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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent, **A124528/A125552**

v. **(Solano County Super. Ct. Nos. FCR227005, FCR227006)**

TYLER GIUGNI et al.,

Defendants and Appellants.

_____/

Tyler Giugni and Stephen Armstrong appeal from judgments entered after a jury convicted them of aggravated mayhem (Pen. Code, § 205[1]), and mayhem (§ 203), respectively. Giugni contends (1) the trial court erred when it denied his motion for acquittal at the close of the prosecution's case, (2) the court erred when it denied his motion to sever his trial from that of his codefendants, (3) he received ineffective assistance of counsel, (4) the court erred when instructing the jury, and (5) the court erred when it imposed a great bodily injury enhancement. Armstrong contends (1) the court erred when it denied his motion to sever his trial from that of his codefendants, (2) the court erred when it imposed a great bodily injury enhancement, and (3) the abstract of

[1] Unless otherwise indicated, all further section references will be to the Penal Code.

judgment contains an error that must be corrected. We conclude the court erred when it imposed the great bodily injury enhancements and that Armstrong's abstract of judgment contains an error that should be corrected. In all other respects we will affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Giugni and Armstrong were convicted of beating a homeless man so seriously that he became permanently disabled.

Joseph Pettaway is an African-American man who in the summer of 2005 was living in his car in the parking lot of the Parkway Community Church in Fairfield. On the night of August 17, 2005, Pettaway visited a friend, John Strassberg, who lived in an apartment that was adjacent to the parking lot. Pettaway left Strassberg's apartment around midnight to go to sleep in his car. Sometime thereafter, the power in that area went out, and while the power was out, Strassberg heard yelling outside. He went outside to look but did not see anything.

In the early morning hours of August 18, 2005, D'Mann Thompson was walking through the church parking lot when he saw someone lying on the ground. Thompson touched the man and asked whether he was all right, but left when he heard the man moan.

That same morning, shortly before 3:00 a.m., Fairfield Police Officer William Shaffer was on patrol when he received a report that a man was down in the parking lot of the Parkway Community Church. Shaffer drove to the church and found Pettaway on the ground outside of his car. He was covered in blood. Pettaway was treated at a nearby hospital and then airlifted to a facility in Roseville for more treatment.

Pettaway's injuries were life-changing. He experienced a severe brain injury and multiple fractures to his face and skull, but no injuries to any other part of his body. As a result of his brain injuries, Pettaway suffers from significant memory loss and a major loss of motor function. He is unable to walk or stand on his own. He is unable to sit without assistance. He is unable to control his body functions. He can only see shadows. Pettaway now resides in a convalescent home.

Authorities investigating the crime ultimately focused on three young men as possible culprits: appellants Giugni and Armstrong, who were 19 and 18 years old respectively, and Corey Reitmeier, who was 17 years old. The theory of the crime was that all three young men attacked Pettaway after a night of excessive drinking.

In December 2006, an information was filed charging Giugni, Armstrong, and Reitmeier with three counts: (1) attempted premeditated murder (§§ 187, 664), (2) aggravated mayhem (§ 205), and second degree robbery. (§§ 211, 212.5, subd. (c).)[2] As is relevant here, the information alleged as to all three counts that the defendants personally had inflicted serious bodily injury within the meaning of section 12022.7, subdivision (b).

The case proceeded to trial where the prosecution presented evidence primarily from four witnesses who had contact with the defendants on the night of the crime: Eric Moosbuchner, Samantha Horton, Angelica Pina, and Christine Meza.

Moosbuchner testified that on the night of August 17, 2005, he met Horton and Pina at a bar. After the bar closed around 2:00 a.m., Moosbuchner agreed to drive both of them to Horton's apartment in Fairfield. At that time, Horton was living with Giugni's brother Will Giugni. When Horton, Pina and Moosbuchner arrived, it was dark because the power was out. Moosbuchner agreed to accompany the women inside. When they opened the door, a man was standing there. Then two other men came walking out of a back room. Horton appeared to know the man in the doorway and he and Horton began to bicker as they walked around the apartment. When the man sat down, Moosbuchner noticed his leg was covered in blood. Moosbuchner asked the man whether he had been in an accident. The man replied, "'No. We pulled some nigger out of a car and beat the shit out of him, kicked his ass.'" Moosbuchner was shocked and he said, "'So you think

[2] The prosecutor subsequently dismissed the robbery counts against Giugni and Armstrong.

that's nice?'" Deciding that he did not want to be part of what was occurring, he quickly left the apartment.

