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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SEAN SARIK, Defendant and Appellant.	H024870 (Santa Clara County Super.Ct.No. CC115149)

I. Statement of the Case

A jury convicted defendant Sean Sarik of aggravated assault (Pen. Code, § 245, subd., (a)(1))[1] and found true enhancement allegations that he personally inflicted great bodily injury (GBI) on someone other than an accomplice (§ 12022.7, subd. (a)) and committed the offense for the benefit of a criminal street gang (§ 186.22). Defendant also admitted an allegation under the "Three Strikes" law that he had a prior conviction for a serious felony. (§§ 667, subds. (b) - (i); 1170.12, subds. (a) - (d)). The court imposed a 12-year sentence, comprising a two-year middle term for the assault, doubled under the Three Strikes law, a consecutive five-year term for the gang enhancement, and a consecutive three-year term for the GBI enhancement.

[1] All further statutory references are to the Penal Code unless otherwise specified.

On appeal from the judgment, defendant challenges the propriety of CALJIC No. 17.20, the instruction given by the court, which tells the jury how to determine whether defendant personally inflicted great bodily injury. He claims that the instruction is legally flawed and giving it was prejudicial error.[2] We agree.

II. Facts[3]

At around 6:00 p.m., on June 14, 2001, Jean Kea was playing basketball with his relatives Steve and David at Independence High School in San Jose. At one point, Kea saw defendant and some friends standing next to a tree, where Kea had hung his backpack. When Kea finished playing, he retrieved his backpack. He said hello to defendant and then started walking away. Kea was wearing a red shirt. Defendant and his friends were dressed in blue. Defendant waved Kea over and asked where he was from. Kea said Modesto. Defendant then asked, "What's up with the red?" At the same time, defendant's friends surrounded Kea. Nervous and afraid, Kea explained in Cambodian that he got the shirt from his high school and that it was not a gang-related shirt. At that point, one of defendant's friends named Nghounly punched Kea in the head. Defendant and a third person with long hair named Kimhay joined the assault, punching and kicking Kea. Kea tried to block their punches and then fell to the ground. A fourth person snatched a gold chain Kea was wearing around his neck.[4] Within moments, Kea managed to get up and run. He testified that the assault lasted only 15 seconds. Kea headed to a gated fence, but Kimhay caught up with him and started

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[2] The propriety of CALJIC No. 17.20 is currently pending before the California Supreme Court in *People v. Modiri* (2003) 112 Cal.App.4th 123, review granted December 23, 2003 (S120238).

[3] Given the issue raised on appeal, we focus our summary of the facts on the evidence relevant to the GBI enhancement allegation.

[4] Based on the forcible taking of Kea's chain, defendant was charged with robbery. However, the jury acquitted him of that offense and the lesser included offense of grand theft.

beating and stabbing him with a stick. Kea fought back, but the others arrived. Someone pushed Kea to the ground and started kicking him, but Kea could not see who it was. They beat and kicked him until a Vietnamese man intervened, and Kea's assailants fled. Kea testified that he suffered multiple injuries, including cuts and bruises to his head and face from being punched and kicked, a wound from being stabbed with the stick, and chipped teeth. Kea said that he still has difficulty focusing his eyes.

David testified, among other things, that he saw Kimhay and Nghounly beating Kea near the gate. Defendant stood nearby and warned David and Steve not to get involved. Steve also testified that defendant was standing by the gate and "talking a whole bunch of stuff." However, Steve said he thought he saw defendant kick Kea in the head.

Officer Tak Odama of the San Jose Police Department testified that he interviewed defendant. Defendant told him that Nghounly punched Kea and then snatched his gold chain. Kea fell down, and defendant and the others punched and kicked him a few times. Kea was able to get up and run, but Kimhay chased him down. Defendant said he did not do anything to Kea during the second part of the incident. He also said he refused to take the chain when Nghounly offered it to him.

III. CALJIC No. 17.20

As noted, defendant contends the court's instruction on the GBI enhancement allegation was erroneous. We agree.

The prosecution alleged an enhancement under section 12022.7, subdivision (a), which provides, "Any person who *personally inflicts* great bodily injury on any person other than an accomplice 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 three years." (Italics added.)

