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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

NHAN VINH CHI,

Defendant and Appellant.

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H024508

(Santa Clara County Superior Court No. CC116539)

Defendant was convicted by jury trial of aggravated assault (Pen. Code, § 245, subd. (a)(1)), and the jury found true allegations that he had personally used a dangerous or deadly weapon (Pen. Code, §§ 667, 1192.7, subd. (c)(23)) and personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a)) on the victim of the assault. The jury also found true an allegation that defendant had committed the assault while out of custody on bail (Pen. Code, § 12022.1). On appeal, defendant claims that the trial court prejudicially erred in denying his motion to suppress his statements to the police. He also asserts that the court's instruction of the jury with the "group beating" portion of CALJIC 17.20 was prejudicial error. We conclude that the court did not err in denying the suppression motion, but we find that the instruction of the jury with the group beating portion of CALJIC 17.20 was prejudicial error.

Consequently, we reverse and remand for possible retrial of the enhancement allegation.

I. The Prosecution's Case At Trial

On May 11, 2001, Kien To and a group of his friends went to the Thien Thanh Café.[1] To's friends Hoang and Vu saw defendant with another male and a female at another table.[2] Hoang believed that defendant and/or the other male had previously assaulted him, and he threw a glass of coffee at their table. After the incident, a friend told To that defendant's name was "Nhan."

On the evening of June 22, 2001, To, his girlfriend and his friend Tin Nguyen went the Quynh Lam Café. The inside of the Quynh Lam Café was "pretty dark" and "dimly lit" but not so dim that a person could not recognize another person from 15 feet away. As To pulled out a chair to sit down at a table, he saw defendant, who was about 15 feet away, stand up and throw a glass of coffee at him. The glass hit To in the forehead. To noticed that defendant was with several other people including Tuan. Defendant's companions also threw glasses toward To's table, but none of these glasses hit To. To left the café, and the police were summoned.

When the police arrived, they found To with a bloody face and a hysterical Nguyen who "kept yelling, 'They attacked us, they attacked us, they attacked us.'" To, who did not speak English well, told the police that he had been hit by a glass, but he was "uncooperative" and told them he did not know any of the people who had thrown the cups at him. To also said he had never seen his attackers before and would not recognize them if he saw them again. To suffered "deep cuts" to his head, including one on his forehead, "kind of in the shape of a cup," that required 23

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[1] To was 17 years old at the time of trial, 8 months after the incident.
[2] Defendant was 23 years old at the time of the incident.

stitches. To also had a black eye, bruising and some other small cuts. Medical personnel reported that the wounds appeared to have been caused by a glass bottle.

On June 27, To told the police that the person who had hit him with a cup was named "Nhan." On July 2, To identified defendant in a photo lineup as the person who had hit him with a glass. Defendant was arrested on July 17 and interviewed by San Jose police officers Shawny Williams and Jason Ta. Most of the interview was conducted in English, but some of it was conducted in Vietnamese. Defendant told Williams and Ta that he had been at the Thien Thanh Café on May 11, and To had been with some people who assaulted defendant. Defendant was injured by a cup thrown by To's companions. Defendant also told Williams and Ta that he wanted to "take revenge" for that incident if he saw those individuals again. Ta falsely told defendant that the police had a videotape of the June 22 incident. Defendant admitted that he had been at the Quynh Lam Café on June 22 with his friends Meo and Tuan, and he told them that he had thrown five or six cups during that incident after his friends said that To and his male companion "are the guys." Defendant repeatedly insisted that he had not thrown the first cup.

II. Procedural Background

Defendant was charged by information with aggravated assault (Pen. Code, § 245, subd. (a)(1)), and it was further alleged that he had personally used a dangerous or deadly weapon (Pen. Code, §§ 667, 1192.7, subd. (c)(23)) and personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a)) on To. The information also alleged that defendant had committed the assault while out of custody on bail (Pen. Code, § 12022.1).

