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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE CESAR MARTINEZ,

Defendant and Appellant.

C067184

(Super. Ct. No.
SF115085B)

Defendant Jose Cesar Martinez was convicted of assault with a deadly weapon. The jury also found that defendant personally used a dangerous or deadly weapon and personally inflicted great bodily injury on the victim. The trial court sentenced him to five years in prison.

Defendant contends on appeal that (1) in responding to a question from the jury during deliberations, the trial court unfairly commented on the evidence, and (2) the enhancement for personally using a dangerous or deadly weapon should be

stricken. The Attorney General agrees that the weapons enhancement should be stricken.

We conclude (1) the trial court's response to the jury question was not a comment on the evidence but instead merely repeated portions of CALCRIM instructions that had already been given to the jury, and thus did not affect defendant's substantial rights; and (2) we agree with defendant and the Attorney General that the weapons enhancement should be stricken.

We will strike the weapons enhancement and affirm the judgment as modified.

BACKGROUND

Gerardo Morales, Jose Sanchez and Brijido Vargas went to Rubie's nightclub in Stockton on May 1, 2010. Morales testified that the three men left the nightclub after 1:00 a.m. within minutes of each other. When Morales left, he saw defendant and codefendant Miguel Martinez¹ beating up Sanchez in a corner of the parking lot. Morales went to assist Sanchez, but defendant stood in front of Morales and pushed him.

Morales then saw defendant and Miguel Martinez hitting Vargas. Defendant punched Morales twice in the stomach when Morales attempted to help Vargas. Morales felt cold and began

¹ Defendant and codefendant Miguel Martinez were charged in count 1 with assault with a deadly weapon against victim Vargas, and defendant was charged in count 2 with assault with a deadly weapon against victim Morales. However, the prosecution dismissed the charges in count 1 at the conclusion of the evidence.

to lose consciousness. He saw blood and realized that he had been stabbed in his abdomen and ribcage.

Morales was transported to Lodi Memorial Hospital and treated for three stab wounds. He was hospitalized for nine days.

Vargas testified that he had previously seen defendant several times at Rubie's and the Flamingo nightclub. Defendant got upset one night when Vargas and defendant danced with the same woman. Vargas spoke to defendant and they agreed they did not want any problems.

Vargas said that on the night of the incident he saw two men, but not defendant or Miguel Martinez, beating Morales with their fists. He saw defendant hit Sanchez. Vargas said that when he tried to separate Morales from his attackers, he was stabbed along with Sanchez and Morales. Vargas testified that defendant did not commit the stabbings, but he also testified that defendant stabbed him.

Following a jury trial, defendant was convicted of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1); count 2.)² The jury also found that defendant personally used a deadly or dangerous weapon (§ 12022, subd. (b)) and personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)). The trial court sentenced defendant to five years in prison (the lower term of two years for assault with a deadly

² Undesignated statutory references are to the Penal Code.

weapon, a concurrent one-year term for the weapons enhancement, and a consecutive three-year term for the great bodily injury enhancement). The trial court also imposed various fines and fees and awarded defendant 346 days of presentence custody credit (173 actual, 173 conduct).

DISCUSSION

I

Defendant contends that the trial court's instruction in response to a question from the jury constituted improper commentary on the evidence. We disagree.

The jury began deliberating on September 30, 2010. At 9:55 a.m. that morning, the jury asked for Morales's testimony, and at 2:10 p.m., the jury reported it was deadlocked. At 2:57 p.m., the jury sent the following question to the trial court: "More specifics on our instructions as to what we are to use as evidence, i.e.,--entirely on testimony? (1st paragraph of page 7) (clarification of page 7 -- 1st paragraph.)"

The jury's question referred to the first paragraph of CALCRIM No. 222, which states: "You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom. 'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence."

The trial court conferred with counsel in chambers (there is no record of the conversation) and the trial court sent a written response to the jury at 3:15 p.m. The response stated:

"In response to your request sent to the court at or near 3:00 pm [on] 9/30/10:

"Evidence consists of: the sworn testimony of the witnesses, the stipulation of the attorneys, the items which were sent into the jury deliberation room for your consideration.

"With regard to your question '. . . entirely on testimony? . . .' Please refer to the instruction on page 14."

The "instruction on page 14" referred to CALCRIM No. 301, which states: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

Defendant did not object to the trial court's response. The jury returned with a guilty verdict at 3:42 p.m.

