Court reversed a great bodily injury finding resulting in the immediate release of the client!

3 of 3 DOCUMENTS

THE PEOPLE, Plaintiff and Respondent, v. LOUIS JULIAN BUONO, Defendant and Appellant.

B179712

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

2006 Cal. App. Unpub. LEXIS 1995

March 9, 2006, Filed

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PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, No. BA253245. Judith Champagne, Judge.

DISPOSITION: Affirmed in part, reversed in part and remanded.

COUNSEL: Marilee Marshall & Associates, Inc. and Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez and April S. Rylaarsdam, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: KRIEGLER, J.; TURNER, P.J., MOSK, J. concurred.

OPINION BY: KRIEGLER

OPINION

INTRODUCTION

A jury convicted defendant and appellant Louis Julian Buono of assault with a deadly weapon with force likely to produce great bodily injury and assault by force likely to produce great bodily injury (*Pen. Code, § 245* **[*2]** *, subd. (a)(1)*). [1] The jury also found true the special allegation that defendant personally inflicted great bodily injury upon the victim within the meaning of *section 12022.7, subdivision*

(a), during the commission of the assault with a deadly weapon. The trial court sentenced defendant to state prison for six years.

1 All statutory citations are to the Penal Code unless otherwise noted.

On appeal, defendant contends there was insufficient evidence to support the finding that he personally inflicted great bodily injury, the trial court's instructions on the great bodily injury enhancement lowered the prosecution's burden of proof, and the trial court abused its discretion in failing to strike the sentence for that enhancement; there was insufficient evidence to support his conviction for assault by force likely to produce great bodily injury and the sentence for that conviction should have been stayed under section 654; and the prosecutor engaged in misconduct by asking defendant if two of the prosecution's **[*3]** witnesses had lied in their testimony. We reject defendant's challenge to the sufficiency of the evidence to support the great bodily injury finding, but hold that the great bodily injury finding must be reversed due to instructional error. We otherwise affirm the judgment.

BACKGROUND

Defendant owned Louie Electrical Repair. Mr. Tansey [2] hired defendant to perform some electrical work on his home on July 30, 2003. Defendant hired Benjamin Zuniga, an electrician with whom he had worked for some 10 to 20 years, to assist him on the Tansey job. Ignacio "Nacho" Sabastian also assisted defendant on the Tansey job. [3]

2 Mr. Tansey's first name is not provided in the record.

3 Sabastian was found to be unavailable to testify at trial, and his preliminary hearing testimony was read to the jury.

Defendant expected Zuniga at the Tansey home around 8:00 or 8:30 a.m. on July 30, 2003. Instead, Zuniga did not arrive until approximately 11:00 or 11:30 a.m. Zuniga had stopped to complete a job for his own company **[*4]** but had called defendant to inform him that he would be late. When Zuniga arrived at the Tansey home, defendant told him what needed to be done to complete the job. Defendant then left the Tansey home.

When defendant returned about 3:00 p.m., the job was not completed. Defendant asked Zuniga, in an "aggressive" tone, why the "fuckin' job wasn't done." Zuniga explained that Sabastian did not know what he was doing. Zuniga and defendant argued. Defendant worked with Zuniga to complete the job. As they worked, defendant and Zuniga continued to argue. Defendant complained that the job was not going to be completed that day.

Eventually, Zuniga told defendant that he was tired of "his shit" and that he was going to leave the job. Zuniga asked defendant to pay him for the jobs he had already completed. Defendant and Zuniga argued a while longer before Zuniga "kind of settled down" and started to go back to work. The argument resumed, however, and Zuniga told defendant that he had it, that he knew defendant did not have a license, that he wanted to be paid what was owed him, and that he was going to walk off the job. Defendant responded that he was going to "kick [Zuniga's] fuckin' ass. **[*5]** " Zuniga paused for a moment and defendant ran to

his truck from which he retrieved a "half inch pipe bender"-"a rigid pipe about three quarters [of an inch] thick and four feet long."

Defendant ran towards Zuniga and struck him with the pipe on his left leg just above the knee. Zuniga buckled, dropping almost to his knees. Defendant readied to strike Zuniga with the pipe a second time. Zuniga threw a plastic sprinkler at defendant, deterring his attack.