Defendant made an in limine motion to suppress the statements he made to the police during the July 17 interview on the grounds that the statements were involuntary and he had not waived his constitutional rights. After an Evidence Code

section 402 hearing, the court denied the motion. It expressly found that defendant had been properly advised of his rights and had acknowledged them before being interrogated. The jury found defendant guilty and found the allegations true. Defendant was committed to state prison for a term of six years, composed of the three-year midterm for the aggravated assault count and a three-year term for the personal infliction of great bodily injury enhancement. He filed a timely notice of appeal.

III. Discussion

A. Admission of Statements

Defendant claims that the trial court prejudicially erred in admitting his statements during the July 17 interview because he had not validly waived his *Miranda*[3] rights.

1. Background

At the hearing on defendant's motion to suppress the statements, Williams testified that the July 17 interview took place after defendant's arrest for a probation violation. Williams asserted that defendant never had any difficulty understanding what Williams was asking him in English and had no difficulty communicating with Williams in English. Williams did not understand Vietnamese, but Ta spoke Vietnamese.

An audiotape and transcript of the July 17 interview was introduced at the hearing. The transcript reflects that the interview began with Williams advising defendant of his constitutional rights. Williams first told defendant "what I wanna talk to you about involves that, that coffee shop." Defendant said "Yeah." Williams said: "Okay? But let me explain your rights to you before I ask you about it. You have the

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

right to remain silent, do you understand? You speak English, right?" Defendant replied "Not very much, but . . . ." Williams then said "Do you understand what I'm saying though?" Defendant said "Yeah."[4] Williams said: "Okay. Anything you say can and will be used against you in a court of law. Do you understand? You have the right to talk to a lawyer and have one present with you while you're being questioned. Do you understand?" Defendant said "Yeah." Williams said: "If you can't afford to hire a lawyer, one will be appointed to represent you at no expense. Do you understand?" Defendant said "Yeah." Williams said "Do, okay, do you understand each of those rights? Okay, you, that's a yes? You're nodding your head." Defendant said "Yeah." Williams said: "Okay. I know that you're a victim, okay?" and then questioned defendant extensively about the May 11 incident. Defendant responded to all of Williams's questions and told Williams that he and a female friend had been struck and injured by cups or bottles during the May 11 incident. During this interchange, defendant responded appropriately to Williams's questions in English. Ta also spoke to defendant in Vietnamese about the May 11 incident.

Eventually, Williams and Ta asked defendant about the June 22 incident. Much of this interchange was between Ta and defendant in Vietnamese. Defendant told the officers that there had been a fight and "cups were thrown." Ta told defendant, in English, "I need you to be honest about the fight, right? Who was involved in the fight? I already know who was in the fight. You know why because there's a camera." Defendant responded "Yeah." Ta said: "It's all on tape. Everything's on tape." Defendant responded, in Vietnamese, "I know." Ta then said "But on the tape you see who throws the first cup. You see where the cup come from and you see there's four cups thrown." Defendant fairly swiftly admitted that he had thrown five or six cups, but he repeatedly insisted that he had not thrown the first cup. He claimed

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[4] At trial, defendant was provided with a Vietnamese interpreter.

that someone behind him, possibly one of his friends, had thrown the first cup. Defendant maintained that the subjects of the assault had thrown cups back at him and his friends. Defendant admitted that he had wanted revenge against To for the earlier incident.

At the conclusion of the hearing, defendant's trial counsel asked the court to exclude the statements "because my client was not given proper Miranda warnings and we have some other problem as well." The court excluded the tape and transcript of the interview, but it allowed the prosecution to adduce testimony regarding defendant's admissions during the interview. The court expressly found that defendant had been properly advised of his rights and had acknowledged them. Williams and Ta testified at trial about defendant's admissions during the interview.

2. Analysis

A waiver may be express or implied, and the prosecution bears the burden of proving, by a preponderance of the evidence, that a knowing and voluntary waiver occurred. (*People v. Cortes* (1999) 71 Cal.App.4th 62, 69; *People v. Whitson* (1998) 17 Cal.4th 229, 250.) "In determining whether a defendant waived his rights, the court must consider the 'totality of the circumstances surrounding the interrogation.'" (*Cortes* at p. 69.) "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Cortes* at pp. 69-70, citation and quotation marks omitted.) "On appeal, we accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence." (*Cortes* at p. 70.) "Once the

defendant has been informed of his rights, and indicates that he understands those rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them." (*People v. Johnson* (1969) 70 Cal.2d 541, 558.)

