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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.

ANTONIO J. CABRERA,

Defendant and Appellant.

B238473

(Los Angeles County
Super. Ct. No. KA095485)

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

Mike Camacho, Judge. Affirmed.

Mona D. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

We appointed counsel to represent appellant in this matter. After examining the record, counsel filed a “*Wende*” brief raising no issues on appeal and requesting that we independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) We directed appointed counsel to immediately send the record on this appeal and a copy of the opening brief to appellant and notified appellant that within 30 days from the date of the notice he could submit by brief or letter any grounds of appeal, contentions or argument he wished us to consider.

We have examined the entire record and are satisfied that appellant’s attorney has fully complied with her responsibilities and that no arguable issue exists. (*People v. Wende, supra*, 25 Cal.3d at p. 441.) We set out below a brief description of the facts and procedural history of the case, the crimes of which the appellant was convicted, and the punishment imposed. (*People v. Kelly* (2006) 40 Cal.4th 106, 110.) We also respond briefly to the arguments appellant submitted in a letter brief.

FACTS AND PROCEEDINGS BELOW

A jury convicted appellant of one count of battery with serious bodily injury and one count of assault by means likely to produce great bodily injury. The jury also found that appellant personally inflicted great bodily injury on the victim.

The court sentenced appellant to the midterm of three years on the assault count plus a consecutive three years on the great bodily injury enhancement. The court stayed sentence on the battery count.

We view the evidence in the light most favorable to the judgment. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 693-694.) Appellant and the victim, Fidel Sosa, were roommates. They had been drinking whiskey and beer for approximately 12 hours when they got into an argument. Sosa testified that he and appellant were standing outside their house when appellant pushed him and he fell between two cars. As Sosa lay on the ground, appellant kicked him and broke his right arm. Appellant then proceeded to kick Sosa in his face and in his ribs.

The emergency room doctor who treated Sosa testified that Sosa had a fractured arm, two broken ribs and bruises and contusions consistent with having been kicked.

In the doctor's opinion, it was unlikely that Sosa suffered those injuries simply by being pushed to the ground.

DISCUSSION

We respond briefly to the arguments submitted by appellant in a letter brief.

1. The District Attorney asked a leading question at the preliminary hearing.

Evidentiary errors at a preliminary hearing may be grounds for reversal of a conviction only if the defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.) Appellant made no showing of prejudice.

2. The photographs of Sosa's injuries lacked foundation and were unduly prejudicial.

There was no objection to the photographs in the trial court. Therefore, this argument is forfeited on appeal. (*People v. Booker* (2011) 51 Cal.4th 141, 170.)

3. At the preliminary hearing the victim testified he does not remember anything about the altercation. This is inconsistent with his trial testimony in which he described the altercation in detail.

In any case, appellant misstates the record. At the preliminary hearing, Sosa testified: "*After the blows, I don't remember anything.*" (Italics added.)

4. The investigating detective, first responders and emergency room nurse "should have been called to describe exactly what happened."

Nothing in the record shows that their testimony would be relevant or why they were not called.

5. CALCRIM instruction No. 220 on reasonable doubt lacks clarity.

This argument was rejected in *People v. Stone* (2008) 160 Cal.App.4th 323, 331-334. Appellant has not provided us any reason why we should not follow the *Stone* opinion.

6. Appellant did not understand the prosecution's plea offer when he rejected it.

Appellant's maximum sentence was seven years. The prosecution offered a three-year sentence if appellant pleaded guilty to the assault count. Appellant initially stated that he did not want to *reject* the offer. Then he said he did not want to *accept* it. Ultimately the court asked appellant: "Then you are rejecting [the offer]?" Appellant answered, "Yes."

Appellant may not have understood the court's initial question but the colloquy taken as a whole shows that appellant knowingly rejected the prosecution's offer.

7. Sosa testified the assault was an "accident."

The victim's opinion about whether a crime has been committed is irrelevant.

8. The trial judge argued with a defense witness and did not give the witness a fair opportunity to testify on appellant's behalf.

The record does not support appellant's claim. The transcript shows that the judge properly attempted to clarify the witness's ambiguous testimony. (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1368.)

9. A breakdown occurred in the relationship between appellant and his counsel over appellant's desire to testify in his own defense.

Again, the record does not support appellant's claim. The court asked appellant: "[D]o you wish to remain silent and not testify?" Appellant answered: "Yes." The court then asked appellant if he understood that he had a right to testify. Appellant answered, "Yes." Finally, the court asked appellant: "You wish not to testify?" Appellant answered, "No." The record shows that appellant had ample opportunity to explain to the court that he wanted to testify but his attorney was preventing him from doing so. He never made such a claim.

10. Defense counsel rendered ineffective assistance.

Appellant argues that defense counsel should have called a radiologist to interpret the x-rays of Sosa's injured arm because a "fracture," which the emergency room doctor diagnosed, is different from a "break." We express no view on whether a "break" differs from a "fracture." A reasonable jury could find a "fracture" or a "break" constitutes great bodily injury and could conclude, therefore, that appellant is guilty of the crimes with which he is charged.

Finally, appellant argues that defense counsel should have moved for a new trial based on insufficiency of the evidence. Such a motion would have been futile. As defense counsel forthrightly acknowledged after the verdict: "[W]hat really clinched it as far as the conviction is the doctor's testimony."

DISPOSITION

The judgment is affirmed.

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ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.