Zuniga stood and defendant resumed his attack, swinging the pipe at Zuniga's upper body. Zuniga backed away from defendant and fell backward off a four-foot driveway retaining wall. Zuniga tried to get up, but could not. His ankle was injured.

Defendant walked across the sidewalk and up the driveway to where Zuniga lay. Defendant struck Zuniga with the pipe three or four times and kicked him three or four times. As defendant struck Zuniga with the pipe and kicked Zuniga, he yelled at Zuniga, calling him a "fuckin' asshole" and saying, "You fuckin' deserve it. That's what you get."

At some point, Sabastian took the pipe from defendant, as defendant was readying to strike Zuniga with the pipe again. Sabastian and defendant walked **[*6]** away, leaving Zuniga on the ground. Zuniga tried to get up. He screamed and pleaded for help. Defendant told Zuniga, "Crawl fuckin' animal, crawl." Zuniga crawled towards the steps in front of the house and called for help from someone inside. No one came out, and Zuniga heard someone inside the house say, "Get him off my property."

Defendant grabbed Zuniga by his jumpsuit and injured leg and dragged him down the walkway and down the steps to the sidewalk. Defendant left Zuniga on the sidewalk. Defendant picked up his tools and materials. Defendant also picked up a pipe and threatened Zuniga with it. Defendant did not strike Zuniga with the pipe, but instead he punched Zuniga in the eye. Defendant put away his tools, threw Zuniga's tools in Zuniga's truck, and left with Sabastian.

Owen Tansey, [4] who was keeping his 97-year-old father company while defendant worked on his father's house, witnessed part of defendant's attack on Zuniga. At about 3:45 p.m., Owen heard someone screaming and believed that someone had been hurt. He looked out the window and saw defendant drag Zuniga down the stairs and hit him. He went outside and asked defendant what was going on. Defendant told Owen **[*7]** that he had thrown Zuniga off the job because Zuniga was doing drugs and would not leave. Owen asked Zuniga if he was all right. Zuniga said that he would be okay and limped over to his car.

4 We use Owen Tansey's first name, not out of disrespect, but to distinguish him from his father.

Seven-year-old Cuilahuac "Nicholas" Arenaza also witnessed part of defendant's attack. Arenaza testified that he saw defendant get a pipe and hit Zuniga with it in the leg three to five times. According to Arenaza, defendant pushed Zuniga to the ground and defendant continued to hit him in the leg with the pipe. Arenaza identified defendant from a six-pack photographic lineup as the man who had hit Zuniga with the "pole."

After defendant left, Zuniga called 911. Paramedics arrived and took him to

Huntington Memorial Hospital where Dr. Douglas Willard, an emergency room physician, treated his injuries. Dr. Willard determined that Zuniga had broken the tibia bone in his right ankle and had a bruise on his left calf. The front **[*8]** of Zuniga's eye was also bruised and there was blood on the front portion of the eye, indicating a possible fracture below the eye. Dr. Willard applied a splint to Zuniga's ankle to immobilize it, prescribed pain medication, and released Zuniga from the hospital. Dr. Willard advised Zuniga that he would need to see an orthopedic surgeon.

Los Angeles Police Officer Ernie Acuna interviewed Zuniga at Huntington Memorial Hospital. Zuniga told Officer Acuna that defendant hit his left leg with a pipe and he injured his ankle when he "jumped" off a five-foot driveway wall as he was backing away from defendant.

On August 2, 2003, Zuniga was admitted to County General Hospital. There was damage to Zuniga's ankle apart from the broken bone. Zuniga was informed that he would have to have surgery. Zuniga's surgery was delayed two weeks, while the doctors waited for swelling to subside. Zuniga's "ankle and leg" were held together with over nine screws and two plates. At the time of trial, Zuniga was still under a doctor's care and continued to feel daily discomfort in his ankle.

Defendant testified that he suspected that Zuniga was doing drugs or smoking "dope" on the job and that he asked **[*9]** Zuniga to leave. Defendant denied that he held a pipe or struck Zuniga with a pipe. He claimed that he hit Zuniga only after Zuniga hit him, and that Zuniga hurt his ankle when he jumped off the wall as defendant tried to get him to leave the property.