Defendant claims on appeal that the prosecution failed to prove that he was aware of the nature of his rights and the consequences of waiving them. He points to his statement that he did not understand "very much" English, Ta's false statement that he had a videotape of the June 22 incident and the fact that the advisements occurred at the beginning of a lengthy interview that was at first concerned solely with an incident in which defendant was an alleged victim. Defendant's implied waiver of his rights, evidenced by his willingness to answer questions about both incidents, occurred prior to Ta's false claim, so Ta's deception could not have influenced defendant's decision to waive his rights. While defendant stated at the outset of the interview that he did not know "very much" English, the transcript of the interview unambiguously displays defendant's ability to understand and communicate in English. Although it is true that the discussion of the June 22 incident did not occur until after a lengthy discussion of the May 11 incident, the record supports the trial court's finding that defendant, who had earlier acknowledged his understanding of his rights, remained aware of those rights and nevertheless chose to speak with the officers about the June 22 incident. We conclude that the totality of the circumstances indicates that defendant understood the nature of his rights and the consequences of waiving them when he made the statements to Williams and Ta that were admitted at trial. The trial court did not err in admitting this evidence.

B. "Group Beating" Instruction

Defendant contends that the trial court prejudicially erred in instructing the jury with the "group beating" portion of CALJIC 17.20 as to the personal infliction of great bodily injury allegation.

1. Background

The prosecutor told the jury during his opening argument that "guess what, to find this guy guilty of 245 with personal use of a cup, you don't have to have him hitting him in the face. He has to be one of the individuals throwing the cup." "Every one of those persons has committed an assault with a deadly weapon. Anybody who threw a cup at Mr. To, whether they hit him or not . . . ." The prosecutor also argued that it was not necessary for there to be proof that defendant hit To with a glass to permit the jury to find true the personal infliction of GBI allegation.

"Here's the great thing about great bodily injury, because we get a lot of cases like this, as you can imagine, where there are a lot of assailants assaulting one person or two persons, and it's very confusing sometimes. Not so much in this case because we have eyewitness testimony that this is [the] individual that threw the cup. [¶] But we have an *exception of law* that the Judge is going to instruct you on, and that's in the case of group beating situations when people assail people in groups like we have in this case. . . . [¶] This is what it breaks down to. This is verbatim what the instruction says, an instruction that you all have a duty to follow at this point of the trial." (Emphasis added.)

"'When a person participates in a group beating and it is not possible to determine which assailant inflicted a particular injury, the defendant may be found to have personally inflicted upon the victim if' -- now there are two exceptions here because it's an 'or.' It's either this or that." "'The application of physical force upon the victim was of such nature that by itself it could have caused the great bodily injury suffered by the victim.' [¶] What does that mean? Well, if you feel that by throwing

five or six cups at Mr. To he could have caused great bodily injury, could have caused great bodily injury, you can hold him responsible for the fact that he got great bodily injury. [¶] Also, again, this is separate. So I think we've established that by throwing five or six cups you can definitely create GBI on a person like we have in this case."

"The other one is 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 on 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. [¶] What does that mean? Well, at the time the defendant threw the five or six cups at the victim, the defendant knew that the guys he was with were also attacking him. There they are right. This is the way they work. They get them outnumbered and they attack him, just like at the 5-11 episode. [¶] Did he reasonably know that the other people were going to do the same thing? Of course he did. I think the evidence was that somebody said, 'There they are,' based on a statement to Shawny Williams and Jason Ta. And of course he knew they were going to throw cups too or whatever else, break chairs up, throw objects, and the bottom line is whether the cumulative effect of that assault was going to cause GBI, could you find him liable. [¶] I'm not telling you you need to rely on this instruction because I think the evidence is pretty clear. . . . [¶] . . . You don't even need to get to this. [¶] But the defense is going to get up and argue, [w]e don't know for a fact or there may be question in your minds or there may be reasonable doubt that he's actually the one that threw the cup. Well, I don't think there is reasonable doubt. The evidence is pretty clear. The defendant's statement parallels. And *the bottom line is you can fall back in this position, use this jury instruction*, and find him guilty and liable for the fact of the group beating, everyone is throwing cups at him." (Emphasis added.)

