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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL WAYNE KING,

Defendant and Appellant.

A142260

(San Mateo County
Super. Ct. No. SC048912A)

Defendant and appellant Paul Wayne King appeals from the trial court's order denying his petition for resentencing pursuant to Penal Code section 1170.126.¹ He argues the jury's not true finding on a great bodily injury enhancement (§ 12022.7) alleged in connection with one of the counts precludes the trial court from finding he was convicted for a serious felony (§ 1192.7, subd. (c)(8)). We affirm.

BACKGROUND

In 2001, appellant was charged with involuntary manslaughter and battery. Witnesses at trial testified that appellant was in a bar when Brad Davis, an African-American man, entered with two Caucasian women. (*People v. King* (Aug. 6, 2004, A101379) 2004 Cal.App.Unpub. LEXIS 7313, *3 [nonpub. opn.] (*King I*).)² Appellant

¹ All undesignated section references are to the Penal Code.

² We, like the parties, take facts relating to the trial from our opinion on appellant's prior appeal. (*People v. Woodell* (1998) 17 Cal.4th 448, 457 ["appellate opinions, in general,

gave Davis “dirty looks,” then went over to talk to him and the two soon stepped out of the back door. (*Id.*, at pp. *4, *8.) There was a “ ‘popping sound,’ ” then appellant ran through the bar and Davis was found lying on the ground with his hands in his pockets. (*Id.* at pp. *5–*6.) Appellant had tattoos associated with White supremacist groups and told an acquaintance that “he ‘hit the nigger one time. [Davis] went down, and that was the end of it.’ [Appellant] said he hit Davis ‘because he didn’t like the fact that he was with a White girl.’ ” (*Id.* at pp. *8, *10.)

Davis never regained consciousness and died six days later. (*King I, supra*, 2004 Cal.App.Unpub. LEXIS 7313 at p. *7.) A forensic pathologist “opined that Davis suffered blunt head trauma to the back of his head, resulting in skull fractures and a ‘contrecoup injury’ to the brain. The cause of death was craniocerebral injuries due to blunt head trauma. [The pathologist] stated that a person who was pushed and fell backward, hitting the back of his head, could ‘very well’ sustain a contrecoup-type injury. Davis also sustained injuries to his left lower lip and cheek area, which could have resulted from being punched. [The pathologist] said a contrecoup injury is less likely to occur from a person merely collapsing and falling straight down and hitting their head, and [the pathologist] found no factors that would have caused Davis to collapse.” (*Ibid.*) “The thrust of the defense was that [appellant] committed no offense against Davis, that he had nothing to do with Davis falling to the ground, and that the evidence regarding his tattoos served only to inflame and prejudice the jury against him.” (*Id.* at p. *12.)

The jury convicted appellant of involuntary manslaughter (§ 192, subd. (b)); battery inflicting serious bodily injury (§ 243, subd. (d)); and battery committed as a “hate crime” (§§ 242, 422.7, subd. (a)).³ However, the jury found not true an allegation

are part of the record of conviction that the trier of fact may consider in determining whether a conviction qualifies under the sentencing scheme at issue”].)

³ “[Section] 422.7 . . . [is one] of California’s ‘hate crime’ statutes.” (*In re M.S.* (1995) 10 Cal.4th 698, 706.)

that appellant personally inflicted great bodily injury (§ 12022.7) in connection with the hate crime battery.⁴

Appellant waived his right to a jury trial on three allegations that he was convicted of a serious felony and had a prior conviction for a serious felony (§ 667, subd. (a)(1)). The trial court found these allegations true.

In 2004, this court affirmed the convictions while reversing and remanding on sentencing issues not relevant here. (*King I, supra*, 2004 Cal.App.Unpub. LEXIS 7313 at p. *48.) Following subsequent proceedings, appellant was sentenced to a prison term of 25 years to life for involuntary manslaughter, plus additional years for prior convictions and prison terms. The sentences on the battery convictions were stayed pursuant to section 654.

