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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL NEGRETE,

Defendant and Appellant.

C071519

(Super. Ct. No. LF012705A)

Defendant Manuel Negrete was at a bar and offered to buy a woman a drink, and when she refused, defendant punched her in the face. A brawl between bar patrons then ensued. An information charged defendant with attempted premeditated murder, aggravated mayhem, assault by means of force likely to cause great bodily injury, and battery with serious bodily injury. (Pen. Code, §§ 664/187, subd. (a), 205, 245, subd. (a)(1), 243, subd. (d).)<sup>1</sup> The jury found defendant guilty of aggravated mayhem,

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise designated.

assault with force likely to create bodily injury, and battery with serious bodily injury. Defendant appeals, challenging the sufficiency of the evidence of both aggravated mayhem and the great bodily injury enhancements, claiming instructional error and sentencing error, and contending the court erred in imposing a restitution fine. We shall strike both great bodily injury enhancements on count 4 and the three-year great bodily injury enhancement on count 3. In all other respects we shall affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

After defendant's offer to buy a female bar patron a drink was rebuffed, a large fight broke out involving about 20 people. An information charged defendant with attempted premeditated murder (count 1), aggravated mayhem (count 2), two counts of assault by means of force likely to cause great bodily injury (counts 3 and 5), and battery with serious bodily injury (count 4). In addition, the information alleged defendant personally inflicted great bodily injury in counts 1, 3, 4, and 5 (former § 12022.7, subd. (a), repealed by Stats. 2010, ch. 711, § 4) and personally inflicted great bodily injury resulting in brain injury or paralysis in counts 3 and 4 (former § 12022.7, subd. (b)).

During a jury trial, the following account emerged. In June 2011 defendant went to the Last Call bar. At the bar defendant tried to buy a drink for another bar patron, Jessenia Isordia. After she refused his offer, defendant punched her in the face and called her a bitch.

The bar bouncer witnessed the attack and testified defendant punched Isordia twice in the face with his closed fist. The bouncer led defendant out of the bar. About 20 bar patrons followed defendant outside and a fight broke out.

As the fight raged, Angel Martinez made his way through the melee. Someone hit Martinez with a "haymaker" punch, knocking him unconscious. The man began to stomp on the prone Martinez. A bouncer at the bar and another bar patron testified that defendant joined the attacker and repeatedly stomped Martinez in the face with his heel.

Defendant then kicked Martinez in the face with powerful “field goal”-style kicks. Martinez remained unconscious, unable to respond or defend himself. Following the beating, Martinez was in a coma for at least five days and remained hospitalized for a month and a half, suffering from a traumatic brain injury.

During the brawl, Arta Rusch was pushed to the center of the melee. Defendant punched Rusch in the face with a “haymaker punch” and knocked her out. Afterward, defendant made eye contact with one of the bar patrons, threw his hands in the air, and shouted, “Come get some.” He then fled on foot.

After witnesses described defendant to police officers, the officers detained him. Defendant was intoxicated, had blood around his left eye, and had a cut under his lip.

### **Defense**

Defendant testified in his own behalf. He stated he went to the Last Call bar to celebrate his birthday with his girlfriend and her sister. Defendant drank “a few” beers before he arrived and had at least six or seven mixed drinks while at the bar.

Defendant denied tangling with anyone inside the bar but testified he accidentally bumped into a woman as he left. Although he apologized, the woman became upset, swore at him, and began to fight with defendant’s girlfriend.

The bar bouncer broke up the fight and escorted them out of the bar. Once outside, someone “sucker punched” defendant, and he fought back to defend himself. Defendant continued to fight until an officer stopped him. During the brawl, defendant’s girlfriend was by his side, fighting with another woman.

Defendant testified he did not kick or stomp on anyone. He had no physical contact with Martinez, nor did he strike Rusch or Isordia. Isordia could have been the woman fighting with defendant’s girlfriend in the bar.

### **Verdict and Sentence**

The jury found defendant guilty of counts 2, 3, and 4. The jury also found true the great bodily injury allegations as to counts 3 and 4. The jury found defendant not guilty

of count 5, but guilty of the lesser included offense of misdemeanor assault. After the jury could not reach a verdict on count 1, the trial court declared a mistrial and dismissed the charge.