At the end of his opening argument, the prosecutor repeated that the jury could either find that defendant "hit him in the face with the cup . . . [o]r he was part of the group under the group instruction . . . . Either way, he's still liable for the great bodily injury."

The prosecutor returned to this issue in his closing argument. "Again, do we have to show that to find him guilty of the great bodily injury under the 245 theory? No. Because, like I talked about earlier, here's the law. Group beatings. The defense attorney is saying we don't know who hit him in the face. My client threw five or six cups, but we don't know who hit him in the face. Great. Let's accept that. . . . [¶] Where it's not possible to determine who inflicted a particular injury, you can still find GBI if . . . the application of unlawful physical force upon the victim was of such nature that by itself it could have caused great bodily injury suffered by the victim. [¶] Five, six cups. Any one of those hit him in the face? Does it matter whether one of them did? No. Because any one of them by themselves could have caused great bodily injury, he's liable for great bodily injury under the group beating instruction. [¶] 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. *And that's the second theory you can fall back on*. Do we have the first? Of course we do. We have this one? Yeah, we do too, because they're going over to get this guy." At the end of his closing argument, the prosecutor reiterated his position. "He did it personally, he did it himself. [¶] And I don't believe you're going to need to rely on the group beating instruction, but it's there for you if you need it. He's liable either way. He's guilty either way." (Emphasis added.)

The jury was thereafter instructed with CALJIC 17.20 including the "group beating" section of the instruction. "It is alleged in Count 1 that in the commission or attempted commission of the crime therein described the defendant personally inflicted great bodily injury on Kien To, not an accomplice to the crime. If you find defendant guilty of that crime, you must determine whether the defendant personally inflicted great bodily injury on Kien To, not an accomplice to the crime, in the commission or attempted commission of that crime. [¶] 'Great bodily injury' as used in this instruction means a significant or substantial physical injury. Minor, trivial, or moderate injuries do not constitute great bodily injury. [¶] 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. 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 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. [¶] The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true."

CALJIC 17.20 was on page 15 of the jury's written instructions. The jury deliberated for one hour at the end of the day on February 19. After another hour of deliberations on the morning of February 20, the jury submitted a note reading: "Members of the jury are unclear with the 2nd part of pg 15. Can we get the definition on Penal Code sections 12022.7(a) and 1203(e)(3)." The court gave the following response. "The second part of the instruction on page 15 says: 'If you find defendant guilty of that crime, you must determine whether defendant personally inflicted great

bodily injury on Kien To, not an accomplice to the crime, in the commission or attempted commission of that crime.' [¶] Sections 12022.7(a) and 1203(e)(3) are penal provisions, and you are reminded that you're not to be concerned with penalty. You're limited to the factual determination of whether or not the defendant personally inflicted great bodily injury on Kien To. [¶] Does that satisfy the requirement then?" The jury foreman responded affirmatively but then asked "[s]o the jury instruction is only on page 15. There is nothing else that we need to say?" The court responded: "The jury instruction simply asks you to determine whether or not the defendant is guilty of the crime and whether the defendant personally inflicted on Kien To. That is your factual determination. If you find that factual determination, then what follows from that is not your concern." The jury foreperson said "Okay," and the jury returned to its deliberations. After an additional half hour of deliberations, the jury returned with a guilty verdict and true findings on all of the allegations.

2. Analysis

Defendant claims that there is no authority for the "second prong" of the "group beating" portion of CALJIC 17.20, and this portion of the instruction violated his right to due process.

The personal infliction of great bodily injury (GBI) allegation at issue here was alleged as an enhancement allegation under Penal Code section 12022.7, which specifies that a three-year sentence enhancement is applicable where a person "personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony." (Pen. Code, § 12022.7, subd. (a).)