In 2013, appellant filed a petition for resentencing under section 1170.126, arguing none of his current offenses are serious or violent felonies. The trial court denied the petition. This appeal followed.

DISCUSSION

Appellant contends the jury's not true finding on the great bodily injury enhancement alleged in connection with the hate crime battery count conclusively establishes that he did not personally inflict great bodily injury on Davis for purposes of section 1192.7, subdivision (c)(8) in connection with any count. We conclude the jury's not true finding is inconsistent with its involuntary manslaughter guilty verdict and therefore the finding does not preclude the trial court's determination that appellant personally inflicted great bodily injury when committing involuntary manslaughter.

“[I]n 2012, the electorate passed Proposition 36. The Act authorizes prisoners serving third-strike sentences whose ‘current’ offense (i.e., the offense for which the third-strike sentence was imposed) is not a serious or violent felony to petition for recall

⁴ The information did not allege a great bodily injury enhancement in connection with the battery inflicting serious bodily injury count. The information initially alleged a great bodily injury enhancement in connection with the involuntary manslaughter count, but this allegation was struck prior to trial.

of the sentence and for resentencing as a second-strike case.” (*People v. Johnson* (2015) 61 Cal.4th 674, 679–680.) The parties agree that appellant is ineligible for resentencing only if his conduct in committing involuntary manslaughter (the conviction for which he is serving a life sentence) elevated the offense to a serious or violent felony because he personally inflicted great bodily injury during the commission of the offense. (§ 1192.7, subd. (c)(8) [“ ‘serious felony’ ” includes “any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice”].)

Appellant notes that all three counts arose from a single act—when appellant punched Davis—and argues the jury’s not true finding on the great bodily injury enhancement therefore “applies in equal force to each offense.” However, this is not the case if the not true finding is inconsistent with one of the jury’s guilty verdicts. “ ‘[I]f an acquittal of one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to both.’ ” (*People v. Avila* (2006) 38 Cal.4th 491, 600.) “[W]here truly inconsistent verdicts have been reached, ‘[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant’s guilt.’ ” (*U.S. v. Powell* (1984) 469 U.S. 57, 64–65; see also *Avila, supra*, at p. 600 [“It is possible that the jury arrived at an inconsistent conclusion through ‘mistake, compromise, or lenity.’ ”].) Accordingly, if the not true finding is inconsistent with the jury’s guilty verdicts, appellant’s argument that the finding is conclusive with respect to the other counts fails.

Appellant first argues that serious bodily injury (§ 243, subd. (d)) is not equivalent to great bodily injury, a contention the People dispute. (Compare *People v. Taylor* (2004) 118 Cal.App.4th 11, 25 [“In these circumstances, the jury’s finding of serious bodily injury cannot be deemed equivalent to a finding of great bodily injury.”], with *People v. Hawkins* (1993) 15 Cal.App.4th 1373, 1376 [“great bodily injury, as defined in section 12022.7, is an element of the crime of battery under section 243, subdivision (d)”].) We find it unnecessary to resolve this question. By the involuntary manslaughter

verdict, the jury found appellant caused Davis's death. Appellant does not, and cannot, argue that death is not a great bodily injury. (*People v. Wilson* (2013) 219 Cal.App.4th 500, 511 ["by causing [the victim's] death, [the defendant] necessarily caused him great bodily injury".])

Appellant also argues the manslaughter verdict found only that he *proximately* caused Davis's death. As appellant notes, to find the personal infliction of great bodily injury "the defendant must be the direct, rather than [the] proximate, cause of the victim's injuries." (*People v. Elder* (2014) 227 Cal.App.4th 411, 418.) However, appellant does not dispute that, if his punch caused Davis to fall and the fall caused the injuries resulting in his death, he directly and personally inflicted great bodily injury on Davis. (See *People v. Modiri* (2006) 39 Cal.4th 481, 493 ["the statute calls for the defendant to administer a blow or other force to the victim, for the defendant to do so directly rather than through an intermediary, and for the victim to suffer great bodily injury as a result".])

