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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES KWAME QUEWON,

Defendant and Appellant.

A126459

(San Francisco County
Super. Ct. No. SCN 208691)

I. INTRODUCTION

James Kwame Quewon appeals a judgment after jury trial on counts arising from his April 8, 2009, attack on a wheelchair-bound man, Milton Torres, who was waiting with his two children at a bus stop in front of San Francisco General Hospital. Quewon began by hitting and kicking Torres and, after briefly stopping when a man intervened, pushed Torres into 6:00 p.m. traffic on Potrero Avenue, where the wheelchair overturned and sent Torres to the pavement.

The jury found Quewon guilty of assault by means of force likely to cause great bodily injury (GBI) (Pen. Code, § 245, subd. (a)(1); count 2),¹ and child endangerment (§ 273a, subd. (b); counts 4 & 5), found him guilty of simple battery (§ 242) as a lesser to battery with serious bodily injury (§ 243, subd. (d); count 3), and failed to reach a verdict on a charge of inflicting unjustifiable pain, on a dependent adult, likely to cause GBI (§ 368, subd. (b)(1); count 1).

¹ All unspecified section references are to the Penal Code.

Sentenced to a midterm of three years for count 2, less credits, and with other terms stayed or run concurrently, Qewon claims (1) insufficient evidence of the count 2 force likely to cause GBI, and (2) a need to retrospectively grant him greater credits under an amendment to section 4019. We reject his first challenge but agree with his second. We affirm the judgment as modified to reflect further credits.

II. FACTUAL AND PROCEDURAL BACKGROUND

A shooting two years earlier had left Torres dependent on a wheelchair for mobility, unable to walk or stand. His right leg was amputated above the knee, and he could not move his left leg. He had been to the hospital that day for appointments for a prosthesis and with his physician, and had brought along his two children, 14-year-old Jennifer and 9-year-old Gustavo. As they all waited at a bus stop at Potrero Avenue and 22nd Street, Torres moved some distance away from the children to smoke a cigarette.

Torres did not know Qewon but saw him move toward his children. Jennifer saw him put out his arms and try to hug her. Torres asked Qewon what he was doing, told him to get away from his children, and directed the children to come over by him. Qewon said he was not touching or talking to them. Qewon had a bloody bandage wrapped around his right hand, seemed inebriated, and would later tell police he had drunk a fifth of gin and hurt his hand breaking a window.

The next thing Torres knew, Qewon landed a painful punch to his mouth with the unbandaged left hand. Torres got no help at first. Worried for his children's safety and seeing no bus coming, he stopped a taxi (after Jennifer stopped one that drove away) and directed the children into it. As the children watched from the taxi, there ensued a scuffle as Torres tried to get in after them but Qewon pulled his wheelchair back. Torres turned around and shoved a hand into Qewon's face, but Qewon grabbed the handles of the wheelchair and pushed him off the sidewalk, far out into the street. Torres's left leg hit the ground, tipping the chair and dumping him onto the pavement in front of traffic. Torres injured a hand in breaking his fall and struck his head on the pavement.

Meanwhile, Milton Brandon and girlfriend Komala Valli were across Potrero Avenue in a restaurant when Valli saw Qewon throw the first punch and alerted

Brandon, who saw the beating continue and went out to intervene as Valli had a waitress call 911. Brandon stepped between Torres and Qewon, just as Torres fell a first time from the chair, on the sidewalk. He told Qewon, “I can’t let you do that”—“beat a man, a crippled man in a wheelchair.” Qewon stood mute but stopped hitting Torres for the moment. Then when Brandon turned his back to talk to Valli, who had come across the street, Qewon grabbed the chair with both hands and pushed it out into the street and oncoming traffic. Brandon thought Torres deliberately put his leg out to stop the chair.

When he went down to the pavement, Torres hit the back of his head. He also dialed 911 on a cell phone, and Qewon saw him making the call. When Torres tried to sit back up, Qewon felled him with another hard punch to the mouth, this one splitting his lip and causing bleeding inside his mouth. Qewon stood on Torres’s foot to hold him in place, ground his own foot into Torres’s soft fabric shoes, and taunted him to get up and defend himself. Torres recalled that one of the impacts of his head hitting the pavement made him briefly lose consciousness.

