appearance of the two Co-defendants evidenced that any significant injuries received by the victim during this incident were in fact inflicted by . . .

Eom and not Defendant.” Defendant made the same arguments, using identical language, to the trial court, which rejected them.

A section 12022.7 great bodily injury enhancement is inapplicable to “one who merely aids, abets, or directs another to inflict the physical injury.” (*People v. Cole* (1982) 31 Cal.3d 568, 571.) But a defendant “need not be the sole or definite cause of a specific injury” to support a finding that the defendant personally inflicted great bodily injury. (*People v. Modiri* (2006) 39 Cal.4th 481, 486.) In the context of a group beating, personal infliction of great bodily injury may be found “if defendant personally applied force to the victim, and such force was sufficient to produce grievous bodily harm either alone or in concert with others.” (*Id.* at p. 497.) In group beating cases, “the evidence is often conflicting or unclear as to which assailant caused particular injuries in whole or part. Thus, . . . those who participate directly and substantially in a group beating should not be immune from a personal-infliction finding for the sole reason that the resulting confusion prevents a showing or determination of this kind.” (*Id.* at pp. 496–497.)

In ruling upon defendant’s request to strike the great bodily injury finding for insufficient evidence, the trial court reviewed Hong’s testimony and the surveillance camera recording and expressly concluded that defendant “applied substantial force” and “the physical force that the defendant used” on Hong was “sufficient in combination with the force used by” Eom “to cause the victim to suffer great bodily injury.” After reviewing the entire record, including the surveillance camera recording, in the light most favorable to the judgment, we conclude substantial evidence supports the trial court’s finding on the great bodily injury allegation. The surveillance camera recording reveals no significant difference in size between Eom and defendant. Although Eom kicked Hong more frequently, defendant vigorously kicked Hong at least seven times and forcefully punched Hong at least 27 times during the course of the attack. Defendant continued to kick and punch Hong even after defendant began attempting to stop Eom from attacking Hong. Defendant participated directly and substantially in the group beating by personally applying force to Hong that was sufficient to produce grievous

bodily harm, either on its own or in concert with the force applied by Eom. The evidence thus supports the trial court's finding that defendant personally inflicted great bodily injury.

## **2. Section 654 and abstract of judgment**

The Attorney General concedes that section 654 does not permit sentencing on both the battery and the aggravated assault convictions but contends that the trial court erred by imposing concurrent terms for these convictions. We agree. The sentence on count 2 should have been stayed. (*People v. Pena* (1992) 7 Cal.App.4th 1294, 1312.)

The Attorney General contends the abstract of judgment must also be corrected to reflect the true finding on the great bodily injury enhancement and to reflect that only the punishment for the enhancement was stricken. Because the true finding on the section 12022.7, subdivision (a) enhancement allegation is relevant to demonstrate that count 2 constituted a "strike," the abstract of judgment should reflect the true finding. When the trial court amends the abstract to reflect the stayed sentence on count 2, it should note the true finding on the enhancement.

## **DISPOSITION**

The sentence on count 2 is stayed pursuant to Penal Code section 654. The judgment is otherwise affirmed. The trial court is directed to issue an amended abstract of judgment reflecting the stayed sentence on count 2 and, in some fashion, the true finding on the Penal Code section 12022.7, subdivision (a) great bodily injury allegation.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.