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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DUANE JARAMILLO et al.,

Defendants and Appellants.

E053008

(Super.Ct.No. RIF10002636)

OPINION

APPEAL from the Superior Court of Riverside County. John M. Davis, Judge.

Affirmed.

Dabney B. Finch, under appointment by the Court of Appeal, for Defendant and Appellant Duane Jaramillo.

Charles R. Khoury, Jr., under appointment by the Court of Appeal, for Defendant and Appellant Anthony Rios.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

The instant case arises from an altercation between prison inmates. Defendants and appellants Duane Jaramillo and Anthony Rios, together with codefendant Joe Talavera Tovar, were charged with assaulting another inmate by means of force likely to produce great bodily injury. (Pen. Code, § 4501.) All defendants were found guilty, and the trial court found true any associated prison term and “strike” priors. Defendants Jaramillo and Rios appealed from the judgment, raising issues of sufficiency of the evidence and alleged error in failing to give a sua sponte instruction on unanimity. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

The incident took place in the prison yard on January 30, 2010. Correctional Officer (CO) Ochoa and CO Gonzales were monitoring the yard on that day. About 1:30 p.m., the officers heard the victim, inmate Banuelos, yelling, “CO, CO!” as three inmates attacked him and knocked him to the ground. The officers ran quickly to the scene, where they saw the victim on his back, on the ground, curled in a fetal position, trying to protect himself from kicks and blows. The victim was not fighting back at all. CO Gonzales saw defendant Rios punching the victim and kicking him; Rios was kicking mostly with his right leg. Defendant Jaramillo was on the opposite side of the victim’s

head. CO Gonzales saw Jaramillo kick and punch the victim multiple times. CO Gonzales had a clear view of all three inmates who were attacking the victim.

The officers ordered the attackers to stop fighting and to get down. When the attackers did not comply, the officers sprayed the inmates with pepper spray. CO Gonzales also hit defendant Rios's wrist with his baton. After the spraying and the baton strike, the attackers stopped fighting.

CO Gonzales saw lumps on the victim's face and the back of his head. He had a number of cuts and scratches, and injuries to his eyes. The victim's face was bloody, and he had blood on his shirt. The victim was rinsed with running water for about 15 minutes to remove the pepper spray before he was taken to the prison medical clinic. The nurse who evaluated the victim found substantial bruising to the victim's face and head. He had a gash on his head, a swollen ear, and a swollen eye. He had dried blood on his nose, as well as scratches and abrasions on his knees and elbows. The nurse recommended transferring the victim to an outside hospital for further evaluation and treatment.

Other officers took the attackers to the shower area to rinse off the pepper spray. Another nurse examined the attackers for any injuries. His notes indicated that both Rios and Jaramillo had been pepper sprayed, but there was no visible indication on Rios. He also found an injury to Rios's leg. Jaramillo did show effects of the pepper spray; his face was reddened around the eyes and he said he was "burning up."

An information charged all three defendants with the offense of being prison inmates and assaulting another inmate by means of force likely to produce great bodily

injury. The information also alleged that defendant Rios had three prison term priors, and that defendant Jaramillo had two prison term priors and one strike prior. The information was later amended to allege a third prison term prior against defendant Jaramillo.

A jury convicted all three inmates, Rios, Jaramillo, and Tovar, of the charged offense. In a separate proceeding, the trial court found true all of the prior prison term and strike allegations. The court sentenced defendant Rios to a term of four years on count 1, plus one year for each of his prison term priors, for a total term of seven years. The court sentenced defendant Jaramillo to the middle term of four years, doubled to eight years as a second strike, plus a consecutive term of one year for one of the prison term priors, for a total of nine years.

Defendants Rios and Jaramillo each filed a notice of appeal from the judgment.

ANALYSIS

1.

DEFENDANT JARAMILLO'S APPEAL

A. Standard of Review

Defendant Jaramillo raises a single issue on appeal: He contends that the evidence was insufficient to support the conviction. That is, he argues that there was no evidence to show how hard he or his codefendants were punching or kicking the victim, where the blows landed, or how many punches or kicks had been inflicted. Neither of the officers mentioned kicking in their reports, and neither testified at the preliminary hearing about any kicking. The sole evidence of any kicking was the officers' trial court testimony.