Horton's recollection was similar in some respects but different in others. She testified that when they opened the door to her apartment Giugni was in front of them, and that two other young men whom she did not know but whom she later identified as being Armstrong and Reitmeier, came out of her bedroom. According to Horton, all three men described what had happened: Armstrong said they had been fighting a "nigger" in the parking lot and that he had kicked the man. Reitmeier said he had kicked the man. Giugni also said they had beaten the man.

Pina testified that when they arrived at the apartment complex, there were "a lot" of police cars in the church's parking lot. When they opened the door to Horton's apartment, they heard noises coming from the back. Horton and Moosbuchner went to investigate and found two people hiding under Horton's bed. Then another man, whom Pina identified as Will Giugni's brother, came out of the patio area. According to Pina, the men said someone tried to jump them in the parking lot and that they "'beat the crap'" out of him. Pina said the boys were "boasting" and "bragging about beating the crap out of somebody."

Christine Meza testified that on August 18, 2005, near 4:00 a.m., she received a phone call from Cory Reitmeier who asked for a ride. Meza picked up Reitmeier and Giugni and drove them to a friend's house. On the way, Reitmeier and Giugni told her that an angry man had attacked Reitmeier after they had bumped into his car and that they "beat the shit out of the guy." Reitmeier then pulled a wallet out of his jacket. The identification inside indicated it belonged to an older black man named Joseph. According to Meza, Giugni had blood on his hand and on his pants. She later told a detective that Giugni had "'blood all over him'" and that "'[y]ou could just smell it.'"

Both Reitmeier and Armstrong testified on their own behalf. Reitmeier said that on the night in question, he, Giugni, and Armstrong were drinking "a lot" of vodka and beer at Will Giugni's apartment. At some point they decided to go home. As they walked through a parking lot, Reitmeier bumped into a car and a "very large" man came

out yelling at them. The man took a swing at Reitmeier, who tried to and may have hit him. However, Reitmeier was so drunk he ended up supporting himself against the car. He could not remember much else except that they all went back to the apartment to hide. He and Armstrong hid under the bed.

Reitmeier also presented testimony from a psychologist who stated that Reitmeier's personality was incompatible with the extreme violence. In addition, Reitmeier presented testimony from five witnesses all of whom stated that he is not a violent person.

Armstrong testified that on the night in question, he, Giugni, and Reitmeier went to Will Giugni's apartment where the three of them finished a half gallon of vodka. After the power went out, the three of them decided to go to the apartment complex where Reitmeier and Armstrong lived. As they passed through the church parking lot, Armstrong heard a "knock" on a car. Suddenly, a man ran up to Reitmeier, shouted at him, and took a swing at him. Armstrong ran to Reitmeier and tried to hit the man, but he did not connect. Giugni then ran up to the man and hit him in the face. Armstrong heard three loud cracks and the man fell down grabbing Armstrong's legs. When Armstrong kicked his leg in attempt to get free, his shoe flew off. Armstrong tried to find his shoe, and as he did, he saw Giugni doing a "little dance thing" next to the man's body. Armstrong then heard a siren and he, Giugni and Reitmeier ran back to Will Giugni's apartment.

Armstrong also presented testimony from four character witnesses who stated that Armstrong was neither a racist nor a violent person.

Giugni elected not to testify on his own behalf; however, he did present testimony from a Fairfield police detective who stated that Giugni's father, a captain in the Fairfield Police Department, had not taken part in the investigation and had not been informed of the results. The parties also stipulated that Will Giugni had called his father on the night in question who told him that someone had been beaten up in the parking lot.

The jurors considering this evidence acquitted Giugni of attempted murder, but convicted him of aggravated mayhem and found the great bodily injury allegation to be

true. The jurors acquitted Armstrong of attempted murder and aggravated mayhem, but found him guilty of simple mayhem and found the great bodily injury allegation to be true. The jurors acquitted Reitmeier of attempted murder and mayhem but convicted him of battery with serious bodily injury (§ 243, subd. (d)) and petty theft.

