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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. JEREMY GRANDORF, Defendant and Appellant.	B290698 (Los Angeles County Super. Ct. No. BA457895)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Robert C. Vanderet and Karla D. Kerlin, Judges. Affirmed.

Cindy Brines, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jeremy Grandorf of mayhem. On appeal, he contends that the trial court should have instructed the jury on a lesser included offense, battery with serious bodily injury. He also contends that a stay-away condition of probation is void for vagueness. We reject these contentions and affirm.

BACKGROUND

I. Prosecution case

On May 26, 2017, Joel Stovall and his girlfriend Gia Gaglio were at a music venue, where they first encountered Grandorf. Learning that Grandorf was down on his luck, Stovall and Gaglio invited him to stay the night at Gaglio's one-bedroom apartment.

There, Grandorf showered, and the trio ate and drank wine. After dinner, Grandorf and Stovall played guitar together. Gaglio made up a makeshift bed for Grandorf in the living room. Stovall went to bed. Gaglio stayed up with Grandorf for a bit longer, but eventually went to bed too. At some point, Gaglio woke to find Grandorf in bed with her and Stovall. At first Grandorf would not leave when Gaglio and Stovall told him to get out. Grandorf then got up, grabbed Stovall's guitar, and tried to throw it out a window. Stovall grabbed the guitar back and, afraid of what Grandorf might do, wrestled Grandorf to the ground. Grandorf bit and scratched at Stovall, who was trying to restrain him, ultimately biting off the tip of Stovall's finger. Grandorf left, saying, "that's what you get for eating meat," an apparent reference to Grandorf's supposed veganism.

II. Defense case

Grandorf agreed that he first met Stovall and Gaglio at the music venue. Although Gaglio invited Grandorf to stay the night, Stovall seemed displeased with the situation, giving him the

"stink eye." When Stovall went to bed, Gaglio and Grandorf stayed in the living room, watching videos and singing. Things turned romantic, as they ran their hands through each other's hair. Gaglio invited Grandorf to join her and Stovall in the bed. However, she soon changed her mind and told Grandorf to leave. He was leaving when Stovall woke and told him to leave the apartment. Having no place to go, Grandorf asked to stay. To calm himself, Grandorf grabbed the guitar, to play it, not to defenestrate it. Stovall grabbed the guitar back and tripped Grandorf, who fell to the ground. Stovall put one hand on Grandorf's throat and another on his mouth, choking him. Scared, Grandorf bit Stovall but did not intend to bite off the tip of his finger.

III. Verdict

A jury found Grandorf guilty of mayhem. (Pen. Code, § 203.)[1] On April 25, 2018, the trial court suspended imposition of sentence and placed Grandorf on three years' formal probation and ordered him to serve 660 days in county jail with credit for 660 days.

DISCUSSION

I. Instruction on lesser included offense

Grandorf contends that the trial court erred by failing, sua sponte, to instruct the jury on the crime of battery with serious bodily injury as a lesser included offense of mayhem. A trial court must instruct on all general principles of law relevant to the issues raised by the evidence, including lesser included offenses, even in the absence of a request. Instruction on a lesser

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[1] All further statutory references are to the Penal Code.

included offense is required when there is evidence the defendant is guilty of the lesser offense but not of the greater. (*People v. Banks* (2014) 59 Cal.4th 1113, 1159–1160.) Substantial evidence is evidence a reasonable jury could find persuasive. (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) We independently review whether the trial court erred by failing to instruct on a lesser included offense. (*Banks*, at p. 1160.)

