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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL SIMONIAN et al.,

Defendants and Appellants.

B232856

(Los Angeles County
Super. Ct. No. MA050393)

APPEAL from the judgment of the Superior Court of Los Angeles County.

Kathleen Blanchard, Judge. Affirmed.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant Daniel Thomas Simonian

Donald H. Glaser, under appointment by the Court of Appeal, for Defendant and Appellant Emanuel Tellez

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent

* * * * *

Defendants and appellants Daniel Thomas Simonian and Emanuel Tellez were jointly charged and tried with one count of violating Penal Code section 4501 (aggravated assault by state prisoner). The jury found both defendants guilty. Defendant Tellez contends the trial court committed error in allowing the prosecutor to argue an incorrect legal theory to the jury. Defendant Simonian contends there is insufficient evidence to support his conviction, the prosecution having failed to prove beyond a reasonable doubt that he was not acting in lawful self-defense. Defendant Simonian also joins in defendant Tellez's argument. We affirm both convictions.

FACTUAL AND PROCEDURAL BACKGROUND

On July 22, 2010, Robin Cook, a correctional officer at the state prison in Lancaster, was the yard officer on duty monitoring the gate in C-yard, also called "Charlie Yard." At approximately 9:45 in the morning, he saw, about 20 yards from his post, three inmates "attacking" another inmate. The three inmates, defendants Simonian and Tellez, as well as defendant Michael Mendibles (who is not a party to this appeal), were repeatedly hitting the other inmate, Juan Luzano, with their fists about his face, head and upper torso. Luzano was lying on his back on the ground, trying to cover his face with his hands. Officer Cook immediately notified the officer in the gun tower to sound the alarm to address the emergency in the yard.

Jeffrey Guerra was the correctional officer in the gun tower that morning. In response to Officer Cook's report to "put the yard down," Officer Guerra sounded the alarm and ordered, through the "PA" system, all inmates in the yard to get down. Upon arriving at the prison, all inmates are given an orientation regarding the prison rules and procedures and know that the sounding of the alarm requires all inmates to get prone on the ground, meaning to lie face down on one's stomach, arms outstretched to each side.

Ignoring the alarm and the order to get down, Simonian, Tellez and Mendibles continued hitting Luzano. All of the other inmates in the yard immediately complied with the order. Officer Guerra, concerned that Luzano appeared "defenseless," fired a sponge round from his .40-millimeter launcher. The sponge round did not hit any of the attackers but landed nearby. Once that shot was fired, Simonian and Mendibles stopped

hitting Luzano and got down on the ground. Tellez, still in a kneeling position over Luzano, continued his assault. At that point, Officer Cook made his way through the gate and into the yard and pepper-sprayed Tellez, which caused him to stop and lie down on the ground. At that point, officers patted down the four inmates and handcuffed them.

Following the incident, Luzano was taken to the prison infirmary to be treated by the nurse. He had at least 10 to 12 fresh-looking red marks or abrasions on his face and torso that were starting to swell, and two bumps on his head. Luzano had no abrasions on his knuckles.

Simonian, Tellez and Mendibles were also seen by the nurse in the prison infirmary. None of them had any injuries, except for abrasions or redness on their knuckles.

Sometime thereafter, Luzano was interviewed and told the officers he had been in C-yard working as part of a cleaning crew when he was “jumped” by three inmates. In a later interview with investigating officer Greg Johnson, Luzano reiterated that he had been working on the yard cleaning up when he was jumped by at least three inmates.

Defendants Simonian and Tellez, as well as Mendibles, were jointly charged with one count of violating Penal Code section 4501, assault by a state prison inmate by means likely to produce great bodily injury. It was also specially alleged that all three defendants had suffered prior qualifying strike convictions and served prior prison terms within the meaning of Penal Code sections 1170.12, 667 and 667.5. Defendants pled not guilty. The court granted defendants’ respective pretrial motions to sever the trial of all prior strike allegations.

At trial, the prosecutor presented the testimony of the correctional officers who witnessed and responded to the assault on Luzano, as well as the prison nurse. Greg Johnson, the investigating officer, also testified. He attested to his interview of Luzano in which Luzano explained that he had been working on the yard that morning when he was jumped by Simonian, Tellez and Mendibles, who were friends of another inmate Luzano had been in a fight with two days earlier. Officer Johnson explained that Luzano was adamant that he would not testify to those facts in court for fear of being deemed a

“snitch.” Officer Johnson further explained that there were always serious consequences for an inmate testifying in court. He said inmates who are considered “snitches” can be assaulted, even murdered, in prison for having spoken out. On cross-examination, Officer Johnson conceded that Luzano may have wanted to downplay his involvement in the fight in order to avoid losing privileges.