Subsequently, the court sentenced Giugni to life in prison with the possibility of parole plus a consecutive five-year term for the great bodily injury finding. The court sentenced Armstrong to four years on the mayhem count plus an additional five years for the great bodily injury finding for a total term of nine years.

Giugni and Armstrong then filed the present appeals. We consolidated the appeals for purposes of briefing, oral argument and decision.

II. DISCUSSION

A. Motion for Acquittal

At the close of the prosecution's case, Giugni's trial counsel moved for acquittal under section 1118.1. The trial court granted the motion as to the robbery count, but denied it as to attempted murder and aggravated mayhem counts. Giugni now contends the trial court erred when it denied his motion for acquittal.

Section 1118.1 authorizes a trial court to enter a judgment of acquittal "if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal." (§ 1118.1.) A trial court ruling on a motion for acquittal applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction. (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213.) Where the motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point. (*Id.* at p. 1213.) On appeal we view de novo whether the evidence presented was sufficient to support a conviction. (*Ibid.*) As with other challenges to the sufficiency of the evidence, we must review the evidence in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (*Id.* at p. 1212.)

Here, Giugni contends the trial court should have acquitted him on both the aggravated mayhem count and the great bodily injury enhancement. We address the former argument first.

As is relevant here, section 205 states: "A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body."

Cases interpreting this language have held that aggravated mayhem is a specific intent crime which requires proof the defendant specifically intended to cause the maiming injury, i.e., the permanent disability or disfigurement. (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.) "A jury may not find specific intent 'solely from evidence that the injury inflicted actually constitutes mayhem.'" (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 831.) Instead, there must be other facts and circumstances which support an inference of intent to maim rather than to attack indiscriminately. (*Ibid.*) A jury may infer a defendant's specific intent from the circumstances attending the act, including the manner in which it was done, and the means used. (*Ibid.*) Evidence of a "controlled and directed attack" or an attack of "'focused or limited scope'" may provide substantial evidence of a specific intent to maim. (*Ibid., quoting Quintero, supra,* 135 Cal.App.4th at p. 1162.)

Giugni argues the evidence here was insufficient because the prosecution was unable to prove that he had "personally struck any blow that injured Pettaway" or that he had "the specific intent to maim."

There was ample evidence that Giugni personally struck a blow that injured Pettaway. Meza testified that Giugni had "'blood all over him'" and that he "'smell[ed]'" like blood. Moosbuchner testified that when he, Horton and Pina opened the door to Horton's apartment, they were met by a man who was directly in front of them. When Moosbuchner asked the man why he was covered with blood, the man replied, "'I kicked some nigger's ass.'" While the identity of that man and precisely what he said was in

dispute, substantial evidence supported the conclusion that the perpetrator was Giugni.[3]

The evidence was also sufficient to support an intent to maim. Giugni's use of a grossly offensive racial epithet to describe the incident to Moosbuchner strongly suggests the attack may have been motivated by racial animus. Giugni's boasts to Moosbuchner, Pina, and Meza can be interpreted to suggest the attack was intentional. The nature of the

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[3] Indeed, this was the interpretation of the evidence that was adopted by Armstrong's attorney during final argument. He argued to the jurors as follows:

"[Mr. Moosbuchner] came in and he testified initially that there was a person standing at the front door when he came in. That person was wearing white tennis shoes. That person was very familiar with Ms. Horton. Ms. Horton appeared to recognize him, talk with him. He was controlling the situation. The two other guys came out of the bedroom.

"So, the person at the front door he said had blood all over his pants leg.

"Now, two years ago at the preliminary hearing Mr. Moosbuchner was asked to identify, if he could identify Mr. Armstrong as distinguished from Mr. Giugni. Could you tell which of those two individuals was sitting in the chair?

"I think the testimony at the prelim was he couldn't identify Mr. Giugni or Mr. Armstrong. He couldn't distinguish between the two of them at that time. And he said at that time according to the stipulation that it had been so long since these events took place he just couldn't pinpoint either of the two of them.

"However, there has been some pinpointing done here. I'm going to talk more about it a little bit later. The pinpointing whoever was at the front door when he came in that had blood all over his leg was boasting, being cocky about what had happened in the parking lot. According to him whoever that person was was the person that knew Samantha Horton. Whoever that person was was the person who had the white shoes on. Whoever that person was was not one of the two people that came out of the bedroom.