According to defendant, Zuniga returned to the Tansey home and sat on the front door step and yelled at defendant, "I am going to kill you," and "I am going to sue you." Defendant grabbed Zuniga by his jumpsuit and pulled him to the top of the stairs, told Zuniga to get off of the property, and let go of him. Zuniga "took another swing" at defendant and defendant punched Zuniga's eye. Defendant then threw Zuniga down the stairs.

DISCUSSION

I. Defendant's Personal Infliction of Great Bodily Injury Enhancement

A. Sufficiency of the Evidence

Defendant argues there is insufficient evidence to support the great bodily injury enhancement. Defendant does not dispute that Zuniga suffered great bodily injury when his ankle was broken during the altercation. Instead, defendant contends he did not personally inflict the great bodily injury upon Zuniga, because the broken ankle resulted when Zuniga either fell or jumped **[*10]** from a wall, rather than as the result of a blow delivered by defendant. [5] We conclude defendant has too narrowly read the language of *section 12022.7, subdivision (a)*, and cases interpreting the statutory language, and hold there is substantial evidence to support the enhancement.

> 5 The record is ambiguous as to exactly how Zuniga suffered the broken ankle. Zuniga testified that after defendant's initial assault with the pipe, "I started backing off and that is when I fell off the wall." Zuniga was "not sure how the event

> actually all occurred. It just -- I just ended up at the end of the wall, the driveway and fell over, but it was more like backing up trying to get away." Zuniga tried to get up, but he had broken his "leg." Zuniga told Officer Acuna he was backing away from defendant "because [defendant] swung the pipe at him," and he injured his ankle when he "jumped" off the wall.

The issue is one of statutory interpretation-does a defendant personally inflict great bodily injury within the meaning of **[*11]** *section 12022.7, subdivision (a)* when a victim attempting to avoid a violent assault suffers an injury in the process of his retreat? We conclude the question must be answered in the affirmative.

"Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years." (*§ 12022.7, subd. (a)*.) "In 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." (*People v. Cole (1982) 31 Cal.3d 568, 579, 183 Cal. Rptr. 350* (*Cole*).) In *Cole*, our Supreme Court held that an aider and abettor does not personally inflict great bodily injury within the meaning of the enhancement. (*Id. at p. 572*.) Because our case does not involve an aider and abettor, in that defendant was the sole attacker, *Cole* does not resolve the issue presented.

Case law also establishes that a defendant must do more than proximately **[*12]** cause an injure under *section 12022.7, subdivision (a)*. "To 'personally inflict' injury, the actor must do more than take some direct action which proximately causes injury. The defendant must directly, personally, himself inflict the injury." (*People v. Rodriguez (1999) 69 Cal.App.4th 341, 349* (*Rodriguez*).) "Proximately causing and personally inflicting harm are two different things. The Legislature is aware of the difference. When it wants to require personal infliction, it says so. (E.g., *Pen. Code, § 12022.7, subd. (a)* [imposing a sentence enhancement on a person who 'personally inflicts great bodily injury'].) When it wants to require something else, such as proximate causation, it says so, as in section 12022.53[, subdivision] (d)." (*People v. Bland (2002) 28 Cal.4th 313, 336* (*Bland*).)

In *Bland*, the California Supreme Court approved of the Court of Appeal's analysis in *Rodriguez*: "In *Rodriguez*, the prosecution alleged that a certain prior conviction was a serious felony under *Penal Code section 1192.7, subdivision (c)(8)*, i.e., that it was a felony in which the defendant **[*13]** 'personally inflicted' great bodily injury. The prior conviction, however, was of a crime that only required that the defendant's actions 'proximately caused' death or serious bodily injury. (*Pen. Code, § 148.10*; see *People v. Rodriguez, supra,* [69 Cal.App.4th] at pp. 345-346.) The trial court instructed the jury in terms of proximate causation under *CALJIC No. 3.40*, and the jury found the prior conviction was serious. The Court of Appeal reversed. It concluded, 'Proximately causing an injury is clearly different from personally inflicting an injury.' (*People v. Rodriguez, supra,* [69 Cal.App.4th] at p. 351.) 'To

"personally inflict" an injury is to directly cause an injury, not just to proximately cause it. The instruction was wrong because it allowed the jury to find against Rodriguez if the . . . injury was a "direct, natural and probable consequence" of Rodriguez's action, even if Rodriguez did not personally inflict the injury.' (*Id. at pp. 347-348.*)" (*Bland, supra, 28 Cal.4th at pp. 336-337.*)

