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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT FRANKLIN,

Defendant and Appellant.

D059987

(Super. Ct. No. SCN289033)

APPEAL from a judgment of the Superior Court of San Diego County, Richard G. Cline, Judge. Affirmed.

A jury convicted Robert Franklin of one count of felony assault by force likely to produce great bodily injury (Pen. Code, § 245, former subd. (a)(1), now subd. (a)(4), as amended by Stats. 2011, ch. 183, § 1, eff. Jan. 1, 2012). Franklin appeals, arguing the evidence was insufficient to support the great bodily injury element because the assault involved only fists and the victim, despite his fragility, suffered minimal injury. We conclude there is no merit to this contention and affirm the judgment.

BACKGROUND

While returning to their car from a movie, Bradley Fite and his wife noticed Robert Franklin walking through the same parking lot. Franklin was making "beatbox" type noises which caught their attention. Franklin noticed Fite look at him and asked, "[A]re you mad-dogging me?" Fite told Franklin to "go home," as he did not want to fight.

Fite was recovering from surgeries for a broken spine, a stomach replacement, broken ribs, collapsed lungs, a dislocated shoulder, and a near complete knee replacement. Though improving, his spine remained weak. In addition, brain trauma and metal used to repair his spine affected his balance and necessitated his use of a cane.

Franklin approached Fite as Fite assisted his wife into their car, which was parked in a handicapped spot. After Fite placed his cane inside the car beside his wife and closed her door, Franklin stood face-to-face with him arguing. Fite told Franklin to "just go home." However, Franklin followed Fite to the driver's side door where they continued to argue. After Franklin began posturing as though he was about to fight, Fite exposed a scar under his shirt and said, "[L]ook, I just had surgery." He told Franklin to "leave now."

Instead of leaving, Franklin punched Fite's jaw, knocking him into an adjacent van. Franklin then grabbed Fite, punched him twice in the back, and threw him to the ground, knocking Fite out of his shoes. Franklin stood over Fite pushing his head into the ground and repeatedly punching the side of his face. Fite tried protecting himself with his arms and legs. A witness soon approached yelling, "[H]ey, the cops are coming, get

out of here, the cops are coming, it's over." After that, Franklin gathered his things and left the scene.

From the ground, Fite looked at his wife and said, "[M]y spine, my spine, my spine." His wife grabbed his shoes and helped him into the driver's seat of their car. They started driving home, but were flagged down by the witness to speak to police. Soon thereafter, police apprehended Franklin and Fite identified him.

After providing statements to police, Fite and his wife went to an emergency room to have Fite's back checked. Although his back hurt, there was no new damage to his spine. His injuries from the assault were limited to scrapes and redness on his neck and jaw, a missing chunk of hair and a laceration on his head that did not require stitches.

DISCUSSION

Franklin contends the evidence is insufficient to support his conviction for assault by force likely to produce great bodily injury because he did not use a weapon and Fite suffered only minor injuries despite his frail condition. Franklin further contends, somewhat contradictorily, that we may not consider Fite an unusually sensitive victim in assessing the sufficiency of the evidence because the record does not show Franklin knew the extent of Fite's preexisting injuries.

"When a defendant challenges the sufficiency of the evidence, ' "[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] [Citations.] 'Substantial evidence includes

circumstantial evidence and any reasonable inferences drawn from that evidence.

[Citation.] [Citation.] We "' 'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " " " (*People v. Clark* (2011) 52 Cal.4th 856, 942–943.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

The jury determines whether or not force used in an assault was likely to produce great bodily injury. (*People v. Score* (1941) 48 Cal.App.2d 495, 498.) The focus is not on whether actual injury occurred, but on whether the force used was *likely* to result in great bodily injury. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028; *In re Nirran W.* (1989) 207 Cal.App.3d 1157, 1161-1162.) "The use of hands or fists alone may be sufficient to support a conviction of assault by means of force likely to produce great bodily injury." (*In re Nirran W.*, *supra*, at p. 1161, citing *People v. Wingo* (1975) 14 Cal.3d 169, 176.) Whether fists were likely to result in such injury is "determined by the force of the impact, the manner in which it was used and the circumstances under which the force was applied." (*People v. Score*, *supra*, at p. 498.)

Here, contrary to Franklin's assertion, Fite's relatively minor injuries did not preclude the jury from reasonably finding the force used was likely to result in great bodily injury. The record shows Franklin punched Fite with enough force to knock him into an adjacent van and threw him to the ground with enough force to knock him out of his shoes. Franklin also pushed Fite's head into the ground with enough force to cause a laceration and remove a chunk of hair. Although Franklin may not have known the

details of Fite's preexisting injuries, the record shows Franklin knew or should have known Fite was a vulnerable victim because Fite used a cane to walk, parked in a handicapped space, stated he just had surgery, and showed Franklin his scar. Under such circumstances, Franklin's repeated punches to Fite's head and back amply support a finding the force Franklin used was likely to result in great bodily injury. (See *People v. Chambers* (1964) 231 Cal.App.2d 23, 27 [holding evidence of repeated blows to an old, emaciated, and, therefore, probably weak man's stomach sufficient to show force used was likely to produce great bodily injury despite absence of actual injury].)

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

AARON, J.

IRION, J.