Appellant instead contends "the jury may have questioned whether a single punch could have knocked Davis backwards to the ground, as necessary to find [appellant] personally inflicted the injuries to Davis's head, or whether Davis more likely tripped, slipped, or simply fell while trying to back away from [appellant] after being hit, all of which would support the not true finding." As an initial matter, even the latter scenario may constitute the personal infliction of injury. (*People v. Dominick* (1986) 182 Cal.App.3d 1174, 1185, 1210–1211 [finding personal infliction of injury where, while the defendant restrained the victim so an accomplice could hit her, the victim "somehow managed to break free and fell off the roadway partway down the mountainside," where she sustained injuries].) In any event, the record does not support this scenario. Two witnesses were outside when appellant punched Davis; although they did not witness the punch itself, they looked after hearing it and saw Davis on the ground. (*King I, supra*, 2004 Cal.App.Unpub. LEXIS 7313 at pp. *5–*6.) Appellant told an acquaintance that he "hit [Davis] one time" and "[Davis] went down." (*Id.* at p. *8.) As stated in our prior opinion: "There was no evidence presented to support a theory that defendant was

guilty of a battery, but that the serious injuries suffered by Davis resulted from some other cause.” (*Id.* at p. *41.) Appellant’s defense at trial—that “he had nothing to do with Davis falling to the ground” (*id.* at p. *12)—is consistent with this understanding of the record.

Accordingly, we conclude the jury’s guilty verdict on the involuntary manslaughter count is inconsistent with its not true finding on the great bodily injury enhancement alleged in connection with the hate crime battery count.⁵ Because the not true finding is inconsistent with the guilty verdict, it does not preclude a finding that the involuntary manslaughter conviction constitutes a serious felony under section 1192.7, subdivision (c)(8).⁶

For the same reason, appellant’s argument that the serious felony finding violates principles of collateral estoppel and double jeopardy fails. Where “ ‘the same jury reached inconsistent results . . . principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful.’ ” (*People v. Santamaria* (1994) 8 Cal.4th 903, 915; see also *id.* at p. 912, fn. 3 [“Collateral estoppel, which applies to relitigation of factual issues, is analytically distinct from double jeopardy, which applies to retrial of offenses. Thus, collateral estoppel is conceptually separate from double jeopardy, but . . . when

⁵ This case is therefore distinguishable from *People v. Arevalo* (2016) 244 Cal.App.4th 836, opinion modified 2016 Cal. App. LEXIS 180, decided after oral argument. In *Arevalo*, the defendant was convicted after a bench trial of grand theft auto and driving a vehicle without the owner’s consent, but acquitted of firearms possession and allegations that he was armed with a firearm were found not true. (*Id.* at p. 843.) Subsequently, a different judge found the defendant ineligible for Proposition 36 resentencing on the ground that he had been armed with a weapon during the commission of the offenses. (*Id.* at pp. 841, 844.) The Court of Appeal reversed, concluding this determination was precluded by the acquittal and not true findings. (*Id.* at p. 842.) In *Arevalo*, unlike in this case, the underlying verdicts and enhancement findings were not inconsistent with each other.

⁶ This conclusion also defeats appellant’s argument that his sentence enhancements under section 667, subdivision (a)(1) were unauthorized because none of his current convictions were serious felonies under section 1192.7 (see § 667, subs. (a)(1), (a)(4)).

applicable, it is a component of the double jeopardy clause of the Fifth Amendment.”].) Similarly, we reject appellant’s argument that the not true finding renders this a case in which “the trial court effectively substituted its own erroneous legal determination for the express factual findings of the jury” in violation of the right to jury trial. (*Taylor, supra*, 118 Cal.App.4th at p. 30; see also *People v. Berry* (2015) 235 Cal.App.4th 1417, 1428 [because “the ruling that a defendant is ineligible for resentencing does not expose him to any potential increase in his sentence . . . , section 1170.126 qualifies as an act of legislative lenity, which does not trigger Sixth Amendment right to a jury determination of disputed facts”].)

DISPOSITION

The order is affirmed.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.