The trial court sentenced defendant to life in prison with the possibility of parole on count 2, four years on count 3, and four years on count 4, plus an additional five years each on counts 3 and 4 under the infliction of a brain injury enhancements (former § 12022.7, subd. (b)) and an additional three years each on counts 3 and 4 under the infliction of great bodily injury enhancements (former § 12022.7, subd. (a)). The court then stayed sentence on counts 3 and 4 under section 654. The court imposed 180 days' time served on count 5. In addition, the trial court imposed several fines, including a \$240 restitution fine. Defendant filed a timely notice of appeal.

## **DISCUSSION**

### **SUFFICIENCY OF THE EVIDENCE**

#### **Aggravated Mayhem**

Defendant challenges the sufficiency of the evidence to support his conviction for aggravated mayhem. According to defendant, the evidence revealed only a sudden, indiscriminate attack that resulted in an explosion of violence. No evidence showed defendant intended to cause a specific, maiming injury to Martinez.

In reviewing a defendant's challenge to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence. Substantial evidence is evidence that is credible, reasonable, and of solid value, such that a reasonable jury could find the defendant guilty beyond a reasonable doubt. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

We do not reassess the credibility of witnesses, and we draw all inferences from the evidence that supports the jury's verdict. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) Unless it is physically impossible or inherently improbable, the testimony

of a single witness is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

“A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an intent to kill. . . .” (§ 205.)

Aggravated mayhem is a specific intent crime requiring proof that the defendant specifically intended to cause the maiming injury. Specific intent to maim is an essential element of aggravated mayhem. An injury resulting in permanent disability or disfigurement does not by itself demonstrate a specific intent to maim. Additional facts must support an inference of an intent to maim. (*People v. Ferrell* (1990) 218 Cal.App.3d 828, 833; *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162 (*Quintero*).

Evidence that shows no more than an indiscriminate attack is insufficient to prove the required specific intent. Intent may be inferred from the circumstances surrounding the attack, the means used, or other factors. Evidence that defendant aimed at a vulnerable part of the victim’s body, such as the head, supports an inference that defendant intended to cause a maiming injury. (*People v. Assad* (2010) 189 Cal.App.4th 187, 195; *Quintero, supra*, 135 Cal.App.4th at p. 1162; *People v. Park* (2003) 112 Cal.App.4th 61, 69.)

Under defendant’s analysis, the evidence showed only an unprovoked, sudden attack for which no witness could offer an explanation: “It was a drunken, violent brawl. There were no words of intent. There was no planned attack. There was no sustained, repeated beating over a period of time.” Defendant reasons that the lack of an explanation for the genesis of the fight reveals that it was nothing more than an

indiscriminate attack. Therefore, the evidence was insufficient to prove aggravated mayhem.

At trial the bouncer, Justin Mayer, testified he saw a person matching defendant's description repeatedly kick and stomp on Martinez's face as the victim lay prone on the ground. Bar patron Cody Griffith testified defendant stomped and kicked Martinez. Griffith described defendant's using his heel to stomp up and down on Martinez. Griffith also stated defendant kicked Martinez with "field goal kicks," like a football player kicking the ball through a goalpost. Defendant pummeled Martinez with these kicks for about 30 seconds. Defendant aimed at a vulnerable part of the prone Martinez's body with powerful kicks. The attack left Martinez with lasting, severe brain injury.

Again, we view the evidence in the light most favorable to the judgment. Defendant focused his attack on a particularly vulnerable portion of Martinez's body, his head, using deliberate, forceful kicks to pummel Martinez many times as the victim lay defenseless.

Similar force was found sufficient to support an aggravated mayhem conviction in *Quintero*: "Here, Quintero focused his initial attack on a particularly vulnerable portion of Barajas's body, his head, using deliberate uppercut motions to slash his face many times with a retractable bladed knife. This action gave his blows more force and thus the greater ability to inflict serious injury than if he had merely jabbed or stabbed at Barajas's face. He held Barajas by the hair as he cut his right cheek and then turned him around by the hair to attack his face full on. The injuries to Barajas's arms and hands were caused by Barajas's attempts to protect and cover his face. Quintero stopped his attack once he had severely maimed Barajas's face. From these facts, a jury could reasonably conclude that Quintero essentially limited his attack to Barajas's face rather than indiscriminately attacking him, and find that the attack was guided by the specific intent of inflicting serious injury upon Barajas's face and head." (*Quintero, supra*, 135 Cal.App.4th at p. 1163.)

