Filed 9/24/03

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SHEA MICHAEL MODIRI,

Defendant and Appellant.

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H023584

(Santa Clara County Superior Court No. CC079647)

Defendant was convicted by jury trial of aggravated assault (Pen. Code, § 245, subd. (a)(1)) and simple battery (Pen. Code, § 242). The jury also found that defendant had personally inflicted great bodily injury (Pen. Code, §§ 667, 1192.7, subd. (c)(8)) and personally used a dangerous and deadly weapon (Pen. Code, §§ 667, 1192.7, subd. (c)(23)) in the commission of the assault. He was granted probation conditioned on serving nine months in jail. On appeal, defendant asserts that the personal infliction of great bodily injury (GBI) finding cannot be upheld because the trial court's instruction on that allegation did not require the jury to find that defendant *personally inflicted* that injury.[1] We conclude that the trial court's instruction erroneously described the "personally inflicts" element of the personal infliction of

[1] In an accompanying petition for a writ of habeas corpus, defendant asserts that his trial counsel was prejudicially deficient. We dispose of his petition by separate order.

GBI allegation and that the error was prejudicial. Therefore, we reverse the judgment and remand for retrial of that allegation alone.

I. Background

On the evening of July 22, 2000, defendant's longtime friend 18-year-old Matthew Brendon Bour had a party at his home. About 100 people attended the party. Bour had obtained a keg of beer that was placed in the backyard, and other attendees also brought alcohol. Defendant lived on the same street as Bour just ten houses down from Bour. Because Bour's parties had a tendency to "get out of hand," Bour's father, who was away for the weekend, had asked that defendant keep an eye on the house.

Defendant and Bour were acquainted with, but not friends with, 18-year-old Ryan Schon. Defendant and Schon had played sports with and against each other in junior high school. They had not seen each other since junior high school. Schon and Schon's friends had a history of intimidating and threatening Bour both in person and by means of telephone calls. Six-foot, two-inch tall Schon was very athletic and weighed over 200 pounds.[2] Both defendant and Bour were a bit shorter, and neither of them weighed over 160 pounds.

Schon arrived at Bour's party with Schon's girlfriend Amy Jorgenson and two male friends. They walked into Bour's front yard where Bour was standing. Bour was highly intoxicated from both alcohol and marijuana to the point that he was incoherent. When Bour saw Schon, he asked Amber Oxley "if that was Ryan Schon." Oxley replied "yes." Oxley heard Bour tell a few people "hey, that is Ryan Schon" and then

[2] It was unclear from Schon's testimony if Schon might have weighed less in July 2000 or if he weighed less at the time of trial. He testified at trial, in response to a question as to whether he weighed 210 pounds, "Yes, at that time. I am about 180. I lost about 20 pounds over the course of the month."

"they start to take off their jewelry."[3] Bour said to defendant "Ryan is here, why."[4] Oxley thought that Bour and his companions were "getting ready to fight." On his way through the yard, Schon heard Oxley say "does Ryan kn[o]w he shouldn't be here . . . ." Schon ignored Oxley and walked up to Bour and greeted him. Bour shook Schon's hand in a friendly manner and appeared to welcome Schon to the party. Schon and Bour did not show any signs of animosity to each other.[5] Jorgenson proceeded to walk into Bour's house.

Schon "only took two steps" past Bour before he encountered Darren Hitt. Hitt said "who is Ryan Schon." Schon said "that is me." Hitt told Schon "[y]ou are not wanted here." Schon told Hitt that Bour "said we could go in." Hitt said to Schon "you shouldn't be here," "someone here doesn't like you." Schon responded "I don't know anybody here. What are you talking about." At this point, defendant intervened in an aggressive manner and said "you know me." Schon did not recognize defendant and said so. Defendant insisted that Schon knew him. Defendant repeatedly told Schon to leave and then he "bumped" Schon with his chest. The other people standing in the immediate vicinity of Schon and defendant were also telling Schon to leave. Schon perceived that defendant was trying to provoke him and start a fight. Schon was not intimidated by defendant, but he was "scared" because his friends had gone inside, and there were "30 guys around telling me they are going to beat the crap out of me."[6] Defendant pushed Schon several times. Schon said "[y]ou are pretty tough here

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[3] The "jewelry" was apparently "bracelets."
[4] Defendant testified that Bour said "Dude, Ryan Schon is here."
[5] Bour could not remember the rest of the evening due to his intoxication.
[6] All of the other witnesses quantified the number of people as around ten.

with all your buddies around."[7] He also said to defendant "I am not going to fight all your friends."[8]

