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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN LEE JONES,

Defendant and Appellant.

H037674

(Santa Clara County
Super. Ct. No. C1088195)

Defendant Kevin Lee Jones was charged by information filed February 24, 2011, with battery with serious bodily injury (Pen. Code, §§ 242, 243, subd. (d);¹ count 1), inflicting corporal injury on a cohabitant (§ 273.5, subd. (a); count 2), and resisting, delaying, or obstructing a peace officer (§ 148, subd. (a)(1); count 3, a misdemeanor). The information further alleged that defendant had personally inflicted great bodily injury in the commission of the offenses in counts 1 and 2. (§§ 667, 1192.7.) A jury found defendant guilty of count 2, inflicting corporal injury on a cohabitant, while finding not true the allegation that he personally inflicted great bodily injury in the commission of the offense. The jury found defendant not guilty of the remaining counts. The court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions. On appeal, defendant's appointed counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

The Trial Evidence

In the early morning of September 13, 2010, San Jose Police Officers Joseph Njoroge and Daniel Stromska were sitting in separate patrol cars that were parked near a nightclub. Shortly after 1:00 a.m., the officers saw two people, later determined to be defendant and Luz Adriana Armas, exit the club and arguing. After defendant and Armas stepped off the sidewalk and into the street, the officers saw Armas hit defendant. Officer Njoroge then observed defendant put up his hands, apparently in defense, and Armas put her hands down while continuing to yell at him.

Both officers testified that they eventually saw defendant turn and take a step away from Armas, and then “immediately” turn around and punch her. Officer Njoroge described defendant’s motion as throwing a “right hook” and punching Armas in the face. Officer Njoroge testified that after Armas was hit, she “went limp” and fell to the ground without raising her arms to break her fall. Based on what he saw, Officer Njoroge believed that Armas had lost consciousness. Officer Stromska similarly testified that defendant had used a “sweeping punch” to hit Armas in the face area. He saw her fall to the ground without raising her arms. Officer Stromska thought Armas had been “knocked out.”

Both officers exited their patrol cars, ran across the street, and assisted each other in handcuffing defendant. During that time, Armas got up from the ground. Officer Njoroge estimated that Armas got up about five to seven seconds after being punched, while Officer Stromska estimated that it took 10 to 15 seconds before Armas started to move. She appeared upset that defendant was in custody.

Another female, later identified as Armas’s sister, had exited the club during this time and began asking Officer Njoroge “[i]n a very loud and very objectionable voice” what he was doing. As she continued to approach, Officer Njoroge repeatedly instructed her to “get back.” Armas’s sister “reach[ed] with her arms towards” defendant and was about one foot away when Officer Njoroge pushed her away.

Officer Njoroge spoke to Armas about 15 to 20 minutes after defendant was handcuffed. She had redness and a scrape on her elbow from the fall. Officer Njoroge did not see any injury on Armas's face. Armas refused an emergency protective order and refused medical attention. She indicated to Officer Njoroge that nothing had happened to her, that she had slipped and fallen because she was wearing new high heel shoes, and that defendant did not do anything to her.

After Officer Stromska advised defendant of his *Miranda* rights,² defendant indicated to the officer that he might have hit Armas, but he also indicated that he thought he pushed her and she fell as a result.

Armas testified that she and defendant had been engaged for 10 years. She had been living with him for approximately seven of the last 10 years, and they had shared some income and living expenses. Prior to the incident, Armas was inside the nightclub with her sister and defendant dancing. Armas testified that when she and defendant left the nightclub, she was angry. She unsuccessfully tried to kick him while they were walking towards the street. Armas then got in front of defendant and slapped him twice. As she tried to slap him again, he covered his face with his hand. Armas testified that she then took a step backward, tripped in her new five-inch stiletto heels, and fell off the curb and into the street. Defendant "immediately went to pick [her] up as soon as [she] fell," and two police officers arrived. According to Armas, defendant did not hit her that evening. She further testified that defendant had been wearing a diamond ring about the size of a quarter on his right hand, and that she did not have any marks on her head that night.

Armas's sister testified on defendant's behalf that all three of them—herself, Armas, and defendant—had drunk alcohol while at the nightclub. The sister exited the nightclub shortly after Armas and defendant had left. When the sister was about six feet

² *Miranda v. Arizona* (1966) 384 U.S. 436.

behind, she saw Armas and defendant walking and then saw Armas fall off the sidewalk. The sister had been “looking down at the ground” while walking and did not see Armas or defendant hit or kick each other. According to the sister, defendant immediately helped Armas up, and Armas “stood up right away.” The sister further testified that she did not notice any injuries on her sister’s face after the incident.

The Verdicts and Sentencing

On July 25, 2011, the jury found defendant guilty of inflicting corporal injury on a cohabitant (§ 273.5, subd. (a); count 2), while finding not true the allegation that he personally inflicted great bodily injury in the commission of the offense. The jury found defendant not guilty of the remaining counts.

On November 18, 2011, defendant orally requested that the trial court reduce the offense to a misdemeanor pursuant to section 17, subdivision (b). The People argued that the motion was “premature” until the terms of probation were satisfied. The court denied the motion without prejudice. The court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions, including that he serve 90 days in county jail with credit for five days.

This Appeal

Defendant filed a timely notice of appeal and we appointed counsel to represent him in this court. Appointed counsel has filed a brief in this court which states the case and facts but which raises no issues. We notified defendant of his right to submit written argument in his own behalf within 30 days. That period has elapsed and we have received no response from defendant. Pursuant to *People v. Wende, supra*, 25 Cal.3d 436 and *People v. Kelly* (2006) 40 Cal.4th 106, we have reviewed the entire record and have concluded that there is no arguable issue on appeal.

The judgment (order of probation) is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

PREMO, ACTING P.J.

GROVER, J.*

*Judge of the Monterey County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.