In *People v. Cole* (1982) 31 Cal.3d 568, the California Supreme Court held that the phrase "personally inflicts" in section 12022.7 is unambiguous and means what it

says: "[T]he individual accused of inflicting great bodily injury must be *the person who directly acted to cause the injury*." (*Id*. at p. 572, italics added.) Consequently, the enhancement is not applicable to one who merely aided and abetted the person who actually inflicted the injury. (*Ibid*.)[5]

Here, in connection with the GBI enhancement allegation, the trial court gave CALJIC No. 17.20, instructing the jury as follows: "When a person participates in a group beating and it is not possible to determine which assailant inflicted a particular injury, he may be found to have personally inflicted great bodily injury upon the victim if: [¶] One. The application of unlawful physical force upon the victim was of such a nature that by itself it could have caused the great bodily injury suffered by the victim; or [¶] Two. At the time the defendant personally applied unlawful physical force to the victim the defendant knew that other persons, as part of the same incident, had applied, were applying, or would apply unlawful physical force upon the victim, and the defendant then knew or reasonably should have known that the cumulative effect of all the unlawful physical force would result in great bodily injury to the victim." (See CALJIC No. 17.20.)

Alternatives one and two set forth in the instruction reflect an expansive view of what it means to *personally inflict* great bodily injury. However, neither the language of section 12022.7 nor anything the court said in *Cole* supports such an expansion. Rather, the instruction was promulgated several years after *Cole* and is based on a later case: *People v. Corona* (1989) 213 Cal.App.3d 589. There, two or three men attacked a man

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[5] Prior to 1977, section 12022.7 did not contain the word "personally," and courts had held that the enhancement applied to not only those who personally inflicted great bodily injury but also those who aided and abetted the infliction of such injury. (See *People v. Mills* (1977) 73 Cal.App.3d 539, 544; *People v. Collins* (1975) 44 Cal.App.3d 617, 622-623.) However, in 1977, the Legislature amended section 12022.7, adding the word *personally*. *Cole* addressed the meaning and application of the amended version of section 12022.7.

named Golden. He "was hit, fell to the ground and was hit and kicked repeatedly," suffering numerous injuries, primarily to his head, including cuts, bruises and a severely swollen jaw. (*Id*. at p. 591.) Golden identified Corona as one of the assailants, and a witness testified that he saw Corona kick and throw beer cans at Golden. (*Ibid*.) However, Corona denied participating in the attack. (*Ibid*.) The jury convicted Corona of assault and further found true an allegation that he personally inflicted great bodily injury. (*Id*. at p. 593.)

On appeal, Corona challenged the enhancement, claiming there was insufficient evidence to support a finding that he personally inflicted any particular injury. (*People v. Corona, supra,* 213 Cal.App.3d at p. 593.) In rejecting this claim, the Fourth District Court of Appeal acknowledged that under *Cole,* the enhancement applies only to those who directly inflict great bodily injury. However, the court opined that *Cole* did not apply to a "group pummeling." (*People v. Corona, supra,* 213 Cal.App.3d at p. 594.) The court reasoned that "[w]hile *Cole* has logical application with regard to the section 12022.7 culpability of an aider and abettor who strikes no blow, it makes no sense when applied to a group pummeling. Central to *Cole* is the conclusion that the deterrent intent of section 12022.7 is served by directing its increased punishment at the actor who ultimately inflicts the injury. Applying *Cole* uncritically in the context of this case does not create a deterrent effect. Rather it would lead to the insulation of individuals who engage in group beatings. Only those whose foot could be traced to a particular kick, whose fist could be patterned to a certain blow or whose weapon could be aligned with a visible injury would be punished. The more severe the beating, the more difficult would be the tracing of culpability. Thus, while it is true the evidence fails to directly attribute any particular injury suffered by [the victim] to any particular blow struck by [Corona], still, the blows were delivered, Corona joined in that delivery and the victim suffered great bodily injury." (*Id*. at p. 594.)

The court further stated, "We do not attempt to set forth a universally applicable test for when an individual ceases to be an accomplice and becomes a direct participant to the infliction of great bodily injury. We conclude only that when a defendant participates in a group beating and when it is not possible to determine which assailant inflicted which injuries, the defendant may be punished with a great bodily injury enhancement if his conduct was of a nature that it could have caused the great bodily injury suffered. [¶] As we have noted, the evidence was sufficient to convict Corona of the assault on Golden. Moreover, the conduct of Corona during the attack was of a nature that it could have resulted in the injuries inflicted. The evidence was therefore sufficient to support the finding he inflicted great bodily injury." (*People v. Corona, supra,* 213 Cal.App.3d at pp. 594-595; see *In re Sergio R.* (1991) 228 Cal.App.3d 588 [following *Corona*, where more than one assailant discharged a firearm into a group of people, and it was not possible to determine which one inflicted which injuries].)

As noted, CALJIC No. 17.20 purports to incorporate *Corona*'s holding. In our view, however, CALJIC No. 17.20 is not entirely consistent with the statutory language of section 12022.7, as construed in *Cole*, limiting enhancements to those defendants who *personally inflict* great bodily injury.