The "personally inflicts" language in Penal Code section 12022.7 was construed by the California Supreme Court in 1982 in *People v. Cole* (1982) 31 Cal.3d 568. During a burglary and robbery, Cole ordered his accomplice to kill the victim. Cole did not strike the victim, but he pointed an unloaded rifle at the victim and blocked the victim's escape while his accomplice repeatedly struck the victim. (*Cole*

at p. 571.) Cole challenged the enhancement of his sentence under Penal Code section 12022.7. (*Cole* at p. 572.) The California Supreme Court found the "personally inflicts" statutory language clear and unambiguous. (*Cole* at p. 572.) "No other expression could have more clearly and concisely expressed what we interpret to be the plain meaning of the Legislature: that the individual accused of inflicting great bodily injury must be *the person who directly acted to cause the injury*. The choice of the word 'personally' necessarily excludes those who may have aided or abetted the actor directly inflicting the injury." (*Cole* at p. 572, emphasis added.) The court also concluded that this interpretation was consistent with the statute's aim of "deter[ring] the infliction of great bodily injury." (*Cole* at p. 572.) "A construction limiting its scope to *the person who himself inflicts the injury* serves that purpose; each member of a criminal undertaking will know that, regardless of the urgings of his confederates, if he actually inflicts the injury he alone will pay the increased penalty." (*Cole* at pp. 572-573, emphasis added.)

Cole noted that *People v. Collins* (1975) 44 Cal.App.3d 617 and *People v. Mills* (1977) 73 Cal.App.3d 539 were no longer good law because they were based on predecessors to Penal Code section 12022.7 that did not contain the word "personally." In *Collins*, a bank robbery was committed by four masked men who were indistinguishable to the witnesses. One of the four robbers shot a bank employee, and the robbers also struck several persons with their pistols and a shotgun. Defendant, one of the robbers, challenged the enhanced sentence imposed on him for intentionally inflicting great bodily injury. The *Collins* court reasoned that "[s]eldom will a victim be able to identify which of several masked robbers inflicted physical injury. A rigid statutory demand for proof of personal assaultive action would permit each defendant to use the other as a foil. The augmented penalty would be frustrated by impossibility of proof." (*Collins* at p. 623.) It held that the statute in question did not require that the defendant "personally inflict" the injury. (*Collins* at p. 623.) In *People v. Mills,*

supra, 73 Cal.App.3d 539, the defendant and an accomplice attacked the victim and, at defendant's urging, his accomplice slashed the victim's throat. Defendant's sentence was enhanced for his infliction of great bodily injury. It was upheld under the authority of *Collins*. (*Mills* at pp. 541-544.)

Cole explicitly rejected the rationale of *Collins* and *Mills*. "Because [the statute now] contain[s] the requirement that the defendant act 'personally,' the rationale of *Collins* and *Mills* can no longer support the proposition that an aider and abettor who does not personally inflict the great bodily injury can be held liable for the enhanced penalty. Indeed, the legislative changes express an intent to reject enhancement liability even in cases where the defendant directs the attack, or otherwise manifests the specific intent to cause the injury." (*Cole* at pp. 578-579.) "[I]n enacting section 12022.7, the Legislature intended the designation 'personally' to limit the category of persons subject to the enhancement to those who *directly perform the act that causes the physical injury to the victim*. The language of the statute is clear and unambiguous, our reading neither frustrates its purpose nor does it lead to absurd results." (*Cole* at p. 579, emphasis added.)

In 1989, the Fourth District Court of Appeal, in *People v. Corona* (1989) 213 Cal.App.3d 589, rejected a challenge to the sufficiency of the evidence to support the enhancement of Corona's sentence under Penal Code section 12022.7. Corona and two or three other men had attacked the victim. The victim "was hit, fell to the ground and was hit and kicked repeatedly." Corona was seen kicking the victim and throwing unopened beer cans at him during the attack. The victim suffered numerous injuries, primarily to his head, including cuts, bruises and a severely swollen jaw. (*Corona* at pp. 591-592.) Corona testified that he had not been involved in the attack at all. (*Corona* at p. 592.) He was convicted of assaulting the victim, and a Penal Code section 12022.7 allegation was found true. (*Corona* at p. 593.)

The Fourth District acknowledged *Cole* but posited that *Cole* did not apply to a "group pummelling." (*Corona* at p. 594.) "While *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." (*Corona* at pp. 594-595, emphasis added.)