The facts in *Rodriguez*, however, demonstrate why its holding does not compel reversal in the instant **[*14]** case. The defendant in *Rodriguez* was fleeing on a bicycle when tackled by an officer, who hit his head on the ground and was knocked unconscious. As the *Rodriguez* court observed, the defendant "did not initiate a struggle or any other physical contact with the officer. Nor can we find evidence in this record of any act by Rodriguez that directly caused the officer injury." (*Rodriguez, supra, 69 Cal.App.4th at p. 351.*) In contrast, defendant aggressively pursued Zuniga after striking him with the pipe, and it was during Zuniga's failed attempt to escape further injury during defendant's ongoing attack that he broke his leg. Considering that defendant did initiate the altercation, and did strike blows upon Zuniga with a deadly weapon, we conclude *Rodriguez* provides no support for defendant's challenge to the sufficiency of the evidence. [6]

> 6 The facts in *Bland* are not pertinent to our discussion because the issue presented in the relevant portion of *Bland* was whether or not the trial court had a duty to provide a jury instruction defining "proximate cause" for purposes of section 12022.53, subdivision (d).

[*15] Courts have resisted applying the holding in *Cole* to situations which do not serve the purpose of the statute. For example, in cases involving assaults by multiple attackers resulting in great bodily injury, "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." (*People v. Corona (1989) 213 Cal.App.3d 589, 594, 261 Cal. Rptr. 765*; accord, *People v. Banuelos (2003) 106 Cal.App.4th 1332, 1336-1338.*)

People v. Dominick (1986) 182 Cal.App.3d 1174, 1210-1211, 227 Cal. Rptr. 849 (*Dominick*) undermines defendant's theory that *Cole* stands for the proposition that only a defendant who personally delivers the blow resulting in great bodily injury is subject to the enhancement. In *Dominick*, the defendant held onto a kidnap victim while another assailant struck the victim in the face with a stick, after which the victim fell into a gulley, breaking her shoulder. Relying on *Cole*, the defendant in *Dominick* argued he was merely an aider and **[*16]** abettor who did not personally inflict the blow resulting in great bodily injury. Rejecting the argument, our colleagues in Division One of this district held the defendant "was directly responsible for the broken shoulder the victim suffered. Hence, his sentence was properly subject to such enhancement." (*Dominick, supra, 182 Cal.App.3d at p. 1211.*)

People v. Guzman (2000) 77 Cal.App.4th 761 further illustrates the practical limitation of the *Cole* holding. The defendant in *Guzman*, driving under the influence of alcohol, made an unsafe left turn in front of another vehicle, resulting in

a collision in which Guzman's passenger suffered great bodily injury. (*People v. Guzman, supra, 77 Cal.App.4th at p. 763*.) Relying on *Cole*, Guzman argued he did not personally inflict great bodily injury upon his passenger, but that it was the other driver who directly performed the act causing the injury. In rejecting the contention, the court noted Guzman's "volitional act was the direct cause of the collision and therefore was the direct cause of the injury." (*People v. Guzman, supra, 77 Cal.App.4th at p. 764*.) Moreover, **[*17]** the accidental nature of the injuries was of no significance, since the enhancement contains no intent requirement. (*Ibid*.) Similarly, in the instant case, it was defendant's volitional attack on Zuniga that directly caused Zuniga's broken ankle.

Given this weight of authority, we are satisfied that a reasonable trier of fact could conclude that defendant's conduct was a direct cause of Zuniga's broken ankle, suffered when he fell or jumped off the wall. Substantial evidence supports the judgment. (*Jackson v. Virginia (1979) 443 U.S. 307, 317-320, 61 L. Ed. 2d 560*; *People v. Rodriguez (1999) 20 Cal.4th 1, 11*.)

B. Jury Instruction on Proximate Cause

Defendant further challenges the great bodily injury finding on the ground the trial court committed prejudicial error by instructing the jury on proximate cause as it relates to the enhancement. As defendant correctly points out, the concept of proximate cause does not apply under *section 12022.7, subdivision (a)*. (*Bland, supra, 28 Cal.4th at pp. 336-337*; *Rodriguez, supra, 69 Cal.App.4th at pp. 347-348*.)