"Ms. Horton came in and told you it was Mr. Giugni who is at the front door, not my client. Ms. Horton testified that my client came walking out of the bedroom . . . . Okay. So that's the reality. The reality is it was not my client standing up there at the front door.

"That's significant because ultimately what Mr. Moosbuchner said here, at first he said the person was saying, 'We did this, we did that.' And I think it was [Giugni's counsel] on cross-examination started asking questions about the preliminary hearing. Mr. Moosbuchner acknowledged at the preliminary hearing this gentleman at the front door was saying, 'I did this, I did that. I beat this guy up.'

"Okay. Not 'we.'"

injuries Pettaway sustained, serious injuries to his face and head but nowhere else, strongly suggest a specific intent to maim. (See, e.g., *People v. Szadziewicz, supra*, 161 Cal.App.4th at pp. 831-832 [evidence of a "controlled and directed attack focused on [the victim's] face and neck" showed specific intent]; *People v. Quintero, supra,* 135 Cal.App.4th at p. 1163 [fact that the defendant focused attack on the victim's head and then stopped "once he had severely maimed [victim's] face" showed specific intent]; *People v. Park* (2003) 112 Cal.App.4th 61, 69 [specific intent shown where defendant aimed directly at victim's head and ceased attack after successfully maiming victim].)

Construing the evidence in the light most favorable to trial court's ruling, we conclude the evidence was sufficient.[4]

Giugni also contends the evidence at the close of the prosecution's case was insufficient to support the great bodily injury allegation under section 12022.7, subdivision (b). We disagree; however, we need not set forth our reasoning at length. As we will explain later in this opinion, that enhancement fails for a different reason.

B. Motion to Sever

Prior to trial, Giugni moved to sever his trial from that of his codefendants. Noting that Armstrong intended to introduce evidence regarding prior acts of violence Giugni had committed, Giugni argued that if he was tried with Armstrong, he would in effect be faced with two prosecutors. Armstrong's counsel filed a similar motion arguing severance was required because he planned to introduce evidence regarding Giugni's prior bad acts. The prosecutor opposed the motions arguing severance was not required and he disputed the accuracy of the prior incidents of misconduct that Armstrong had identified.

The trial court denied the motions to sever finding that the defendants' statements regarding the beating were adoptive admissions and were admissible in each defendant's

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[4] Having reached this conclusion, we necessarily reject Giugni's argument that the evidence presented *at trial* was insufficient to support an aggravated mayhem charge. Since the evidence presented in the prosecution's case was sufficient to support the aggravated mayhem charge, a fortiori, the evidence presented at trial was sufficient.

case. With respect to Armstrong's request to introduce evidence concerning Giugni's prior bad acts, the court noted there was a dispute regarding the nature of those acts. Saying it was reluctant to rule without knowing the precise facts, the court denied the motion "without prejudice" to Armstrong's right to renew it based on an "additional offer of proof with more specificity . . . ."

The trial then commenced and the parties presented their opening statements. However, subsequently, the prosecutor notified the defendants that Christine Meza had provided additional information about a cell phone video that depicted Pettaway lying on the ground and that had Reitmeier's and Giugni's voices in the background. Armstrong's counsel argued the cell phone video was exculpatory and he renewed his motion to sever.

The trial court conducted an Evidence Code section 402 hearing to address the issues regarding the cell phone video. Meza testified that on the morning of the attack, Reitmeier telephoned and asked for a ride. Meza agreed and as she drove the young men to Reitmeier's residence, Reitmeier showed her a short video on his cell phone. It was about 30 seconds long and depicted an unclear image of what appeared to be a "man lying down." Meza said she could hear Giugni's voice in the background saying something she could not recall, and Reitmeier saying something about "a man [lying] in his blood." Meza did not see or hear anyone else in the video.

After Meza testified, Armstrong's counsel asked that Meza be allowed to testify about the cell phone video arguing that while "there may have been three people in the parking lot" his client was not one of the "people who did the damage[.]" The trial court excluded testimony concerning the cell phone video finding there was no evidence about whether it was taken "one minute, two minutes . . . [or] twenty minutes . . . post the infliction of the injuries." Therefore, the court found that the "fact that Mr. Armstrong's voice was not being heard at that point [did] not really prove anything regarding guilt or innocence. And any probative value [was] outweighed by confusion that could potentially occur if it were admitted."