In *Corona,* the court reasoned that proof that a defendant personally "joined" in the "delivery" of "blows" by a group of attackers that caused great bodily injury to the victim could be sufficient to uphold a jury's true finding on a GBI enhancement allegation against a sufficiency of the evidence challenge on appeal if it was "not possible to determine which assailant inflicted which injuries" and the defendant's "conduct was of a nature that it could have caused the great bodily injury suffered." (*People v. Corona, supra,* 213 Cal.App.3d at p. 594.) Even if this reasoning is consistent with *Cole*, it does not establish the propriety of CALJIC No. 17.20. This is so because in *Corona,* the jury was more simply instructed that it had to find that the defendant *personally* inflicted great bodily injury, and the issue on appeal was whether there was sufficient evidence to

support the jury's finding that he did. Here, however, we face the propriety instructional language that allows the jury to base a GBI finding on either of two alternative theories of what it means to *personally inflict* GBI.

As noted, the instruction permitted the jury to find the enhancement allegation if (a) defendant "participate[d] in a group beating," (b) "it is not possible to determine which assailant inflicted a particular injury," and (c) *either* "(1) the application of unlawful physical force upon the victim was of such a nature that, by itself, it could have caused the great bodily injury suffered by the victim; or (2) that at the time the defendant personally applied unlawful physical force to the victim, the defendant knew that other persons, as part of the same incident, had applied, were applying, or would apply unlawful physical force upon the victim and the defendant knew, or reasonably should have known, that the cumulative effect of all the unlawful physical force would result in great bodily injury to the victim." (CALJIC No. 17.20.)

Although the first alternative may reasonably track the reasoning in *Corona,* the second alternative goes beyond *Corona* and is facially inconsistent with the statutory language that requires a finding that the defendant *personally inflicted* great bodily injury. Moreover, neither section 12022.7 nor any other section of the Penal Code applicable to GBI allegations permits a finding that the defendant knew GBI would be inflicted as a substitute for a finding that the defendant "himself inflict[ed] the injury." (*People v. Cole, supra*, 31 Cal.3d at p. 572.) Instead, the "clear and unambiguous" statutory language "limit[s] the category of persons subject to the enhancement to those *who directly perform the act that causes the physical injury to the victim*." (*Id.* at p. 579, italics added.) In our view, therefore, the second alternative theory in CALJIC No. 17.20 is erroneous to the extent that it permits the jury to substitute a knowledge finding for a finding that the defendant directly performed the act that caused physical injury to the victim, as required by the plain and unambiguous language of section 12022.7 as

construed in *Cole*.[6] Neither this court nor the CALJIC authors have the "power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. This court [and the CALJIC authors are] limited to interpreting the statute, and such interpretation must be based on the language used." (*Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365.) Rather, "[i]n interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, ' " 'whatever may be thought of the wisdom, expediency, or policy of the act.' " ' " (*California Teachers Assn. v. Governing Bd. Of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632.) Clearly, the authors of CALJIC instructions lack the authority of the Legislature or the California Supreme Court.

We acknowledge that in *People v. Banuelos* (2003) 106 Cal.App.4th 1332, Fourth District reaffirmed *Corona* and upheld the validity of CALJIC No. 17.20. However, *Banuelos* fails to address the portion of the instruction with which we find fault and relies instead solely on the validity of *Corona*. (See *People v. Banuelos, supra,* 106 Cal.App.4th at pp. 1337-1338.) As we explained above, the instruction is invalid even if *Corona* is correct because the second alternative theory of *personal infliction* in the instruction finds no support in the statute or *Corona*. Therefore, we must respectfully disagree with *Banuelos* to the extent that it upholds a version of CALJIC No. 17.20 that includes the second alternative theory that we find invalid.

In sum, therefore, we conclude that CALJIC No. 17.20 is flawed. In determining whether giving it here was prejudicial error, "we ascertain at the threshold what the relevant law provides. We next determine what meaning the charge conveys in this regard. Here the question is, how would a reasonable juror understand the instruction. In

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[6] We reject the People's claim that the second alternative is implicit in the holding of *Corona*. Moreover, even if it were, it is inconsistent with the language of section 12022.7 as interpreted by *Cole* and thus legally unauthorized.

addressing this question, we consider the specific language under challenge and, if necessary, the charge in its entirety. Finally, we determine whether the instruction, so understood, states the applicable law correctly." (*People v. Warren* (1988) 45 Cal.3d 471, 487.) The "relevant law" provides that a GBI allegation may not be found true unless the defendant *personally* inflicted great bodily injury on the victim. The instruction given by the trial court obviated any need for the jury to make such a finding because it provided a legally erroneous alternative basis (the second alternative basis) for a true finding. In our view, a reasonable juror would have readily understood from the court's instruction that it was *not* necessary to find that the defendant personally inflicted the injury if the jury utilized the second alternative basis in CALJIC No. 17.20. By eliminating the need for the jury to find a statutorily required element of the allegation, the instruction misstated the law and therefore was erroneous.