Defendant attempts to distinguish *Quintero*, arguing the defendant in *Quintero* verbally taunted his victim, which was evidence of specific intent. However, the lack of verbal comments is not dispositive, nor is the lack of an explanation for the origins of defendant's attack on Martinez. Instead, we determine whether, given the evidence at trial, a reasonable trier of fact could have found defendant harbored the specific intent to permanently disable Martinez. We find substantial evidence supports the conviction.

#### **Great Bodily Injury Enhancements in Counts 3 and 4**

Defendant also challenges the sufficiency of the evidence in support of the personal infliction of great bodily injury enhancements on counts 3 and 4, arguing the People failed to prove it was impossible to determine which act by which aggressor resulted in the great bodily injury. Instead, defendant asserts, the evidence revealed Martinez's injuries were most likely inflicted by an unidentified attacker, not defendant.

In general, a former section 12022.7 enhancement requires that the defendant personally inflicted the great bodily injury. However, an exception arises when a number of individuals participate in a group beating and it is impossible to determine which act by which individual resulted in the great bodily injury or injuries suffered by the victim. (*People v. Cole* (1982) 31 Cal.3d 568, 571; *People v. Corona* (1989) 213 Cal.App.3d 589, 594 (*Corona*)). To establish the group beating exception, there must be evidence the defendant participated in the group beating, it is impossible to determine which assailant inflicted which injury, and the defendant's conduct must have been of such a nature that it could have caused the great bodily injury. (*Corona*, at p. 594.)

Defendant argues the evidence showed an attacker other than defendant was the main assailant against Martinez: "Someone other than Negrete punched Martinez first, and knocked him to the ground. [Citation.] The unidentified attacker apparently wore shoes with a real sole, like DC brand shoes. [Citation.] This attacker's shoes left the shoe prints on Martinez. The mere flip flops Negrete wore did not match the shoe prints on Martinez. [Citation.] According to the evidence technician, Negrete's flip flops were

not even close to matching the shoe prints on Martinez. The evidence, rather than showing it was impossible to show which assailant caused Martinez's serious injuries, supported the reasonable conclusion that the other attacker, not Negrete, caused them. Thus, this was not a case where the group beating exception applied."

We read the evidence produced at trial differently. An unknown assailant initially punched Martinez and stomped on him while he was unconscious. Defendant then took advantage of the situation and began repeatedly stomping and kicking Martinez in the face. The jury could reasonably conclude Martinez's grave injuries resulted from the blows by either the unknown assailant or defendant, or a combination of both. In other words, sufficient evidence supported the group beating exception to the requirement that defendant personally inflicted the great bodily injury. Defendant participated in a group beating, it was impossible to determine which assailant inflicted which injury, and defendant's conduct could have caused the great bodily injury. (*Corona, supra*, 213 Cal.App.3d at p. 594.)<sup>2</sup>

### **INSTRUCTIONAL ERROR**

#### **CALCRIM Nos. 3160 and 3161**

Defendant argues the trial court erred in instructing with CALCRIM Nos. 3160 and 3161 since the People failed to prove the group beating exception applied. According to defendant, the error was prejudicial.

The trial court instructed: "If you conclude that more than one person assaulted Angel Martinez and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on Angel Martinez if the People have proved that:

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<sup>2</sup> We note the People concede in a later argument that one great bodily injury enhancement was improperly imposed on count 3 and both enhancements were improperly imposed on count 4.

“1. Two or more people, acting at the same time, assaulted Angel Martinez and inflicted great bodily injury on him;

“2. The defendant personally used physical force on Angel Martinez during the group assault;

“AND

“3A. The amount or type of physical force the defendant used on Angel Martinez was enough that it alone could have caused Angel Martinez to suffer great bodily injury;

“OR

“3B. The physical force that the defendant used on Angel Martinez was sufficient in combination with the force used by the others to cause Angel Martinez to suffer great bodily injury.

“The defendant must have applied substantial force to Angel Martinez. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.

“The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.” (CALCRIM No. 3160.)