Luzano testified and said he was working as part of the cleaning crew, mowing the lawn, on the morning of July 22. He said he could not recall many details, but he did get into a fight with defendant Simonian. Luzano said they were both punching at each other, but he admitted he had attempted to throw the first punch. He also recalled falling to the ground during the fight, and believed he may have tripped over some exercise bars. Luzano denied telling Officer Johnson that he was jumped by three inmates, but admitted that being a snitch in prison can bring “a lot of trouble,” including getting stabbed or murdered. Luzano said he recalled hearing the siren and the order to get down and that he was still being hit at that time. The videotaped interview of Luzano in which he stated he had been jumped by three inmates was played for the jury.

Defendant Simonian testified in his own defense. He said he had been waiting in line in C-yard to attend church services, and was talking to two friends, Tellez and Mendibles. He said that he saw Luzano, with some of his friends, working the yard as part of a cleaning crew. Simonian said Luzano then saw him and approached quickly, got up close to him in a threatening way and asked Simonian if he had been “talking shit” about him. Luzano threw the first punch, but it only grazed Simonian. Simonian said he did not know if Luzano had a weapon and Luzano was bigger than him, so he started punching back and they both fell down. Simonian testified he believed Luzano tripped over some exercise bars and grabbed Simonian’s shirt as he started to fall, pulling Simonian down to the ground with him. Simonian said they both continued to punch at each other on the ground, but fairly quickly the siren sounded and Simonian heard a gunshot. Simonian stopped fighting at that point, because he felt sure the correctional officers would be there soon, so he no longer felt in danger. Simonian also denied knowing that a friend of his had been in a fight with Luzano two days earlier.

The jury returned guilty verdicts as to all defendants. Each defendant waived his right to a jury trial on the severed priors and a court trial was conducted. The court found true the special allegations, including that defendant Simonian had suffered two prior qualifying felonies and defendant Tellez one prior qualifying felony under California's Three Strikes law. Defendant Simonian was sentenced to 26 years to life and defendant Tellez to a term of 11 years. This appeal followed.

DISCUSSION

1. There Was No *Guiton* Error.

Defendant Tellez contends reversal of his conviction is warranted under *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*) because the court allowed the prosecutor to make misleading arguments regarding the requisite force needed to establish the charged crime, which was akin to giving an erroneous instruction on an invalid legal theory. We are not persuaded.

While defendant colors his claim as one of *Guiton* error, the true crux of his argument is that the prosecutor misstated the law during closing argument, providing an invalid basis upon which the jury could convict defendants. Accordingly, this case is more akin to *People v. Morales* (2001) 25 Cal.4th 34 (*Morales*).

In *Morales*, the defendant was charged with possession of a controlled substance. During closing arguments, the prosecutor made several arguments that urged the jury to find the defendant guilty because he had been under the influence of the controlled substance, an argument which was an incorrect statement of the law. (*Morales, supra*, 25 Cal.4th at pp. 38-42.) On appeal, defendant argued that *Guiton* required reversal because the jury may have convicted on the legally incorrect theory. (*Morales*, at pp. 42-43.) There was no contention any specific jury instruction stated the law incorrectly.

The Supreme Court rejected the defendant's argument and reversed the Court of Appeal, explaining: "[T]he court did not present to the jury a case that was premised on a legally incorrect theory. The prosecutor arguably misstated some law, but such an error would merely amount to prosecutorial misconduct [citation] during argument, rather than

trial and resolution of the case on an improper legal basis.” (*Morales, supra*, 25 Cal.4th at p. 43.)

Similarly here, defendant Tellez does not argue any of the jury instructions were improper. Rather, Tellez contends that, in closing argument, the prosecutor told the jury to imagine what would have happened if the correctional officers had not intervened to stop the assault. Tellez contends the prosecutor implied to the jury that they could convict Tellez if, imagining that the assault had continued, they believed sufficient force likely to cause great bodily injury would have been eventually applied. Tellez argues this was wholly improper as an assault must be based on the force actually used.

Defendant correctly notes that only the force actually used is relevant. (*People v. Duke* (1985) 174 Cal.App.3d 296, 303 [only “force *actually used*” and not force that could have been used by the defendant is relevant to “determine if it was likely to cause great bodily injury to the victim”].) However, we agree with the trial court that there was nothing in the prosecutor’s argument that suggested to the jury they could speculate about a possible future crime or use of greater force in determining whether to convict defendant Tellez.

The prosecutor told the jury that the crime of assault under Penal Code section 4501 does not require the actual infliction of great bodily injury. He went on to explain that “what we punish is the act, not the result. And what I mean by that is if I have a baseball bat and I swing it at somebody and miss, does that mean because I didn’t hit him I didn’t assault him? No. . . . The charge here is they assaulted him. They did that with means likely to produce great bodily injury. In other words, they were stopped from committing great bodily injury. Imagine that nobody showed up, no officers showed up, and they kept striking.”