"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."[5] (*Corona* at pp. 594-595.)

A decade after *Corona*, a new version of CALJIC 17.20 was devised that purported to incorporate *Corona*'s holding into a jury instruction for use when there is an allegation that a defendant personally inflicted GBI. The issue before us is whether the new language added to CALJIC 17.20 is consistent with the statutory element limiting the scope of such an allegation to a defendant who "personally inflicts" great bodily injury. We are necessarily bound by *Cole*'s interpretation of the "personally inflicts" language in Penal Code section 12022.7. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The California Supreme Court held in *Cole* that the words "personally inflicts" are clear and unambiguous and apply only to "*the person who himself inflicts the injury*." (*Cole* at p. 572.) The Fourth District reasoned in *Corona* 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."

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[5] *Corona* was followed with the following analysis by the Second District in *In re Sergio R.* (1991) 228 Cal.App.3d 588. "We hold that where, as here, more than one assailant discharges a firearm into a group of people and '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.' (*People v. Corona* (1989) 213 Cal.App.3d 589, 594.) It is beyond dispute that the discharge of a loaded 12-gauge shotgun by Sergio into a crowd of people was the type of conduct which could have caused the great bodily injury and death here which resulted from shotgun pellets." (*Sergio* at pp. 601-602.)

Assuming arguendo that the Fourth District's holding in *Corona* does not violate *Cole*, it does not resolve the issue before us in this case. In *Corona*, the jury had not been given any special instructions on the enhancement allegation that permitted it to return a true finding on any basis other than a conclusion beyond a reasonable doubt that Corona had *personally inflicted* great bodily injury on the victim. The evidence demonstrated that Corona kicked the prone victim and threw full beer cans at him. The victim suffered injuries that were wholly consistent with Corona's blows. Although there was at least one other participant in the beating, a rational jury could have concluded beyond a reasonable doubt that Corona had *personally inflicted* great bodily injury on the victim by his kicks and thrown cans.

Here, on the other hand, the question is whether a *jury instruction* that provided *two additional alternative bases* for a true finding by the jury on the personal infliction of great bodily injury allegation erroneously obviated the need for the jury to find beyond a reasonable doubt that defendant *personally inflicted* great bodily injury on To. The jury in *Corona* did not receive any instruction of this type. We proceed then to consider whether the instruction is consistent with the statutory requirements.

The challenged portion of the instruction given by the trial court told the jury that it could find the allegation that defendant had personally inflicted great bodily injury true 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 physical force upon the victim was of such nature that by itself it could have caused the great bodily injury suffered by the victim" *or* (2) "at the time that 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 on 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."

The first alternative basis for finding the allegation true tracks language in *Corona*. The second alternative basis does not find any basis in the holding of *Corona* and is not facially consistent with the statutory language of Penal Code section 12022.7 requiring a finding that the defendant *personally inflicted* great bodily injury. Neither Penal Code section 12022.7 nor any other section of the Penal Code applicable to great bodily injury allegations permits a knowledge finding to obviate the need for a finding that defendant "himself inflict[ed] the injury." (*Cole* 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*." (*Cole* at p. 579.)

We encounter no difficulty in concluding that the second alternative basis in CALJIC 17.20 is erroneous to the extent that it permits the jury to substitute a knowledge finding for a finding that the defendant "directly perform[ed] the act that cause[d] the physical injury to the victim" as required by the plain and unambiguous language of the statute as construed by the California Supreme Court in *Cole*. (*Cole* at p. 579.) 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.) "In 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.) The authors of CALJIC instructions lack the authority of the Legislature or the California Supreme Court.

There may well be good policy reasons for legislative action to enlarge the scope of the statute so that it extends to a person who cannot be proven to have

personally inflicted great bodily injury but who knowingly joined in a group beating that he or she knew would result in great bodily injury. Nevertheless, we lack the power to diverge from clear and unambiguous language used by the Legislature in the statute and construed by the California Supreme Court in *Cole* in order to achieve a policy objective that might otherwise be quite appropriate and warranted.