Defendant takes no issue with the first paragraph of the trial court's response, which paraphrased a portion of CALCRIM No. 222. Defendant acknowledges that the first paragraph of the trial court's response was "accurate" and "fairly responded" to the jury's question. But defendant contends the second paragraph of the response -- the reference to CALCRIM No. 301 -- was not responsive to the jury question, and constituted an unfair comment on the evidence. Defendant argues that the single witness instruction "clearly favored the prosecution's case" because the prosecution relied on the testimony of a single witness. Defendant asserts that the reference to CALCRIM No. 301 effectively directed a verdict for the People.

The jury's question asked for more specifics as to what it should use as evidence. Defendant is correct that the first paragraph of the response answered that question: the jurors were told that evidence consisted of testimony, stipulations and items sent into the jury room. However, the jury question was not entirely clear, and defendant did not object to the response provided by the trial court. "On review, we examine the jury instructions as a whole, in light of the trial record, to determine whether it is reasonably likely the jury understood the challenged instruction in a way that undermined the presumption of innocence or tended to relieve the prosecution of the burden to prove defendant's guilt beyond a reasonable doubt. [Citation.]" (*People v. Paysinger* (2009) 174 Cal.App.4th 26, 30.) And because defendant did not object to the response, we review the merits of defendant's claim only to the extent they affect his substantial rights. (§ 1259; *People v. Prieto* (2003) 30 Cal.4th 226, 247.)

The trial court's reference to CALCRIM No. 301 was not a comment on the evidence or a directed verdict for the People. The trial court had already instructed the jury with CALCRIM No. 301 before the jury asked its question, and referring to it again did not affect defendant's substantial rights. CALCRIM No. 301 accurately articulates the law and does not induce the jury to rely on a single witness.

In discussing CALJIC No. 2.27,³ the predecessor to CALCRIM No. 301, the California Supreme Court explained: "CALJIC No. 2.27 focuses on how the jury should evaluate a fact (or at least a fact required to be established by the prosecution) proved solely by the testimony of a single witness. It is given with other instructions advising the jury how to engage in the *fact-finding process*." (*People v. Gammage* (1992) 2 Cal.4th 693, 700, original italics.) Thus, CALJIC No. 2.27 did not "create a preferential credibility standard for the complaining witness, or somehow suggest that that witness is entitled to a special deference," because it "merely suggests careful review when a fact depends on the testimony of one witness." (*Id.* at p. 701.)

CALCRIM No. 301 is no different. The instruction informs the jury that it is permitted, but not required, to find a fact based on the testimony of a single witness. Nonetheless, the jury must review "all the evidence" before determining that the testimony of the witness proves a particular fact. Use of the instruction in this case did not give preference to the prosecution witness or favor the prosecution.

Defendant suggests the trial court should have referred the jury to CALCRIM No. 302, which instructs on evaluating

³ CALJIC No. 2.27 stated: "You should give the [uncorroborated] testimony of a single witness whatever weight you think it deserves. Testimony concerning any fact by one witness, which you believe, [whose testimony about that fact does not require corroboration] is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends."

conflicting evidence, rather than CALCRIM No. 301. But defendant's failure to request a clarifying instruction in the trial court forfeits this contention on appeal. (*People v. Riggs* (2008) 44 Cal.4th 248, 309.)

The trial court's response to the jury did not constitute an error affecting defendant's substantial rights.

II

Defendant further contends, and the Attorney General concedes, that the weapons enhancement must be stricken. We agree.

The trial court imposed a concurrent one-year term for the weapons enhancement. (§ 12022, subd. (b)(1).) At the time of sentencing, section 12022, subdivision (b)(1) stated: "Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, *unless use of a deadly or dangerous weapon is an element of that offense.*" (Emphasis added.) Here, use of a deadly or dangerous weapon is an element of assault with a deadly weapon, the felony for which defendant was convicted. (§ 245, subd. (a)(1); *People v. Birch* (1969) 3 Cal.App.3d 167, 177.) Thus, section 12022, subdivision (b)(1) precludes imposition of the weapons enhancement in this case.

DISPOSITION

The enhancement for personal use of a deadly or dangerous weapon (§ 12022, subd. (b)(1)) is stricken. As modified, the judgment is affirmed. The trial court is directed to prepare an

amended abstract of judgment reflecting this modification and to forward a copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation.

_____ MAURO _____, J.

We concur:

_____ HULL _____, Acting P. J.

_____ BUTZ _____, J.