Defendant Jaramillo also relies on photographs of the victim, as well as the nurse's record, to show that there was no great bodily injury actually inflicted.

We review this claim under the substantial evidence standard of review. We view the evidence 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 any reasonable trier of fact could find the essential elements of the charged crime or allegation proven beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 99 S.Ct. 2781]; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

B. The Evidence Was Sufficient to Support the Conviction

Defendant Jaramillo acknowledges that the offense of assault “by means of any force likely to produce great bodily injury” may be committed without actually striking any blow or inflicting any injury, but cites *People v. Wells* (1971) 14 Cal.App.3d 348, for the proposition that, “when the evidence shows that a blow has been struck or a physical injury actually inflicted, the nature and extent of the injury is a relevant and often controlling factor in determining whether the force used was of felonious character. [Citations.]” (*Id.* at p. 358.) Because the victim was bruised and battered, but the nurse listed no broken bones, no continuing active bleeding, and no other injuries on his medical record, the injuries were only minor or moderate, not serious. The victim had not lost consciousness, fractured a bone, had a protracted loss of a bodily function, suffered serious disfigurement, or suffered a wound requiring extensive suturing (see *People v. Kent* (1979) 96 Cal.App.3d 130, 136-137 [defining “serious injury”]); thus, the

evidence was insufficient to show that the victim had been attacked with force likely to cause any such serious injury.

“There is no merit to defendant’s contention that where injuries are actually inflicted, the measure of the likelihood of great bodily injury resulting from the assault is demonstrated by the injuries actually inflicted” (*People v. Samuels* (1967) 250 Cal.App.2d 501, 512.) Similarly, there is “no merit” to the notion that “the likelihood of great bodily injury from a blow is demonstrated solely by the injury actually inflicted.” (*Id.* at p. 513.) Rather, the injury actually inflicted is but one circumstance which may be relevant to the jury in making the factual determination whether the force used was likely to cause great bodily injury. (*Ibid.*)

The record here discloses circumstances which are more than sufficient to support a finding that defendants assaulted the victim with substantial force, i.e., force likely to produce great bodily injury. The correctional officers saw three men hitting the victim with closed fists, and kicking the victim while the victim was in a vulnerable position.¹

¹ Defendant Jaramillo points out that the officers’ reports, and their testimony at the preliminary hearing, did not mention kicking. He argues that the failure to mention kicking in the reports or at the preliminary hearing casts doubt on the officers’ trial testimony, in which each stated that he saw defendant Jaramillo punching and kicking the victim. Jaramillo’s argument constructs a picture of the evidence in a light most favorable to himself, rather than in the light most favorable to the judgment, and is thus contrary to the appropriate standard of review. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574 [“If the defendant fails to present us with all the relevant evidence, or fails to present that evidence in the light most favorable to the People, then he cannot carry his burden of showing the evidence was insufficient because support for the jury’s verdict may lie in the evidence he ignores.”].)

The victim was on the ground, lying on his back, in a fetal position and trying to protect himself from multiple strikes by multiple assailants. Defendants Rios and Jaramillo were on opposite sides of the victim's head, and each was both punching and kicking the victim repeatedly for 30 to 50 seconds. The officers ran up and commanded the assailants to stop, but they continued the beating. The assailants had to be pepper sprayed four times (twice by each officer) and one of them struck before they finally desisted. The officers described the attackers as "wailing" [*sic*: whaling] on the victim. The attackers caused a gash to the victim's head, raised numerous bumps and bruises, and bloodied the victim's face. An ear and an eye were badly swollen, and the attack was severe enough to cause the victim to lose control of his bowels.