We are mindful of the fact that the Fourth District has recently upheld the validity of this instruction in *People v. Banuelos* (2003) 106 Cal.App.4th 1332. However, *Banuelos* fails to address the portion of the instruction with which we find fault, but instead relies solely on the validity of *Corona*. (*Banuelos* at pp. 1337-1338.) As we have explained, the instruction is invalid even if *Corona* is correct because the second alternative basis in the instruction finds no support in either the statute or *Corona*. Therefore, we must respectfully disagree with *Banuelos* to the extent that it upholds a version of CALJIC 17.20 that includes the second alternative basis that we find invalid.

We next consider whether the court prejudicially erred in giving this faulty instruction. "In deciding whether an instruction is erroneous, 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 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; accord *People v. Kelly* (1992) 1 Cal.4th 495, 525-526.)

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 by providing a legally erroneous alternative basis (the second alternative basis) for a true finding. A reasonable juror would have readily understood from the court's

instruction that it was not necessary to a true finding that the defendant personally inflicted the injury if the jury utilized the second alternative basis in CALJIC 17.20 By eliminating the need for a jury finding on the statutorily required elements of the allegation, the instruction misstated the law and therefore was erroneous.

When a 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 of review applicable to this inquiry 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.' Such error is reversible under *Chapman*, 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, citations omitted.) The *Chapman*[6] 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.) Unless we are persuaded beyond a reasonable doubt that the jury's true finding on the personal infliction of GBI allegation was not premised on the erroneous second alternative basis in CALJIC 17.20, we must reverse the jury's finding.

"In determining whether there was prejudice, the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict." (*Guiton* at p. 1130.) Here, the prosecutor repeatedly invited the jury during his opening and closing arguments to "fall back" on the invalid second alternative basis. His opening argument reiterated the instruction on the invalid basis and exhorted the jury to "use"

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[6] *Chapman v. California* (1967) 386 U.S. 18.

that portion of the instruction. "[T]here may be question in your minds or there may be reasonable doubt that he's actually the one that threw the cup. . . . And the bottom line is you can fall back in this position, *use this jury instruction*, and find him guilty and liable for the fact of the group beating, everyone is throwing cups at him." (Emphasis added.) The prosecutor covered much of the same ground again in his closing argument.

Nothing in the trial court's instructions or the jury's inquiry suggested that the jury was ***not*** relying on the invalid second alternative basis. The trial court's instructions expressly permitted the jury to rely on the invalid second alternative basis, and the jury's inquiry specifically identifying CALJIC 17.20 as a concern did nothing to rebut the possibility that the jury was relying on the second alternative basis.

The evidence produced at trial did not discount a reasonable possibility that the jury had rejected the primary and first alternative bases and yet accepted the invalid second alternative basis. Defendant repeatedly insisted that he had not thrown the first cup but admitted that he had thrown several other cups after the first cup. It was undisputed that To's injury was suffered when he was struck by the first cup. The jury could have reasonably credited defendant's denial that he had thrown the *first cup* or at least entertained a reasonable doubt about its truth thereby rejecting the primary basis for a true finding on the allegation. And the jury could also have reasonably rejected the first alternative basis on the ground that, because To's injury had already occurred *before* defendant threw any cups and To testified that he immediately left the café, there was at least a reasonable doubt as to whether defendant's cup throwing was of "such a nature that by itself it could have caused" To's injury. On the other hand, the jury could have rationally concluded that the allegation was true under the second alternative basis, as set forth in the court's faulty instruction and as argued by the prosecutor, because defendant's cup throwing, *after To's injury by the first cup*, had

been done with knowledge that someone else had already thrown a cup at To and that this cup had already caused To great bodily injury.

On the record before us, we cannot conclude that the trial court's instructional error was harmless beyond a reasonable doubt. Consequently, we must reverse the judgment and remand for possible retrial of the personal infliction of GBI allegation.

IV. Disposition

The judgment is reversed and remanded for possible retrial of the personal infliction of great bodily injury allegation. If the prosecution chooses not to retry the allegation, defendant shall be resentenced.

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Mihara, J.

WE CONCUR:

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Elia, Acting P.J.

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Wunderlich, J.