A lesser offense is included in a greater offense if one of two tests is met. The first test is the elements test. Under that test, if the statutory elements of the greater offense include all the elements of the lesser offense, the latter is necessarily included in the former. (*People v. Juarez* (2016) 62 Cal.4th 1164, 1174.) The second test is the accusatory pleading test. Under that test, if the facts alleged in the accusatory pleading include all elements of the lesser offense, the latter is necessarily included in the former. (*Ibid.*) In determining whether an accusatory pleading encompasses an allegedly lesser included offense, courts "consider *only* the pleading for the greater offense." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1036.) It is " 'of no consequence that the evidence at trial might also establish guilt of another and lesser crime than that charged.' " (*People v. Steele* (2000) 83 Cal.App.4th 212, 218.)

Mayhem occurs when a person unlawfully and maliciously deprives another of a member of his or her body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip. (§ 203.) On the other hand, battery is any willful and unlawful use of force or violence on another. (§ 242.) For the purposes of battery with serious bodily injury, " '[s]erious bodily injury' " is a serious impairment of physical condition, including, but not limited to,

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. (§ 243, subd. (f)(4).)

Under the statutory elements test, battery with serious bodily injury is not a lesser included offense of mayhem, as Grandorf concedes. As we have said, battery with serious bodily injury requires a serious impairment of physical condition. (§ 243, subd. (f)(4).) However, the injuries resulting from mayhem do not have to result in loss or impairment of function. (*People v Santana* (2013) 56 Cal.4th 999, 1010.) Because serious bodily injury is not an element required to be proven for the crime of mayhem, battery with serious bodily injury is not a lesser included offense of mayhem. (*Ibid.*; *People v. Poisson* (2016) 246 Cal.App.4th 121, 125.) The trial court therefore had no duty to instruct on that theory under the statutory elements test.

Grandorf therefore argues that the instructional duty arose under the accusatory pleading test. The accusatory pleading, here the information, alleged that Grandorf unlawfully and maliciously deprived Stovall of "a member of the body and did disable, disfigure and render it useless and did cut and disable the tongue, and put out an eye and slit the nose, ear and lip of said person." Citing *People v. Smith* (2013) 57 Cal.4th 232, 244, Grandorf contends that where the People elect to charge a defendant with multiple ways of committing a greater offense in the accusatory offense, the defendant may be convicted of the greater offense on any theory alleged, including a theory that necessarily subsumes a lesser offense. *Smith* is inapplicable. Here, there is no substantial evidence that Grandorf committed a

battery with serious bodily injury but *not* mayhem. Stated otherwise, there are no facts giving rise to guilt only of battery with serious bodily injury. Rather, the undisputed evidence is that Grandorf bit off the tip of Stovall's finger. Therefore, he cannot have committed the lesser without also having committed the greater offense of mayhem.

II. Stay-away condition of probation

Next, Grandorf contends that a stay-away condition of probation is void for vagueness because it does not have a knowledge requirement. The trial court ordered Grandorf to stay "completely away from and have no contact whatsoever" with Stovall, specifying that Grandorf must stay at least 100 yards from Stovall. The void-for-vagueness doctrine derives from the due process concept of fair warning. (*People v. Hall* (2017) 2 Cal.5th 494, 500.) It bars the government from enforcing a provision forbidding or requiring an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application. (*Ibid.*) In the context of probation conditions, a court order withstands a vagueness challenge if it is "sufficiently definite to inform the probationer what conduct is required or prohibited, and to enable the court to determine whether the probationer has violated the condition." (*Ibid.*) We will not find a court order unconstitutionally vague if it can be given any reasonable and practical construction. (*Id.* at p. 501.) We review a constitutional challenge to a stay-away order de novo. (*R.D. v. P.M.* (2011) 202 Cal.App.4th 181, 188.)

The order requiring Grandorf to stay 100 yards from Stovall is clear and, under *People v. Hall*, *supra*, 2 Cal.5th 494, a knowledge requirement is implied. Thus, Grandorf must remove

himself from a place when he knows Stovall is there or learns of his presence. No modification is necessary.

DISPOSITION

The judgment and order are affirmed.
NOT TO BE PUBLISHED

DHANIDINA, J.

We concur:

EDMON, P. J.

HANASONO, J.*

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