The case was then tried and the jurors returned the verdicts we have described above. Subsequently, Giugni filed a motion for new trial arguing the trial had been unfair

because his codefendants has presented evidence of their good character, and by doing so, had impliedly characterized him as being a person who *did not* have a good character. According to Giugni's counsel, the primary problem was the "manner in which the evidence came in[.]" The other defendants had testified and had presented evidence of their good character which "logically unavoidably . . . sets the other defendant . . . as the odd man out." The trial court stated it understood counsel's argument but it believed a new trial was not justified.

Giugni and Armstrong both now argue the trial court erred when it denied their motions to sever.

As is relevant here section 1098 states: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." Joint trials are favored because they promote economy and efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40 (*Coffman*).) Where, as here, defendants are charged with having committed a common crime against a common victim, the court is presented with a "classic case" for a joint trial. (*Ibid.*) A court's denial of a motion for severance is reviewed for abuse of discretion, judged on the facts as they appeared at the time of the ruling. (*Id.* at p. 41.) A court's error in failing to grant severance requires reversal only if it is reasonably probable the defendant would have received a more favorable result in a separate trial. (*Ibid.*)

Applying this standard, we find no abuse. Turning to Giugni's arguments first, we conclude the court did not err when it denied his pretrial motion to sever. As we have noted, the primary ground for that motion was Giugni's concern that Armstrong would be allowed to present evidence concerning Giugni's reputation for violence. However, the trial court denied Armstrong's request to present such evidence ruling Armstrong had not provided an adequate foundation. Armstrong did not attempt to cure that inadequacy and the evidence was never presented. Thus, what Giugni's counsel characterized as the

"major ground" for his severance motion did not exist. The court did not abuse its discretion when it denied that motion.

Giugni also contends the trial court erred when it denied his posttrial motion for new trial. We review the denial of a new trial motion for abuse of discretion. (*Coffman, supra,* 34 Cal.4th at p. 127.) Again, we find no abuse here.

Giugni bases his argument on the fact that Armstrong and Reitmeier were able to present evidence of their good character while he was unable to present similar evidence in his own defense. Noting that Armstrong's counsel highlighted the character evidence that had been presented, Giugni argues the character evidence that Armstrong and Reitmeier presented "inevitably pointed" to him as being someone who did not have a reputation for peacefulness.

Although many California decisions have stated that the existence of conflicting defenses may compel severance of codefendants' trials, *none* has found an abuse of discretion or reversed a conviction on that ground. (*People v. Hardy* (1992) 2 Cal.4th 86, 168.) Indeed, if the existence of conflicting or antagonistic defenses alone required separate trials, it would negate the legislative preference for joint trials and separate trials would be mandatory in almost every case. (*Ibid.*) Accordingly, courts have applied this ground for severance very narrowly. (*Ibid.*) Codefendants are deemed not to have antagonistic defenses simply because they accuse one another of the crime or approach one another with hostility. (*Ibid.*) Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that the defenses are irreconcilable and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty. (*Ibid.*) When sufficient independent evidence against the moving defendant exists, it is not the conflict alone that demonstrates his guilt and antagonistic defenses do not compel severance. (*Coffman, supra,* 34 Cal.4th at p. 41.)

Here, the mere fact that Armstrong and Reitmeier did present evidence of their good character while Giugni did not, does not mean that Giugni's defense was irreconcilable with that of Armstrong and Reitmeier. Even those with sterling reputations occasionally commit serious crimes. Furthermore and importantly, there was more than

sufficient evidence that demonstrated Giugni's guilt. In addition to the evidence from Moosbuchner that we have described above, Armstrong testified that Giugni struck Pettaway in the face three times causing a loud crack each time, and then performed a "little dance thing" next to Pettaway's body. On this record, it was "not the conflict alone that demonstrate[d] [Giugni's] guilt . . . ." (*Coffman, supra,* 34 Cal.4th at p. 41.)