Where, as here, the jury is instructed on alternate theories, one of which is legally inadequate, reversal is required unless the record reflects that the jury's finding was not based on the legally invalid theory. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1130.) The standard for certainty in this regard is a stringent one. "[A] trial court's failure to instruct the jury on an element of a sentence enhancement provision (other than one based on a prior conviction), is federal constitutional error if the provision 'increases the penalty for [the underlying] crime beyond the prescribed statutory maximum.' [Citation.] Such error is reversible under *Chapman,*[7] unless it can be shown 'beyond a reasonable doubt' that the error did not contribute to the jury's verdict." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325-326.) The *Chapman* standard is just as applicable to a "misinstruction" on an element as it is to a failure to instruct on an element. (*People v. Swain* (1996) 12 Cal.4th 593, 607.) Thus, here, the GBI enhancement cannot stand unless we are satisfied beyond a reasonable doubt that the

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7 *Chapman v. California* (1967) 386 U.S. 18, 24.

jury's finding was *not* based on the legally erroneous second alternative theory in CALJIC No. 17.20. In making this determination, we examine the evidence, arguments of counsel, communications from the jury, and the verdict. (*People v. Guiton, supra,* 4 Cal.4th at p. 1130.)

Here, the evidence reveals that when defendant asked Kea about his red shirt, defendant's friends surrounded Kea. When Kea tried to explain that the shirt was not gang related, Nghounly punched him. Then defendant and Kimhay joined the attack, punching and kicking. Kea managed to flee a short distance, but Kimhay caught up to him and started beating and stabbing him with a stick. He fell to the ground, where he was repeatedly kicked. Defendant admitted to police that he punched and kicked Kea during the initial assault but denied involvement after that. David tended to corroborate defendant's claim, saying that when the others attacked Kea for the second time, defendant stood near the gate and warned against getting involved. Steve tended to corroborate David's testimony about where defendant was standing and what he said, but he *thought* he saw defendant kick Kea.

Kea's injuries could have been caused by being punched, kicked, and/or beaten with a stick. Thus, the evidence of defendant's involvement was clearly enough to support an enhancement finding under the first alternative theory: Defendant participated in a group beating where it is impossible to determine which assailant inflicted a particular injury and where the defendant's use of force was of such a nature that by itself it could have caused the victim's great bodily injury.

However, the evidence also reasonably supported a finding under the second alternative. The record indicates that the second part of the assault was more intense and protracted than the first, which, according to Kea, lasted only 15 seconds. Moreover, the evidence was ambiguous concerning whether defendant participated in the second part. Under the circumstances, the jury could have concluded that regardless of whether defendant personally inflicted any injuries during the initial assault, he knew that his

friends, as part of the same incident, had punched and kicked Kea and would continue to do so and also beat him with a stick, and he further knew or reasonably should have known that the cumulative effect of all the unlawful physical force would cause GBI.

Indeed, the prosecutor argued both alternatives to the jury. In particular, he argued, "Now one of the things that's going to be said is that, Well, three people were attacking Mr. Kea. It says that the defendant is personally responsible for inflicting great bodily injury. Well, if three people are attacking him, how are we going to know who's personally responsible? Again, the law takes care of that for you. Because the issue is whether or not the application of force—and this is a little shortened instruction so I could fit it on the paper—but you're going to make the determination as to whether or not the application of force by the defendant—the kicking, the punching, the hitting—since we can't determine which blow caused Mr. Kea to suffer this lasting physical injury, could any of those blows by [defendant] have caused the suffering that Mr. Kea is still feeling. *Or better yet,* the defendant knew that others were applying or would apply unlawful physical force, and the defendant knew, or reasonably should have known, that the cumulative affect [*sic*] of all the force would result in great bodily injury. It says 'GBI,' but it's great bodily injury." (Italics added.) The prosecutor's comment "or better yet" suggests that it would be simpler to find the allegation true under the second alternative.

Under the circumstances, we cannot conclude beyond a reasonable doubt that the enhancement finding was not based on the legally incorrect second alternative theory set forth in CALJIC No. 17.20. Consequently, the GBI enhancement cannot stand.

IV. Disposition

The judgment is reversed, and the matter is remanded for further proceedings, including, a retrial of the section 12022.7 enhancement allegation if the district attorney elects to retry it.

Wunderlich, J.

WE CONCUR:

Elia, Acting P.J.

Mihara, J.