Defendant renews his argument that the evidence did not support the group beating exception to the requirement of former section 12202.7 that the defendant personally inflict great bodily injury and therefore the court erred in instructing with CALCRIM Nos. 3160 and 3161. Since we find sufficient evidence in support of the group beating exception, we reject defendant’s claim of instructional error.

### **SENTENCING ERROR**

#### **Great Bodily Injury Enhancement on Count 4**

Defendant argues the trial court erred in imposing the former section 12022.7, subdivision (a) enhancement because the infliction of great bodily injury is an element of

battery causing serious bodily injury. Similarly, the enhancement under former section 12022.7, subdivision (b) cannot be imposed on count 4.

Section 243, subdivision (d) prohibits battery resulting in the infliction of serious bodily injury. Former section 12022.7, subdivision (b) provides a three-year enhancement on any felony resulting in great bodily injury from a comatose brain injury. However, former section 12022.7, subdivision (g) states, “. . . Subdivisions (a), (b), (c), and (d) shall not apply if infliction of great bodily injury is an element of the offense.” Great bodily injury as defined in former section 12022.7 is an element of the crime of battery causing serious injury in violation of section 243, subdivision (d). (*People v. Hawkins* (1993) 15 Cal.App.4th 1373; *People v. Beltran* (2000) 82 Cal.App.4th 693, 696-697.)

The People concede that the enhancement imposed under former section 12022.7, subdivision (a) cannot be imposed on count 4 because the infliction of great bodily injury is an element of battery causing serious bodily injury. Under the same rationale, the enhancement under former section 12022.7, subdivision (b) cannot be imposed on count 4. Accordingly, we shall strike both enhancements as to count 4.

### **Great Bodily Injury Enhancement on Count 3**

Defendant argues the trial court erred in imposing enhancements under both former section 12022.7, subdivision (a) and former section 12022.7, subdivision (b) on count 3. Former section 12022.7, subdivision (h) states: “The court shall impose the additional terms of imprisonment under either subdivision (a), (b), (c), or (d), but may not impose more than one of those terms for the same offense.”

In the present case, the trial court imposed an additional five-year term under former section 12022.7, subdivision (b) and an additional three-year term under former section 12022.7, subdivision (a). The People concede that, although the trial court stayed both terms, the three-year enhancement under subdivision (a) should be struck because the statute prohibits imposition of more than one former section 12022.7, subdivisions (a)

through (d) enhancement for the same offense. Therefore, we shall strike the former section 12022.7, subdivision (a) enhancement as to count 3.

### **Restitution Fine**

Defendant claims the trial court's imposition of a \$240 restitution fine violated the ex post facto clause and his right to due process because the court imposed it under a statute amended after he committed the offense.

At the time of defendant's offenses, section 1202.4, former subdivision (b)(1) required the trial court to use its discretion to impose a restitution fine between \$200 and \$10,000 on all felonies. If the trial court imposed a fine greater than the minimum, the court was required to consider specific factors. However, no express finding by the court of these factors was required. (§ 1202.4, subd. (d).) In 2011, after defendant committed his offense but prior to sentencing, the minimum fine was raised to \$240.

Restitution is to be imposed under the law applicable at the time of the offense, not at the time of sentencing. (*People v. Souza* (2012) 54 Cal.4th 90, 143.) A fine that was properly imposed under the law at sentencing but improper under the law at the time of the offense violates ex post facto principles. (*Ibid.*; *People v. Saelee* (1995) 35 Cal.App.4th 27, 29-30.)

In the present case, the court imposed a restitution fine of \$240, well within the range under section 1202.4, subdivision (b)(1) as it read at the time of defendant's offense. Therefore, the \$240 fine did not retroactively increase defendant's punishment because the statute at the time allowed the court to impose any fine between \$200 and \$10,000. Nor was the trial court required to state its reasons for imposing a fine greater than the minimum. We find no error.

### **DISPOSITION**

We shall strike both great bodily injury enhancements on count 4 and the three-year great bodily injury enhancement on count 3. The trial court is directed to prepare an

amended abstract of judgment and to send a certified copy thereof to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

\_\_\_\_\_RAYE\_\_\_\_\_, P. J.

We concur:

\_\_\_\_\_BUTZ\_\_\_\_\_, J.

\_\_\_\_\_HOCH\_\_\_\_\_, J.