We conclude the trial court did not abuse its discretion when it denied Giugni's motion for new trial based on severance.[5]

Turning to Armstrong's argument, he contends the court's severance ruling was incorrect because it effectively prevented him from presenting evidence of Giugni's bad character, and from introducing evidence about the cell phone video. We reject both arguments.

While the court declined to introduce evidence of Giugni's bad character, it did so only because the evidence Armstrong had presented was inadequate to support his request.[6] The court specifically granted Armstrong leave to refile his motion and make a stronger showing. Armstrong never attempted to make that showing and therefore this court, like the trial court, simply has no way of determining if the evidence should have been admitted and whether it would have made a difference in the court's severance ruling. The record before us fails to demonstrate that the trial court erred.

Turning to the cell phone video, as the trial court noted, (1) it was unclear precisely when that video was taken, and (2) the mere fact that Armstrong's voice was not heard in the background does not prove he was uninvolved in the incident. Indeed, Armstrong admitted that he was present during the attack although he tried to diminish his responsibility. On this record, it is not reasonably probable Armstrong would have achieved a more favorable result if severance had been granted. (*Coffman, supra,* 34 Cal.4th at p. 41.) Any possible error was harmless.

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[5] For the same reasons, we reject Giugni's argument that his conviction was the product of "gross unfairness" that resulted in a denial of due process.

[6] Armstrong *has not* argued the trial court erred when it ruled the evidence presented was inadequate to make its ruling.

C. Instructions

1. Self-Defense

The trial court instructed the jurors on the principles of self-defense using CALCRIM No. 3470. As is relevant here, the court told the jurors:

"Self-defense is a defense to attempted murder, attempted voluntary manslaughter, aggravated mayhem, mayhem, battery with serious bodily injury and battery. The defendant is not guilty of those crimes if he used force against the other person in lawful self-defense or defense of another. The defendant acted in lawful self-defense or defense of another if:

"One. The defendant reasonably believed that he or someone else was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully;

"Two. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

"[And]

"Three. The defendant used no more force than was reasonably necessary to defend against that danger.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed that there was imminent danger of violence to himself or someone else. Defendant's belief must have been reasonable and he must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense or defense of another."

Giugni now contends the standard CALCRIM instruction is inadequate because it omits the principle that "a person is entitled to use whatever level of force he reasonably believes to be necessary, if other people similarly situated would believe such force could reasonably be used, under similar circumstances."

The principle Giugni articulates is an essential aspect of self-defense. Our Supreme Court has said that any right of self-defense is limited to the use of such force as is reasonable under the circumstances, and what is reasonable under the circumstances is determined from the point of view of a reasonable person in the defendant's position. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065.) However, that principle is articulated in the standard CALCRIM self-defense instruction. The instruction told the jurors that one of the essential elements of self-defense was that a defendant "used no more force than was reasonably necessary" and that a "defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation." Reading the instruction as a whole as we are required to do (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088), we conclude the jurors were instructed correctly.[7]

2. Aiding and Abetting

Near the middle of trial, the parties began discussing possible jury instructions. Giugni's counsel asked whether an instruction on aiding and abetting might be appropriate. Armstrong's counsel opposed any such instruction arguing the evidence demonstrated that all three defendants had participated directly in the crime. The court agreed. The prosecutor stated that aiding and abetting was one of her theories, but she admitted she had not submitted an instruction on that issue. The parties agreed to wait until the close of evidence to determine precisely which instructions were appropriate. At the conclusion of the evidence, no one asked that an instruction on aiding and abetting be given.

Giugni now contends the trial court erred because it did not instruct on aiding and abetting.

A trial court has the duty to instruct, sua sponte, on general principles of law that are closely and openly connected with the facts that are presented at trial. (*People v. Ervin* (2000) 22 Cal.4th 48, 90.) However, instructions on aiding and abetting are not

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[7] Having reached this conclusion, we need not determine whether any possible error was harmless.

required where the defendant was not tried as an aider and abettor, and there was no evidence to support such a theory. (*People v. Young* (2005) 34 Cal.4th 1149, 1201.)