Counsel for Mendibles objected at that point, and the court had a discussion with all counsel at sidebar. The court entertained argument that the prosecutor’s comments would allow the jury to speculate about the potential future use of greater force by the defendants in order to meet the requisite force required for a violation of the statute. The

court overruled defense counsel’s objection and allowed the prosecutor to resume.¹ The prosecutor then continued with his argument: “As I was saying, what we punish is the actual act, not the result And when somebody jumps you or somebody’s jumped by three people, that’s likely to produce great bodily injury. Whether it does or not is irrelevant. It says it right there in the jury instructions.”

There is nothing improper or suggestive about this argument. It was fair argument highlighting the fact that an assault under Penal Code section 4501 does not require the actual infliction of great bodily injury and that an assault, even without weapons, by three individuals against one is sufficient force likely to cause great bodily injury. Not only was this fair argument, defendant Tellez does not argue or identify any jury instructions that allegedly compounded any purported basis for confusion by the jury. Defendant Tellez failed to identify any *Guiron* error and also failed to affirmatively establish any prosecutorial misconduct in closing argument.

2. There Is Substantial Evidence Supporting the Verdict.

Defendant Simonian contends there is insufficient evidence to support his conviction. Simonian argues there was no evidence he started the fight, there was solid evidence that Luzano was the initial aggressor and that he acted only to repel Luzano’s attack, and that the prosecution failed to prove beyond a reasonable doubt that Simonian was not acting in lawful self-defense. We disagree.

“In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . [R]eview for sufficiency of evidence entails not the

¹ The objection was stated on the record by counsel for defendant Mendibles, but we conclude the lengthy discussion with all counsel at sidebar and the court’s decision to overrule the objection are sufficient to preserve the issue for appeal by codefendant Tellez, as a further objection or request for admonition after the court’s ruling would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, italics added; accord, *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) “Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Defendant Simonian was convicted of one count of violating Penal Code section 4501, which provides in relevant part that “every person confined in a state prison of this state who commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, shall be guilty of a felony.” It is well-established that the use of hands or fists alone, without any separate weapon, may support a conviction for an assault by “‘means of force likely to produce great bodily injury.’” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028; *People v. Roberts* (1981) 114 Cal.App.3d 960, 965 [kicks to head and torso of “largely defenseless” man on the ground resulting in bruises and welts sufficient to support finding of force “likely to produce great bodily injury” within the meaning of Pen. Code, § 245]; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 36, p. 660 [requisite “force quite often consists of blows of the fist, kicks, or other acts without use of any weapon”].)

There is substantial evidence that defendant Simonian repeatedly punched Luzano in concert with Tellez and Mendibles. Both Officer Cook and Officer Guerra believed Luzano was in danger, lying on his back and covering his face, and “defenseless” to the combined assault of the three other inmates. None of the three attackers stopped the assault even after the prison siren and order for all inmates to get down on the ground was broadcast over the yard. Simonian did not stop until Officer Guerra fired a warning shot. Tellez continued even then and had to be pepper-sprayed to stop his assault.

Defendant Simonian makes much of the fact that Luzano did not suffer any serious injuries and that even Luzano testified in court that he threw the first punch. The lack of severe injuries is not dispositive. Actual injury is *not* an element of the offense. “The issue is whether the force was *likely* to produce great bodily injury, not whether great bodily injury was produced.” (1 Witkin & Epstein, Cal. Criminal Law, *supra*, § 37, pp. 660-661.)

Moreover, determining who initiated the fight, while a factor to be assessed by the jury, also is not dispositive. The jury was duly instructed with the appropriate CALJIC instructions on self-defense, including CALJIC No. 5.52, which reads: “The right of self-defense exists only as long as the real or apparent threatened danger continues to exist. When the danger ceases to appear to exist, the right to use force in self-defense ends.”

There was some conflicting evidence on how the fight started, including Luzano’s in-court testimony stating he acted first, contrasted with his prior videotaped statement shortly after the fight in which he stated he was jumped by three inmates. There was also the testimony of Officer Johnson, who corroborated that Luzano told him he was jumped but that he would not testify to that in court for fear of retaliation. Neither Officer Cook nor Officer Guerra saw the start of the fight and defendant Simonian testified Luzano was the initial aggressor.

However, there was uncontradicted evidence that the fight, no matter how it started, continued on to a point where the victim, Luzano, was lying on the ground essentially defenseless against the combined assault of three individuals. Even assuming, for the sake of argument, the jury accepted Simonian’s claim he initially acted in self-defense, there was solid evidence on which the jury could rest its decision to find that any legal basis for self-defense ended and that the continuation of the attack, three against one, constituted an unlawful assault. “Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

Defendant correctly points out that evidence which raises only a suspicion of guilt is not sufficient to be deemed substantial evidence. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) However, by no stretch of the imagination can the record below be interpreted as containing only a suspicion of guilt against defendant Simonian. There is solid evidence of guilt supporting the jury's verdict and we will not disturb it.

DISPOSITION

The judgments of conviction are affirmed.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.