After defendant and others had repeatedly told him to leave, Schon said "fine, I am leaving" and "somebody get my ride." He looked around for Jorgensen (his "ride") and said "somebody go get her." Then he began walking back toward Jorgenson's car, and Jorgenson came with him. Defendant followed Schon "pushing [Schon] and pulling, let's go, come on, let's fight . . . ." Schon pushed defendant away. Defendant, who had nothing in his hands, responded by punching Schon in the left side of his face or jaw. Schon faced defendant, moved toward him and tried to grab and hit him and throw him to the ground, but Schon was immediately "tackled" from behind "by a big mob of people." The "mob" came from behind Schon, and someone "just tackled me or something." Schon could not tell how many people were in the "mob" or discern their identities. Schon did not see defendant during the melee after Schon was tackled. When Schon tried to get up from the ground, he was hit from behind over the back of the head with a bottle. Several more times he tried to get up and was hit again. Schon perceived at least three blows to his head.

Jorgenson saw defendant punch Schon. When Schon turned to defend himself, Schon was engulfed by "a swarm of guys" "behind" defendant. Jorgenson, who was about ten feet away, watched as defendant "just ran on him and jumped on [Schon]." She "heard bottles being broken." She saw someone hit Schon with a bottle, but she did not see defendant hit Schon with a bottle. Jorgenson testified that defendant "was in the group of guys that were hitting, kicking [Schon]." She screamed and "confronted" defendant. Defendant "turned around," and she pushed him off of

[7] Defendant testified that Schon said "why are you acting all bad in front of your friends."

[8] Defendant testified that Schon also said "but I will fight you."

Schon. Jorgenson felt a bottle in defendant's hand when she separated him from Schon.

The entire altercation had taken no more than ten to fifteen seconds.[9] Schon got up, and he and Jorgenson began walking away. Schon heard someone say "let's get him again." Jorgenson looked back and saw defendant, who was about 15 feet away, throw a bottle at them. The bottle "hit behind our feet" about five feet away from them.

The police arrived within a couple of minutes, and many of the party-goers ran away. Defendant remained at Bour's house and spoke to the police. Several partygoers had blood on their clothing. One of them was Michael Scharland. Schon's blood was found on Scharland's shoes and shirts. Schon's blood was found on defendant's shoes, socks and pants. Schon's blood was also found on Hitt's shoes. Hitt told the police that he "never got near the fight." Schon went to the hospital. The wounds on the side and top of his head required a total of ten staples to close, and he had a broken nose that required surgery.

Defendant was charged by information with battery with serious bodily injury (Pen. Code, §§ 242, 243, subd. (d)) and aggravated assault (Pen. Code, § 245, subd. (a)(1)). It was further alleged that defendant had personally inflicted great bodily injury (Pen. Code, §§ 667, 1192.7, subd. (c)(8)) and personally used a dangerous and deadly weapon ("a bottle") (Pen. Code, §§ 667, 1192.7, subd. (c)(23)) in the commission of these offenses.

At trial, Leslie LaBarbera, who lived on the same street as Bour and defendant and had known defendant for many years, testified that she did not observe the altercation at the party because she was inside the house. LaBarbera had also been friends with Schon and Jorgenson for many years, and she had attended the same high

[9] Defendant testified that the altercation lasted "a minute."

school as Schon. She stated that she had no "animosity toward" defendant. LaBarbera denied that she had any problems with defendant.[10] When she heard that Schon had "been in a fight," she went outside the house. She saw defendant standing near the front door of the house, and she heard him "pretty loud[ly]" say "give me another beer. I just broke the last . . . two . . . over the guy's head." Although there were many other people around, no one else apparently heard this remark.

Defendant's girlfriend Lynelle Rose testified that she had not seen the altercation. However, after the party, she went to a park where a number of other people from the party had gathered. She claimed that Hitt told her that he "hit [Schon] on the head with a Remy bottle." Rose had seen Hitt with a Remy bottle at the party prior to the altercation.

Defendant testified on his own behalf. At the time of the altercation with Schon, the only person defendant recognized other than Schon among the people in Bour's front yard was Hitt. Bour had told defendant of Schon's presence, and defendant was concerned that Bour and Schon might have an altercation because he knew that Schon had threatened Bour in the past.[11] Defendant saw Schon and Hitt conversing. He heard Hitt tell Schon to leave and Schon respond "no, I could be here." Defendant also heard Schon say "I don't know anybody here." Defendant walked up and said "you know me, Ryan."[12] Schon said "who are you." Defendant identified himself and told Schon to leave because "you are not welcome here" and "not liked." Schon again said "no, I can be here." Defendant raised his voice, "got in

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[10] LaBarbera became upset during her testimony because "I have just known [defendant and Schon] both very well, so it is kind of really hard."