Back in the taxi, the children tried to get the driver to call 911, but he refused and told them they had to get out if they were not going to pay the fare. Needless to say, they were emotionally traumatized by seeing their father attacked. Jennifer saw a man in a car stop, get out, and tell Qewon to stop, and Torres similarly testified that a driver in his early 60’s tried to stop Qewon but that Qewon may have landed a blow or two to him.

Landing immobilized in the street also posed the perils of traffic for Torres. Witness accounts of his position varied from one to three lanes into Potrero Avenue. Torres recalled it being “in the middle of the street”; “a lot of cars had to stop to not run me over”; “all the cars had to veer off to the side so they wouldn’t run me over.” The location was two or three blocks from the freeway. There were six to eight lanes, with “quite a bit of traffic.” Seeing that his children had left the taxi and were running around in the street, trying to help, Torres feared most that they would be hit by a car.

After one further intervener tried to stop the attack, Qewon relented, crossed and walked down the street, and got into the back seat of a car, evidently uninvited, until the driver ordered him out.

Motorist Roy Edgar ultimately effected Quewon's apprehension. He was passing the hospital in heavy southbound traffic on Potrero Avenue when he saw Quewon push Torres out into the street and beat him with his left hand. He made a U-turn to the scene, while dialing 911, and got out of his car just as Quewon started walking away south. He saw Quewon go down the east sidewalk, cross mid-block, and get into the passenger seat of a car driven by a Filipino man who looked shocked and frightened to have company. Edgar went up to the driver's window and advised him, in Tagalog/English, to turn off the engine and hand him the keys. The driver complied and, as Edgar figured, this ended Quewon's interest in the car. Quewon got out and walked south. Edgar followed, after giving the driver his keys back.

Almost immediately, Edgar saw a police car come to the intersection at 23rd Street, which as it happened was responding to the 911 calls. Edgar flagged the car down and pointed out Quewon to the officers, saying "that's him." The officers arrested Quewon, who still wore a bloody bandage, and conducted in-field identifications.

Torres testified about his injuries, some three months after the event, referring to photographic exhibits taken right afterward, apparently during his day-long stay in the hospital. The big toe of his foot, badly bruised and abraded from being crushed against the pavement, had healed and was "fine." His left hand, swollen and bruised from breaking his fall with it in the street, and the forearm beyond, which had been dislocated and placed in a brace for three weeks, were "fine"; the hand still hurt, "but . . . not much." The split lip and other injuries to his mouth had healed. His head injuries, one of which had had been very painful and caused brief loss of vision and consciousness, was "the only problem that I still have," for he continued to have headaches.

The defense rested without calling witnesses.

III. DISCUSSION

A. Force Likely to Cause Great Bodily Injury

"The test on appeal for determining if substantial evidence supports a conviction is whether ' "a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." ' [Citation.] In making this

determination, we “must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) Substantial evidence must exist as to each essential element of the offense. (*People v. Frye* (1998) 18 Cal.4th 894, 953.)

Section 245, subdivision (a)(1), requires an assault with “force likely to produce great bodily injury,” and Qewon argues that substantial evidence is lacking because: (1) evidence shows that Torres’s actual injuries were not severe; (2) the jury found him guilty of simple battery on count 3, acquitting him of the charged battery with serious bodily injury (SBI) (§ 243, subd. (d)); and (3) the jury could not reach a verdict on the count 1 charge of inflicting unnecessary pain (on a dependent adult) likely to cause GBI (§ 368, subd. (b)(1)).

