Filed 7/17/15 P. v. Garcia 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. IRENA VALENE GARCIA, Defendant and Appellant.	B255332 (Los Angeles County Super. Ct. No. KA102749)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed.

Julia J. Spikes, 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, Stephen D. Matthews and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Irena Valene Garcia appeals from a judgment following her jury conviction of assault with a deadly weapon. She maintains that she was denied due process because the court did not instruct the jury on the lesser included offense of simple assault, and that the great bodily injury and prison prior enhancements are not supported by substantial evidence. We find no error and affirm.

FACTUAL AND PROCEDURAL SUMMARY

On July 27, 2013, appellant celebrated her birthday in a roped-off space at a nightclub. The victim, Juan Alcala, was not a guest at the birthday party, but he walked into the roped-off area to talk to Angelica Parada, who had caught his interest. Within moments of Alcala sitting next to Parada, appellant approached and told him to leave because Parada was married to appellant's cousin. Alcala retorted that Parada wore no wedding ring and could speak for herself if she did not want him sitting next to her.

Appellant then struck Alcala in the face with a champagne glass she was holding in her right hand.[1] A bouncer who was standing nearby was sprayed with liquid and noticed broken glass. When he looked over, he saw appellant on top of Alcala and apparently attacking him. Appellant was arrested later in the evening, after she was found hiding in shrubbery near the nightclub.

Alcala suffered lacerations below his left eye and above his left eyebrow, a gash on top of his head, and numerous minor scratches. A one and one-half inch long piece of glass was taken out of the top of his head. He was taken to a hospital where he received two stitches to the wound on top of his head and six stitches to his face. Alcala's sister, a registered nurse, treated the wounds afterwards and removed the stitches after eight or nine days. Alcala could not fully open his left eye and his vision was impaired for several months. At the time of trial, scars remained on top of his head and above his eyebrow. He had no other residual effects from his injuries.

---

[1] Alcala testified he thought appellant had hit him in the head with a bottle. During her trial testimony, appellant demonstrated how she hit Alcala, and the court described her demonstration as "a slashing motion with the right arm."

Appellant was charged with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),[2] with enhancements for great bodily injury (§12022.7, subd. (a)) and three prior prison terms (§ 667.5, subd. (b)). A jury convicted her as charged and found the great bodily injury allegation to be true. Appellant admitted the three prison prior allegations. She was sentenced to eight years in prison, consisting of the low term of two years for the assault with a deadly weapon conviction, plus three years for the great bodily injury enhancement and three years for the prison priors. She received 33 days of credit and was ordered to pay various fines and fees.

This appeal followed.

DISCUSSION

I

Appellant argues the trial court violated her right to due process in denying her request for an instruction on simple assault as a lesser included offense of assault with a deadly weapon. She argues that the evidence supports a conclusion that she hit Alcala while holding the champagne glass but without using it as a weapon.

"[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) Simple assault is a lesser included offense of assault with a deadly weapon. (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 747.) The trial court has a duty to instruct the jury on lesser included offenses when "substantial evidence rais[es] a question as to whether all of the elements of the charged offense are present." (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) Substantial evidence is '"evidence a reasonable jury could find persuasive. [Citation.]" (*Ibid*.) We review de novo whether the trial court erroneously failed to instruct on a lesser included offense. (*People v. Avila* (2009) 46 Cal.4th 680, 705.)

---

[2] Statutory references are to the Penal Code.

Assault with a deadly weapon is committed by means of an '"object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029.) An object grasped in hand while throwing a punch may be a deadly weapon depending on the manner in which it is used. (*In re David V.* (2010) 48 Cal.4th 23, 30 & fn. 5.) It is common knowledge that a glass is breakable and capable of producing death or great bodily injury when used as "a slashing weapon." (*People v. Snyder* (1992) 11 Cal.App.4th 389, 393 ["Common experience dictates" that a bottle "[o]nce broken . . . is effective as a slashing weapon"].) When an injury is inflicted, its nature and location are relevant to whether an object was used in the requisite manner. (*People v. Brown* (2012) 210 Cal.App.4th 1, 7.)