[11] Defendant testified that he did not have any personal problems with or animosity toward Schon prior to the altercation on July 22, 2000.

[12] Defendant testified that he had drunk three beers and smoked some marijuana prior to the altercation, but he was not intoxicated. It was stipulated at trial that his blood alcohol level was .04.

[Schon's] face" and told Schon "[g]et the fuck out of here. Stop being a fag." Schon "pushed" defendant. Defendant fell back into the crowd, but the crowd pushed him back toward Schon.

Defendant then punched Schon in the face. Defendant testified that he did not know that anyone else would "jump in and help" him in a fight.[13] Schon and defendant were grabbing each other and trying to punch each other when the crowd "tackled" them. Defendant's impression was that "everyone from the front yard ran and got in the fight." He was "getting tossed around" by the crowd. Defendant testified that he did not have a bottle in his hand during the altercation and that he did not hit Schon over the head.

Eventually, defendant felt himself get pushed out of the melee into a bush. He got up and saw Schon nearby. Defendant noticed a full bottle of beer on the ground by his foot. He picked up the bottle and threw it at Schon. The bottle landed ten feet away from Schon and shattered in the street. Defendant admitted that it was "kind of dangerous throwing a bottle at somebody."

Defendant then returned to Bour's house. He encountered LaBarbera. She grabbed his arm and said "why did you do that." Defendant said "do what? He started to fight with me." He did not say anything to LaBarbera or anyone else about hitting Schon over the head or breaking a bottle over anyone's head. Defendant testified that he had known LaBarbera for many years and had never had any problems with her "face to face." His only explanation for her testimony was that she "might have been mistaken" or "[s]omeone else might have said it."

In his opening argument, the prosecutor relied heavily on LaBarbera's testimony about defendant's post-altercation statement to prove the GBI enhancement.

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[13] Defendant testified that he knew some but not all of the people who were in the front yard when the altercation occurred but only recognized Hitt.

"You saw Leslie testify. You saw Leslie talk about how long she has known Shea Modiri. You could see the conflict that Leslie had. One point, she knows both of these guys. On the other hand, she is going to have to see Shea Modiri, they live on the same street, she is going to continue to see Shea Modiri. . . . Not that many people came forward. Leslie LaBarbera did. Would have been a lot, lot easier for her not to. And you saw the torment that caused, you saw her crying on the stand of what she had to say, what she heard the defendant Shea Modiri say . . . . [¶] The fact when Mr. Modiri took the stand, he couldn't come up with the reason for why Leslie LaBarbera would make this up about him. . . . It seems pretty darn clear, she was absolutely positive that that is what he said. And it caused her a lot of grief in doing that. Because she was acting responsibly . . . no matter how much that pained her, and it did."

The injuries specified as the GBI were the staples in Schon's head and the broken nose. The prosecutor explicitly relied on the "group beating" language in CALJIC 17.20. "How do I know which hit the defendant Mr. Modiri did and which hit the defendant Mr. Hitt did. You know, which cut, which broken nose. How do I know who caused the broken nose? The thing is you don't have to make that decision, because in this sort of group beating, this sort of attack, when it is going on all at the same time and the people who are involved are there and they know what is going on, and they are causing part of the injuries, and they know this was likely to know that others are hitting and attacking this Ryan Schon are also causing those kinds of injuries, they are all guilty. This fact is true. You just need to find that it is true this attack to Ryan Schon caused this great bodily injury. [¶] Now, the personal use of the dangerous weapon. Well for this finding you do, you do need specifically to place the bottle in Mr. Hitt's or Mr. Modiri's hands. And we will get to that a little bit later. And we can do that, we can put the bottle in their hands." "[Defendant] knows

everybody else is going to back him up. So Ryan says, you know I will fight you, but not all your friends."

In the prosecutor's closing argument, he again relied on the "group beating" language in CALJIC 17.20. "And again, that other instruction, don't know if Shea hit him the first time, Shea hit him third, don't know if Shea Modiri hit him in the exact place as open wound before. What we do know, that he hit him over the head with the bottle or two or three times. We know that because Leslie LaBarbera told us that. And again, kind of hard to discredit Miss LaBarbera. Again, she has known Mr. Modiri a lot longer. There is no history, there is no bad blood between the two of them."

The jury instructions described the assault count as "an assault upon the person of Ryan Schon with a deadly weapon and instrument other than a firearm, a bottle, and by means of force likely to produce great bodily injury."