The trial court instructed the jury pursuant to *CALJIC No. 3.40* **[*18]** as follows: "To constitute personal infliction of great bodily injury there must be in addition to the great bodily injury an unlawful act which was a cause of that injury. [P] The criminal law has its own particular way of defining cause. A cause of the great bodily injury is an act that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act the injury and without which the injury would not occur." In addition, the jury was instructed pursuant to *CALJIC No. 3.41* as follows: "There may be more than one cause of the great bodily injury. When the conduct of two or more persons contributes concurrently as a cause of the injury, the conduct of each is a cause of the injury if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the injury and acted with another cause to produce the injury. [P] If you find that the defendant's conduct was a cause of injury to another person, then it is no defense that the conduct of some other person, even the injured person, contributed to the injury."

In combination, the giving of *CALJIC Nos. 3.40* **[*19]** and *3.41* was error. *CALJIC No. 3.40* clearly encompasses the concept of proximate cause and, as indicated above, proximate cause does not satisfy the elements of *section 12022.7, subdivision (a)*. Respondent takes the position that the challenged instructions were properly given in connection with the charges in counts one and two-assault with a deadly weapon or by means of force likely to produce great bodily injury. Respondent points out that the jury was instructed as to the elements of *section 12022.7, subdivision (a)*, by means of *CALJIC No. 17.20* as follows: "It is alleged in Count I that in the

commission of a felony or attempted felony, the defendant personally inflicted great bodily injury on Benjamin Zuniga, Jr. [P] If you find a defendant guilty of Count I, a felony, you must determine whether that defendant personally inflicted great bodily injury on Benjamin Zuniga, Jr. in the commission or attempted commission of Count I. [P] '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. **[*20]** [P] 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. [P] Include a special finding on that question in your verdict, using a form that will be supplied for that purpose."

There are two difficulties with respondent's argument. First, the jury was instructed to "consider the instructions as a whole and each in light of all the others." As such, there is no way to conclude the jury only considered *CALJIC Nos. 3.40* and *3.41* in connection with the substantive charges in counts one and two, as opposed to the great bodily injury allegation. Second, and more significantly, the prosecutor expressly relied upon the proximate cause language in urging the jury to return a finding of true as to the great bodily injury allegations. The prosecutor argued as follows:

"The judge is going to instruct you about the law of causation in criminal cases. Basically what you have on the driveway is the question of well, did Mr. Buono break that ankle? There is no testimony that the pipe came down on his right ankle. There is no testimony that necessarily Mr. **[*21]** Buono took both of his hands and pushed Mr. Zuniga off that wall with the intention of shattering his leg. There is no testimony to that.

"Criminal law does not require that. Criminal law instructions say you can look at the causation, the cause of the injury in a but for-type of scenario. If you find that the defendant committed a criminal act by [assaulting] Mr. Zuniga with the pipe here on the lawn, he sets in motion a series of events by doing that, the consequences of which he is liable for. We really wouldn't want it any other way.

"If you are running away from someone and you get injured, they shouldn't be criminally liable for that? No, absolutely not. You won't be backing up focused on something other than where you were going but for the pipe, but for the crime.

"It is not a complicated issue that some of you might have encountered in some civil service. The criminal law is very clear about it and the judge will instruct you. Even if you find that someone else, the injured, had some impact, some influence on their injury, if the defendant set it in motion, the defendant's liable. That is the allegation pursuant to *[section] 12022.7*[, subdivision (a)] in this case.

[*22] "It is the injury in the driveway and the extent of that injury.

"The first element, the personal infliction of great bodily injury is addressed in the causation argument that you can find the crime was the thing that set the cause of action in motion, then the defendant is personally liable for any and all of the injuries that occurred as a result of that."

The remaining question is whether the instructional error was prejudicial. The issue as to whether defendant personally inflicted great bodily injury was a close

question on the facts. The proximate cause instruction injected an improper theory of liability into the great bodily injury issue. The prosecutor expressly relied upon the improper instruction on proximate cause in urging the jury to find the great bodily injury allegation to be true. Under these circumstances, the instructional error must be deemed prejudicial and the enhancement reversed. (*Chapman v. California (1967) 386 U.S. 18, 22, 17 L. Ed. 2d 705*; *People v. Flood (1998) 18 Cal.4th 470, 504*.)