In *People v. Roberts* (1981) 114 Cal.App.3d 960, the court held that kicking the head and torso of a largely defenseless man on the ground is "unmistakably an assault which a jury could reasonably find was likely to produce great bodily harm." (*Id.* at p. 965.) The court also observed that the victim "received a blow to the forehead which produced a large welt. If this blow had struck the nearby eye, it might well have produced blindness in that eye, surely a great bodily injury." (*Ibid.*) As in *Roberts*, defendant Jaramillo was simply lucky that none of the blows, already forceful enough to gash the victim's head or to raise a welt or bump, caused any greater injury.

Defendant Jaramillo's reliance on *People v. Duke* (1985) 174 Cal.App.3d 296 is misplaced. There, the defendant was convicted of an assault with force likely to produce great bodily injury, when the defendant placed the victim in a momentary headlock while

touching her breast. The headlock was momentary and did not cut off the victim's airway. She could still breathe and could still scream. She did scream, and ran away. The victim did not describe an attempt to choke or strangle her. The only injury was a slight laceration to her earlobe from her earring being pushed against her ear. The *Duke* court held that an assault which does not result in any physical injury (and which does not involve assault with a deadly weapon or other types of felonious assaults) is unlikely to support more than a misdemeanor conviction. (*Id.* at p. 303.) The court stated that the crime of assault with force likely to produce great bodily injury necessarily contemplates an assessment of the force actually used, rather than speculation about what an accused might have done. (*Ibid.*)

By contrast, the attack here involved actual force consisting of multiple closed-fist blows and multiple kicks about the head. The blows and kicks raised numerous bumps, gashed the victim's head, resulted in swollen features (ear and eye), and interfered with the victim's bodily functions. A pummeling like that inflicted here is, like the attack in *People v. Roberts, supra*, "unmistakably an assault which a jury could reasonably find was likely to produce great bodily harm." (*People v. Roberts, supra*, 114 Cal.App.3d 960, 965.)

Although the actual injuries in other cases might have been greater than the injuries inflicted here, we iterate that a felonious assault may be committed without the actual infliction of great bodily injury. (See, e.g., *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028 [use of hands or fists alone will support a conviction of assault by means of

force likely to produce great bodily injury; the actual injuries included bruises, concussion, broken thumb, a wound requiring stitches, and an ankle injury requiring a cast]; *People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1064, 1066 [the defendant held the victim's face, pinched both sides of her mouth, held her jaw, and put his whole hand down her throat to stop her screaming; the injuries included bruises on arms, face and jaw, fingernail scratches on the back of her throat, and loss of voice the next day]; *People v. Roberts, supra*, 114 Cal.App.3d 960, 965 [kicking the head and torso of a man on the ground produced unconsciousness, cuts and bruises, and a large welt on the forehead]; *People v. Covino* (1980) 100 Cal.App.3d 660 [The defendant squeezed the victim's neck, with his thumbs near her larynx, and she appeared to be choking, with her tongue protruding; the victim suffered redness and scratches, and she still had pain in her neck some months later. Although the appellate court concluded she had not actually suffered great bodily injury, a reasonable trier of fact could conclude that the force used was likely to produce great bodily injury.]; *People v. Chavez* (1968) 268 Cal.App.2d 381, 383-384 [the defendant struck the victim with a machete causing a cut that required 13 stitches]; *People v. Horton* (1963) 213 Cal.App.2d 185, 188 [blows with fists alone may be sufficient to support conviction of assault by means of force likely to produce great bodily injury; there, the attack was by means of fists and kicks, resulting in a broken jaw].)

The evidence, viewed properly in the light most favorable to the judgment, was sufficient for a reasonable jury to find that the assault on the victim was carried out by means of force likely to produce great bodily injury.

2.

DEFENDANT RIOS'S APPEAL

A. Standard of Review

Defendant Rios raises two claims on appeal. First, like defendant Jaramillo, he contends that the evidence was insufficient to support the felony assault conviction. Our discussion above is sufficient to dispose of that contention. However, Rios raises the additional contention that the trial court erred below in failing to give an instruction, sua sponte, on unanimity. That is, defendant Rios posits that the conviction might rest on a “patchwork” verdict, in which each juror may have believed that a different act—e.g., a punch or a kick—formed the basis for finding that Rios used force likely to produce great bodily injury.