Alcala testified he was hit with an object, which he believed was a bottle. When appellant demonstrated how she hit Alcala, the court characterized her demonstration as a "slashing motion." Appellant claimed her hand made contact with Alcala's left eyebrow, but Alcala had a laceration at the point of contact, which appellant recognized was caused by the glass she held in her hand. It would be unreasonable to conclude that when appellant made "a slashing motion" with the hand in which she held her champagne glass, she did not use the glass as a weapon, especially considering that all injuries were caused by the glass. While appellant did not purposefully pick up the glass to hit Alcala, neither did she set it down or move it to her other hand before striking him. There is no evidence she was unaware she was holding a glass when she struck Alcala, and contrary to her suggestion on appeal, drawing such an inference from the evidence would be speculative.

Because there was no substantial evidence from which a jury composed of reasonable people could have concluded that appellant committed the lesser offense of simple assault, but not the greater offense of assault with a deadly weapon, the trial court was not required to instruct the jury on simple assault.

II

Appellant argues the imposition of the great bodily injury enhancement violated her right to due process because Alcala did not suffer such an injury.

Great bodily injury is "significant or substantial physical injury" (§12022.7, subd. (f)), "*beyond* that inherent in the offense itself." (*People v. Escobar* (1992) 3 Cal.4th 740, 746–747.) Contrary to appellant's suggestion, the statute does not require "that the victim suffer 'permanent,' 'prolonged' or 'protracted' disfigurement, impairment, or loss of bodily function." (*Id.* at pp. 749–750 [reversing Court of Appeal holding that "bruises, scrapes, stiff neck and sore vagina" were not great bodily injury because they "constituted only 'transitory bodily distress'"].) Evidence of "the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the injury" is commonly used to prove the injury was great. (*People v. Cross* (2008) 45 Cal.4th 58, 66.) Because a '"fine line'" may divide greater from lesser bodily injuries, whether great bodily injury is inflicted in a particular case is a factual issue to be decided by the jury. (*Id.* at pp. 64–65, quoting *People v. Escobar*, at p. 752.) On appeal, we are bound to accept the jury's finding when supported by substantial evidence even though the evidence might reasonably be reconciled with a contrary finding. (*People v. Escobar*, at p. 750.)

Here, substantial evidence supports the jury's finding of great bodily injury beyond that inherent in the crime itself. (See *People v. Brown, supra*, 210 Cal.App.4th at p. 7 [assault with deadly weapon does not require infliction of actual injury].) Alcala received three cuts on his head and face. He experienced severe pain immediately after the assault, could not see, or saw blood all around. A one and one-half inch piece of glass was pulled from the cut on top of his head. The other two cuts were above his left eyebrow and below his left eye. He was taken to a hospital and received two stitches on his head and six on his face. The cuts to his face inhibited his ability to open his left eye for several months, and impaired his vision. The scars on his head and forehead were shown to the jury at trial.

Appellant contends that Alcala's cuts and scrapes were minor because he sought no follow-up care. The reason he did not return to the hospital for additional treatment was that his sister, a registered nurse, tended to and pulled out his stitches: it cannot be said that he received no follow-up care. Appellant also argues Alcala's wounds were not "analogous to protracted impairment of a bodily organ or serious disfigurement." Neither protracted impairment nor disfigurement is required for great bodily injury (*People v. Escobar*, *supra*, 3 Cal.4th at p. 750), and in any case, Alcala's inability to open his left eye over several months may qualify as a protracted impairment of an organ.

Appellant relies on several cases predating *People v. Escobar*, *supra*, 3 Cal.4th 740, which established the current standard for reviewing a jury's finding of great bodily injury under section 12022.7. The reliance on these earlier cases is questionable, but in any event they are readily distinguishable.