The jury was instructed with CALJIC 17.20 on the personal infliction of GBI allegation and, separately, on the personal use of a dangerous or deadly weapon allegation. "If you find the defendant guilty of either Count 1 and/or Count 2 as charged, you must determine that defendant personally inflicted great bodily harm on Ryan Schon in the commission or attempted commission of the crime. [¶] 'Great bodily injury' as used in the 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 or she 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 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 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. [¶] 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. [¶] Include a special finding on that question in your verdict, using a form that will be supplied for that purpose. [¶] It is alleged in Count 2 that in the commission or attempted commission of the crime charged, the defendants personally used a deadly or dangerous weapon. [¶] If you find a defendant guilty of the crime thus charged, you must determine whether the defendant personally used a dangerous or deadly weapon in the commission or attempted commission of the crimes. [¶] 'A deadly or dangerous weapon' means any weapon, instrument or object that is capable of being used to inflict great body [*sic*] injury or death. [¶] The term 'personally used a deadly or dangerous weapon' as used in this instruction means the defendant must have intentionally displayed a weapon in a menacing manner or intentionally fired it or intentionally struck or hit a human being with it. [¶] The People have the burden of proving the truth of this allegation." Defendant's trial counsel did not object to these instructions.

The jury deliberated for about two and a half days. Halfway through the jury's second full day of deliberations, it submitted two separate inquiries. The court met with counsel that afternoon, and the court then responded to the jury's inquiries during an unreported session. The first inquiry read: "Our question regards Cal JIC 17.20 [¶] We understand that we are judging the facts/evidence for each defendant separately. Does any level of participation in the group directly doing the assault constitute personal use of physical force. (This is asking for clarification of 'Personal') [¶] If the defendant was found to be in the core of individuals inflicting the beating regardless of there being proof as to whether or not they personally used physical force . . . [¶] Can they be found guilty of [¶] Count 1 - yes or no [¶] and/or

[¶] Count 2 - yes or no." The court's response to this inquiry was "you were to look at CALJIC 3.00 and CALJIC 3.01 with regard to the charges that are alleged in Counts 1 and 2 and lesser charge you are to look at CALJIC 17.20 with regard to the enhancement or allegation."

The second inquiry read: "Our question regards Cal JIC 3.00 and 3.01 [¶] We understand that we are judging the facts/evidence for each defendant seperately [*sic*]. Does 'Aids and Abets' only apply to the lessor [*sic*] charge of (Simple Assault) or does it also apply to 'uses physical force' element in the greater charge (Assault with a deadly weapon or by means of force likely to produce great bodily injury)." The court's response to this inquiry was "aiding and abetting also applies to the greater charges." The jury returned its verdicts the next morning.

Defendant was acquitted of battery with serious bodily injury but convicted of the lesser included offense of simple misdemeanor battery.[14] He was convicted of the aggravated assault count and both the personal use of a deadly or dangerous weapon and the personal infliction of GBI allegations were found true. Defendant's request that the court strike the GBI and personal use allegations was denied, and the court refused to reduce the assault conviction to a misdemeanor. The court suspended imposition of sentence. It placed defendant on probation for three years conditioned on his serving nine months in jail. Defendant filed a timely notice of appeal.

II. Analysis

Defendant does not challenge his convictions on appeal. His appellate contentions concern only the allegations that he personally inflicted GBI and personally used a deadly or dangerous weapon. His primary challenge is to the

[14] Hitt was convicted of the lesser included offense of simple assault and acquitted of battery. The jury apparently disbelieved both Rose's testimony and Hitt's statement to the police.

validity of the "group beating" language is currently part of CALJIC 17.20. He claims that this instruction "lowered the prosecution's burden of proof" by failing to require the jury to find that he *personally inflicted* the injury. Defendant maintains that this error was "structural" and therefore reversible per se. Alternatively, he asserts that this error violated his federal constitutional right to a jury trial and therefore must be reviewed under the "harmless beyond a reasonable doubt" standard. Defendant also contends that the trial court reversibly erred in its response to the jury's inquiry regarding the "group beating" language in the instruction. Finally, he argues that the "group beating" language in the court's instruction on the personal infliction of GBI allegation prejudicially infected the court's proper instructions on the personal use of a deadly or dangerous weapon allegation.

The personal infliction of GBI allegation at issue here was that defendant's aggravated assault on Schon was a serious felony under Penal Code section 1192.7, subdivision (c) because the assault was a "felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice . . . ." (Pen. Code, § 192.7, subd. (c)(8).) This language is identical to that in 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. 72-573, 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."[15] (*Corona* at pp. 594-595.)