“In criminal cases “[a] trial court has a duty to instruct the jury ‘sua sponte on general principles which are closely and openly connected with the facts before the court.’” [Citations.] We review de novo a claim that the trial court failed to properly instruct the jury on the applicable principles of law. [Citation.]” (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 850.)

B. No Unanimity Instruction Was Required

We conclude that no unanimity instruction was required.

“The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a ‘particular crime’ [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed [him] guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate ‘when conviction on a single count could be based on two or more discrete criminal events,’ but not ‘where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.’ [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.” (*People v. Russo* (2001) 25 Cal.4th 1124, 1134-1135.)

This is a case of the second type, where there was only one discrete criminal event, and each defendant was charged with only one crime. All three defendants engaged in one continuous course of conduct in battering and kicking the victim, a fellow inmate. The jury had no reason to consider each punch or each kick as a discrete criminal event. The entire attack lasted some 30 to 50 seconds. Both correctional officers testified that all three defendants struck the victim with closed fists, and all three kicked the victim.

Defendant Rios makes much of the officers' failure to include the specific detail of kicking either in their reports or in their testimony at the preliminary hearing, arguing that some jurors might not have believed that a particular defendant kicked the victim (because of the absence of earlier testimony to that effect), but might have violated the assault statute by punching, whereas other jurors might have concluded that punching alone would not support a finding of force likely to produce great bodily injury, but relied on the kicking. However, the jury was not even required to find unanimously that any individual defendant actually struck a blow or delivered a kick with force likely to produce great bodily injury. The jury was instructed on aiding and abetting, and may have found defendant Rios guilty as an aider and abettor, rather than a direct perpetrator. "Further, the jury was not required to agree unanimously whether defendant was the actual perpetrator of the murder or the other participant in the crime. [Citations.]" (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 126.) Just as the jury was not required to decide unanimously as to the theory of liability, it was not required to parse out and agree unanimously on particular acts, where all the acts constituted one criminal event. "[N]o unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises 'when the acts are so closely connected in time as to form part of one transaction' [citation], or 'when . . . the statute contemplates a continuous course of conduct or a series of acts over a period of time' [citation]. There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various

acts constituting the charged crime. [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 679.)

“[W]here the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the ‘theory’ whereby the defendant is guilty. [Citation.] The crime of burglary provides a good illustration of the difference between discrete crimes, which require a unanimity instruction, and theories of the case, which do not. Burglary requires an entry with a specified intent. (Pen. Code, § 459.) If the evidence showed two different entries with burglarious intent, for example, one of a house on Elm Street on Tuesday and another of a house on Maple Street on Wednesday, the jury would have to unanimously find the defendant guilty of at least one of those acts. If, however, the evidence showed a single entry, but possible uncertainty as to the exact burglarious intent, that uncertainty would involve only the theory of the case and not require the unanimity instruction. [Citation.] Other typical examples include the rule that, to convict a defendant of first degree murder, the jury must unanimously agree on guilt of a specific murder but need not agree on a theory of premeditation or felony murder [citation], and the rule that the jury need not agree on whether the defendant was guilty as the direct perpetrator or as an aider and abettor as long as it agreed on a specific crime [citation].” (*People v. Russo, supra*, 25 Cal.4th 1124, 1132-1133.)

There was one criminal event here, and only one charge as to each defendant. Thus, no unanimity instruction was required, ““where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.”” (*People v. Datt* (2010) 185 Cal.App.4th 942, 950.)

DISPOSITION

The evidence was sufficient to permit a reasonable jury to find each defendant guilty of the crime as charged, either as a direct perpetrator or as an aider and abettor. The evidence supported a finding that the attack involved the application of force likely to produce great bodily injury. Because there was only one discrete criminal event, and the only distinction was the precise manner in which each defendant might have committed the crime, the court did not err in failing to give a sua sponte instruction on unanimity. The judgment is affirmed.

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MCKINSTER
J.

We concur:

HOLLENHORST
Acting P.J.
MILLER
J.