In *People v. Martinez* (1985) 171 Cal.App.3d 727, the court considered the gravity of injuries inflicted on two victims. One victim's tendons were cut resulting in permanent disability to her hand. (*Id*. at p. 732.) The other victim received "a little stab" in the back through several layers of clothing and was not taken to a hospital. (*Id*. at p. 735.) Substantial evidence supported the jury's finding that the former victim suffered great bodily injury; the prosecution agreed the great bodily injury allegation as to the latter victim must be stricken. (*Ibid*.) A case that deals with injuries on the outer ends of the spectrum does not provide guidance on where to draw the fine line on injuries in the middle. It is clear that Alcala's injuries to his head and face, which were in sensitive areas, required stitches, and left scars, were more significant than a pinprick to the back that required no treatment. That they left no permanent disability is not dispositive. (*People v. Escobar*, *supra*, 3 Cal.4th at p. 750.)

People v. Covino (1980) 100 Cal.App.3d 660, which appellant also cites, also is distinguishable on its facts. The injury in that case resulted from choking and consisted of "momentary interruption of breathing and slight reddening of the skin without any substantial damage to bodily tissues." (*Id*. at p. 667.) The case does not stand for the proposition that lacerations requiring stitches, which obviously damage bodily tissues, are

no more serious than "slight reddening of the skin." *People v. Nava* (1989) 207 Cal.App.3d 1490 involved an instructional error, which the court concluded was not harmless because the evidence could support a finding that the victim's nose fracture was great bodily injury, as well as the contrary finding. (*Id*. at p. 1499.) The case confirms that weighing the evidence is the function of a well instructed jury. We may not reweigh the evidence on appeal even were it reasonably reconcilable with a contrary finding. (*People v. Escobar, supra*, 3 Cal.4th at p. 750.)

The evidence in this case was sufficient for the jury to find the enhancement allegation true.

III

Relying on *People v. Epperson* (1985) 168 Cal.App.3d 856, appellant contends that the three prior prison term enhancements imposed under section 667.5, subdivision (b) are not supported by evidence because she admitted only the fact of her convictions, not that she served separate prison terms for the priors and that she committed a new crime within five years of her release from custody.

The established rule is that an "admission of the prior convictions is not limited in scope to the fact of the convictions but extends to all allegations concerning the felonies contained in the information." (*People v. Ebner* (1966) 64 Cal.2d 297, 303.) In *People v. Epperson, supra*, 168 Cal.App.3d 856, the defendant admitted two prior convictions after having been advised they were alleged as prison priors under section 667.5, subdivision (b). (*Id*. at pp. 863–864.) Yet the probation report showed, and the People conceded on appeal, that he had not committed a crime within five years of his release from custody and thus was not subject to the enhancement under section 667.5, subdivision (b). (*Id*. at pp. 863, 865.) Under these unusual circumstances, the court declined to construe appellant's admission of his convictions as an admission that he had committed a crime within five years of his release from custody because he had not been separately asked to make such an admission. (*Id*. at p. 865.)

People v. Epperson, supra, 168 Cal.App.3d 856 does not change the general rule that an admission of a conviction admits all allegations about that conviction. (*People v.*

Ebner, *supra*, 64 Cal.2d at p. 303.) Nor is a departure from that rule necessary in this case where the probation report shows appellant served three separate prison terms and committed her latest offense within five years of her release from custody.

Appellant's contention that the trial court did not give her any notice that it was taking her admission on the prison term priors alleged in the information is not well taken. The court took appellant's admission as to "the three priors alleged" after she had stated she had talked with her attorney about giving up her right to trial on them. The three prison priors were alleged in the information only in relation to section 667.5, subdivision (b). Both in the sentencing memorandum and at sentencing, which followed immediately after taking appellant's admissions, defense counsel conceded appellant had "three one-year priors." The record provides no basis to conclude that appellant was confused about the purpose of her admissions or that an error requiring reversal occurred.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.