Here, Giugni contends the court should have instructed on aiding and abetting because the prosecutor relied on that theory during his final argument. We are unpersuaded. The prosecutor in fact argued that *each* of the defendants was guilty because he had participated in the crimes charged. For example, the prosecutor argued that "defendants Stephen Armstrong, Tyler Giugni and Cory Reitmeier acted willfully and they intended to kill when they acted." Later the prosecutor told the jurors "You know based on your own common sense if somebody is implicating you in a crime and you didn't do it, you know you would say, 'Hey, I didn't do that.' You might say, 'Yeah, they were out there, but I didn't do that.'" [¶] None of these defendants during the course of these conversations that took place in the apartment ever denied being involved." The prosecutor also highlighted the specific act that each defendant committed against Pettaway, "we know that Ms. Horton says that Mr. Armstrong admitted to kicking the victim in the head multiple times. We know that Ms. Horton said that Mr. Reitmeier admitted to kicking the victim. . . . [¶] Then we know Mr. Giugni had blood on his hands. He didn't deny being involved." Clearly, the prosecutor's theory of the case was that *each* defendant directly participated in the attack. She was not relying on an aiding and abetting theory.

In arguing to the contrary, Giugni relies on isolated comments such as the fact that the prosecutor described the injuries committed by "'these defendants'" and his argument that "'they kicked [Pettaway] in the head.'" According to Giugni, these attempts to show group responsibility demonstrated that the prosecutor was in fact relying on an aiding and abetting theory. We disagree. The prosecutor's references to group responsibility plainly were referring to the evidence that was presented that demonstrated each of the defendants had joined into the attack on Pettaway. Those comments cannot be read in isolation to mean the prosecutor was relying on an aiding and abetting theory.

We conclude the court did not err when it declined to instruct on aiding and abetting.[8]

D. Ineffective Assistance

Giugni contends his conviction must be reversed because he received ineffective assistance of counsel.

The standard of review we apply is settled.

A defendant who contends he received ineffective assistance has the burden of proving that (1) trial counsel's performance was deficient in that it fell below an objective standard of reasonableness when measured by prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) An appellant who alleges ineffective assistance on direct appeal bears an especially heavy burden of proof: "'[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected. [Citations.]" (*People v. Wilson* (1992) 3 Cal.4th 926, 936, quoting *People v. Pope* (1979) 23 Cal.3d 412, 426; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

With this background, we turn to the specific arguments advanced.

Giugni contends trial counsel was ineffective because he failed to seek an instruction based on *People v. Myers* (1998) 61 Cal.App.4th 328, that a defendant is entitled to repel an attack, even if that attack did not pose a threat of bodily injury. However, jurors were instructed on that principle. The court told the jurors that one of the elements of self-defense was that the defendant "reasonably believed that he or someone else . . . was in imminent danger of being touched unlawfully . . . ." Counsel was not ineffective on this ground.

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[8] Having reached this conclusion, we need not decide whether the court's failure to instruct was prejudicial.

Next, Giugni contends trial counsel was ineffective because he failed to seek an instruction that Giugni could only be convicted if the force he used to repel Pettaway's attack was "'so excessive as to be clearly vindictive under the circumstances.'"

Giugni has not cited and we are not aware of any case that holds a court is obligated to instruct as he suggests. Indeed, Giugni's argument on this point is based almost entirely on a passage from a single case; *People v. Ross* (2007) 155 Cal.App.4th 1033. There, the victim slapped the defendant during a confrontation, and the defendant responded by punching the victim in the face. On appeal the court criticized the prosecutor's final argument for conflating the defendant's conduct with the consequence it produced:

"[P]unching one's assailant in the face is not like shooting him in the head or stabbing him in the heart. The test is not whether the force used appears excessive in hindsight but whether it appeared reasonably necessary to avert threatened harm under the circumstances at the time. The law grants a reasonable margin within which one may err on the side of his own safety, and so long as he is found to have done so reasonably, no abuse of the right of self-defense should be found to have occurred. A leading forms book makes a similar point in a proposed jury instruction: '[I]n using force in self-defense, a person may use only that amount of force, and no more, that is reasonably necessary for that person's protection. However, since in the heat of conflict or in the face of an impending peril a person cannot be expected to measure accurately the exact amount of force necessary to repel an attack, that person will not be deemed to have exceeded his or her rights *unless the force used was so excessive as to be clearly vindictive under the circumstances*. Thus, a person's right of self-defense is limited by the reasonableness of his or her belief that such force was necessary at that time and under the particular circumstances.' [Citations.]" (*People v. Ross*, *supra*, 155 Cal.App.4th at p. 1057, italics added.)