These arguments are unpersuasive. Having reviewed the testimony and photographic exhibits, we are a bit perplexed at the jury’s apparent conclusion that the injuries did not actually amount to GBI. GBI was defined for them as “significant or substantial physical injury”—“an injury that is greater than minor or moderate harm.” (CALCRIM No. 875.) Torres suffered a split lip, cuts to his mouth, an injured hand and dislocated left forearm that required a brace, head injuries from striking the pavement, causing brief unconsciousness with residual headaches through the time of trial, bruises and abrasions (including the badly crushed toe). Nevertheless, this jury arguably felt, from their acquittal on the count 3 charge of battery with SBI (§ 243, subd. (d); *People v. Otterstein* (1987) 189 Cal.App.3d 1548, 1550 [SBI is the “essential equivalent” of GBI]), that the evidence did not rise to actual GBI.²

² We say arguably because, while SBI and GBI have been deemed essential equivalents (*People v. Otterstein, supra*, 189 Cal.App.3d at p. 1550), the jury here was given a definition of SBI that was arguably more rigorous than the one for GBI. “A ‘serious bodily injury’ means a serious impairment of physical condition. Such an injury may include but is not limited to loss of consciousness, concussion, protracted loss or impairment of function of any bodily member or organ, a wound requiring extensive suturing, and serious disfigurement.” (CALCRIM No. 925.)

Unlike count 3, however, the element for count 2 was force “*likely to produce great bodily injury*” (CALCRIM No. 875, italics added), not force that *did produce* GBI. (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1065-1066.) The jury was further instructed on this distinction (*ibid.*): “No one needs to actually have been injured by defendant’s act. But if someone was injured, you may consider that fact along with all the other evidence, in deciding whether the defendant committed an assault, and if so, what kind of assault it was.” This was a correct instruction. (*People v. Richardson* (1972) 23 Cal.App.3d 403, 410-411.)

Substantial evidence supports that element. It is satisfied even by considering *alone* Quewon’s act of pushing the wheelchair out into the traffic on Potrero Avenue. Testimony was that he used the handles to push the chair off the sidewalk and into the traffic lanes. Torres’s leg ultimately hit the ground and apparently made the chair turn sharply and tip over, dumping Torres into the traffic lanes where, according to Torres, there was “quite a bit of traffic” and “a lot of cars had to stop to not run me over.” Pushing a wheelchair-bound person into traffic like that easily qualifies as force *likely* to product GBI. It is sheer luck that Torres was not hurt worse.

The jury’s failure to convict on the count 1 offense is not necessarily inconsistent, for the instructions required that: (1) defendant willfully inflicted unjustifiable physical pain or mental suffering on Torres; (2) he inflicted suffering under circumstances or conditions likely to produce great bodily harm or death; (3) Torres was a dependent adult; and (4) defendant knew or reasonably should have known he was. We have no way of telling what element or elements of that offense troubled the jury, or why, and if some jurors applied some part of those instructions too leniently, Quewon cannot complain.

Substantial evidence supports force likely to produce GBI.

B. Conduct Credits

Defendant was sentenced on September 23, 2009, and granted 253 days presentence credit, comprised of 169 days actual time served plus 84 days of conduct credits under section 4019, which at that time allowed two days of conduct credit for every four days actually served. Section 4019 was amended on January 25, 2010, to

effectively allow four days of total credit for every two days actually served, and defendant asks that we give him the retrospective benefit of that change by modifying his total credits to 337 days (169 actual plus 168 conduct). The People do not dispute his calculation under the new formula but argue that the amendment does not apply retroactively.

This issue has spawned a split of authority in the Court of Appeal, and our Supreme Court has granted review in a lead case (*People v. Brown* (S181963) (*Brown*)), and granted review in a number of other cases, ordering them held pending its disposition in *Brown* (e.g., *People v. Rodriguez* (S181808); *People v. House* (S182813); *People v. Sonnier* (S183604)). One such case (*People v. Landon* (2010) 183 Cal.App.4th 1096, review granted June 23, 2010 (S182808)), is one where, as both parties recognize, our Division considered the same arguments they now present, and gave the amendment retrospective operation. We see no point in reiterating or departing from that position and, accordingly, grant Quewon the relief he seeks pending ultimate resolution in *Brown*.

IV. DISPOSITION

The judgment is affirmed as modified to reflect 337 total days of presentence credits (169 actual plus 168 conduct). The trial court is directed to prepare an amended abstract of judgment (§§ 1213, 1213.5) and forward it to the Department of Corrections and Rehabilitation.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.