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[15] *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

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 great bodily injury. 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.) As the word "personally" was actually added to Penal Code section 1192.7, subdivision (c)(8) in 1986, *after Cole* interpreted the meaning of the "personally inflicts" language in Penal Code section 12022.7, *Cole* governs not only an interpretation of the language in Penal Code section 12022.7 but also the identical language in Penal Code section 1192.7, subdivision (c)(8).[16] (Stats. 1986, ch. 489.)

The California Supreme Court held in *Cole* that the words "personally inflicts" are clear and unambiguous and apply only to "a *person who himself inflicts the injury*." (*Cole* at p. 572, italics added.) 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

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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.)

[16] Penal Code section 1192.7, subdivision (c)(8) had previously applied to "'any other felony in which the defendant inflicts great bodily injury on any person, other than an accomplice.'" (See *People v. Piper* (1986) 42 Cal.3d 471, 476.)

inflicted which injuries" and the defendant's "conduct was of a nature that it could have caused the great bodily injury suffered." (*Corona* at p. 594.)

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 to 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 Schon. 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 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) "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 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."

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 1192.7, subdivision (c)(8) requiring a finding that the defendant *personally inflicted* great bodily injury. Neither Penal Code section 1192.7, subdivision (c)(8) nor 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, italics added.)

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 should have known 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 trial 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, internal citations omitted; accord *People v. Kelly* (1992) 1 Cal.4th 495, 525-526.)

The "relevant law" provides that a personal infliction of 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.)

Nothing in the record before us indicates that the jury's true finding was not based on the legally invalid second alternative basis theory. The appropriate standard of review here is that appropriate to a state law error. "[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.) Here, the personal infliction of GBI allegation was not alleged as an enhancement under Penal Code section 12022.7 and therefore did not increase the penalty for the underlying aggravated assault count. Consequently, any instructional error was not of federal constitutional dimension and

merits reversal only if it is reasonably probable that a result more favorable to defendant would have resulted in the absence of error. (*Sengpadychith* at p. 326; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The Attorney General does not argue that the instructional error was harmless. It was clearly prejudicial. It was undisputed that defendant punched Schon in the side of his face, but it was equally undisputed that this blow did not result in the cuts and broken nose that constituted great bodily injury. The only evidence that defendant was responsible for these injuries was LaBarbera's testimony that, shortly after the altercation, defendant said that he had broken a couple of bottles over Schon's head and Jorgenson's testimony that defendant had a bottle in his hand at the end of the altercation. Defendant testified that he had not hit Schon with a bottle and had not made any such statement.

The resolution of this credibility contest was not so clear that it is not reasonably probable that a juror would entertain a reasonable doubt about defendant's *personal involvement* in the causation of the injury yet rely on the second alternative basis as the basis for finding that defendant *knew that others would cause* Schon great bodily injury when he initiated the altercation. The trial court's erroneous instruction regarding the second alternative basis obviated the need for the jury to resolve this credibility contest, and the prosecutor's argument reinforced the erroneous instruction. Indeed, the jury verdicts as a whole suggested that the jury substantially credited defendant's testimony. Defendant admitted punching Schon and throwing a full beer bottle at him that did not hit him. The jury found that defendant had committed simple battery (the punch) and aggravated assault (throwing the beer bottle). It also concluded that defendant had personally used a bottle in the commission of the assault. Since defendant had admitted personally throwing a bottle at (but missing) Schon, the

jury's finding on this point was obviously supported by defendant's testimony.[17] The erroneous instruction on the second alternative basis permitted the jury to improperly base its true finding on the personal infliction of GBI allegation on evidence that defendant knew that the altercation would cause Schon great bodily injury.

Consequently, we must reverse the judgment and remand for retrial of the personal infliction of GBI allegation. This disposition obviates the need to consider defendant's contention that the trial court erred in responding to the jury's inquiry.

III. Disposition

The judgment is reversed, and the matter is remanded for retrial of the personal infliction of great bodily injury allegation.

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Mihara, J.

WE CONCUR:

_____

Bamattre-Manoukian, Acting P.J.

_____

Wunderlich, J.

[17] For this reason, we cannot accept defendant's contention that the erroneous instruction infected the personal use finding. Both the prosecutor's argument and the trial court's instructions noted that the personal use allegation required a finding that defendant had actually personally used a bottle. He indisputably did so. The erroneous instruction does not necessitate a retrial of the personal use allegation.

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Trial Judge:	Honorable Alfonso Fernandez
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