While the *Ross* court did discuss whether a defendant's response was "clearly vindictive" it did so in a different context--while criticizing the prosecutor's argument. The court did not state and did not imply that a jury instruction on that concept was

required under California law. Cases are not authority for propositions that are not considered. (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2.) Furthermore, it has long been recognized that language in an appellate decision which may be a good statement of the law or of the appellate court's reasoning does not necessarily make a good jury instruction. (*People v. Adams* (1987) 196 Cal.App.3d 201, 204-205; see also *People v. Colantuono* (1994) 7 Cal.4th 206, 221, fn. 13 ["The discussion in an appellate decision is directed to the issue presented. The reviewing court generally does not contemplate a subsequent transmutation of its words into jury instructions and hence does not choose them with that end in mind. We therefore strongly caution that when evaluating special instructions, trial courts carefully consider whether such derivative application is consistent with their original usage."]) We conclude trial counsel was not ineffective because he failed to seek an instruction based on the out-of-context passage upon which Giugni relies.

E. Great Bodily Injury Enhancement

The jurors convicted Giugni and Armstrong of aggravated mayhem and mayhem respectively. In addition, the jurors found that Giugni and Armstrong both had personally inflicted great bodily injury on Pettaway within the meaning of section 12022.7, subdivision (b). Based on those findings, the trial court sentenced both Giugni and Armstrong to consecutive terms of five years in addition to the sentences that were otherwise imposed. Giugni and Armstrong now argue the great bodily injury enhancements must be stricken because they were statutorily unauthorized. We agree.

Section 12022.7, subdivision (b) states: "Any person who personally inflicts great bodily injury on any person . . . in the commission of a felony or attempted felony which causes the victim to become comatose due to brain injury or to suffer paralysis of a permanent nature, shall be punished by an additional and consecutive term of imprisonment in the state prison for five years."

As is relevant here, section 12077.7, subdivision (g) states: "Subdivisions (a), (b), (c), and (d) shall not apply if infliction of great bodily injury is an element of the offense."

Giugni and Armstrong contend, and the People concede, that great bodily injury is an element of both mayhem and aggravated mayhem. (Cf. *People v. Hill* (1994) 23 Cal.App.4th 1566, 1575.) Under the plain language of section 12077.7, subdivision (g) since great bodily injury is an element of both aggravated mayhem and mayhem, the enhancement section 12077.7, subdivision (b) did not apply. The court erred when it imposed sentenced based on that section.

The People argue the court ruled correctly because Pettaway did not just suffer great bodily injury, he was rendered comatose and paralyzed by the beating he sustained. That undoubtedly is true, but it does not make a difference. Section 12022.7, subdivision (b) states that the section only applies when a victim has been rendered comatose or paralyzed. The same condition cannot both trigger and make inapplicable a sentence enhancement.

The primary case upon which the People rely *People v. Guzman* (2000) 77 Cal.App.4th 761, does not change this conclusion. The defendant in that case was convicted of felony drunk driving. The *Guzman* court ruled a section 12022.7, subdivision (b) enhancement could properly be imposed under those circumstances because the infliction of great bodily injury was more than the simple "bodily injury" required by the drunk driving statute. (*Id.* at p. 765.) We have no quarrel with the decision in *Guzman*; however, that case cannot be read to mean that where, as here, great bodily injury is an element of the statute, a section 12022.7 enhancement can be imposed.

We conclude the court could not validly impose the great bodily injury enhancements under the facts of this case. We will remand the case for resentencing. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258, *People v. Kelly* (1999) 72 Cal.App.4th 842, 844-845, *People v. Baylor* (1989) 207 Cal.App.3d 232, 237.)

F. Abstract of Judgment

Armstrong contends and the People concede that the abstract of judgment incorrectly states that the court imposed an $18,000 fine, rather than the $1,800 fine that was actually imposed. We order the appropriate modification.

III. DISPOSITION

Giugni's case and Armstrong's case are both remanded for resentencing consistent with this opinion. At the same time, the court must correct the abstract of judgment to reflect the $1,800 fine that was actually imposed. In all other respects, the judgments are affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.