C. Remand for Limited Retrial

Because there is constitutionally sufficient evidence to support the great bodily injury finding, **[*23]** the cause is remanded to the trial court for a limited retrial on that allegation. If the prosecution elects not to retry the allegation, or if the allegation is found not true, defendant's presentence conduct credits must be recalculated. At the time of sentencing, defendant was eligible for a maximum of 15 percent of conduct credits-here 18 days-because the great bodily injury finding caused the charge in count one to be a violent felony. (§§ 667.5, subd. (c)(8), 2933.1, subd. (a).) If the great bodily injury allegation is not established upon remand, defendant would be entitled to a maximum of 68 days of conduct credit, given his presentence time in custody of 138 days. (§§ 2900.5, subd. (a), 4019, subds. (b)-(c).)

II. Defendant's Assault by Means of Force Likely to Produce Great Bodily Injury Conviction

A. Sufficiency of the Evidence

Section 245, subdivision (a)(1) prohibits assaults committed "by any means of force likely to produce great bodily injury." "Great bodily injury is bodily injury which is significant or substantial, not insignificant, trivial or moderate." (*People v. Armstrong (1992) 8 Cal.App.4th 1060, 1066*.) "One **[*24]** may commit an assault without making actual physical contact with the person of the victim; because the statute focuses on *use* of a deadly weapon or instrument or, alternatively, on force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial. [Citation.]" (*People v. Aguilar (1997) 16 Cal.4th 1023, 1028*; see also *In re Nirran W. (1989) 207 Cal.App.3d 1157, 1161-1162, 255 Cal. Rptr. 327* ["The essential determination is whether the force was likely to produce great bodily injury rather than the actual injury incurred"].) "The question of whether or not the force used was such as to have been likely to produce great bodily injury is one of fact based on all the evidence, including but not limited to the injury inflicted. [Citations.]" (*People v. Chavez (1968) 268 Cal.App.2d 381, 384, 73 Cal. Rptr. 865*.)

"That the use of hands or fists alone may support a conviction of assault 'by means of force likely to produce great bodily injury' is well established. [Citations.]" (*People v. Aguilar, supra, 16 Cal.4th at p. 1028*.) A single blow to the victim's face may have **[*25]** been likely to cause great bodily injury. (*In re Nirran W., supra, 207 Cal.App.3d at p. 1161*.) "Whether a fist would be likely to produce such injury is to be determined by the force of the impact, the manner in which it was used and the circumstances under which the force was applied. Such matters are for the triers of fact." (*People v. Score (1941) 48 Cal.App.2d 495, 498*.)

Defendant contends that there is insufficient evidence to show that he

assaulted Zuniga by means of force likely to produce great bodily injury. There is sufficient evidence to support his assault conviction.

According to Zuniga, after sustaining the injury to his ankle, he crawled to the front of the house where he called for help. Someone inside the house said, "Get him off my property," and defendant grabbed him and dragged him down the walkway and down the steps to the sidewalk. Zuniga could not resist, his ankle hurt so much that he just let defendant drag him. Defendant then punched Zuniga in the eye. Dr. Willard testified that the front of Zuniga's eye was bruised and there was blood on the front portion of the eye indicating a possible fracture below the eye. Defendant's **[*26]** version of the assault largely matched Zuniga's version, except that defendant claimed that he punched Zuniga in the eye at the top of the stairs after Zuniga attempted to punch him, and then he "threw" Zuniga down the stairs. Standing alone, the evidence presented as to either of defendant's acts of "dragging" or "throwing" an already injured Zuniga down the stairs to the sidewalk, or punching an essentially defenseless Zuniga in the eye causing the injuries Dr. Willard described, was sufficient for a reasonable or rational juror to have found defendant guilty of assault by means of force likely to produce great bodily injury beyond a reasonable doubt. (See *People v. Rodriguez, supra, 20 Cal.4th at p. 11*; *People v. Rayford (1994) 9 Cal.4th 1, 23*.) Together, the evidence of these acts was sufficient to support the conviction.

B. Section 654

Section 654 prohibits multiple punishments for a single act or omission, even when that act or omission violates more than one statute and thus constitutes more than one crime. [7] Thus, although a defendant may be charged with and convicted of multiple crimes arising from a single act, the defendant may **[*27]** be sentenced only on the crime carrying the highest punishment; the sentence on the other counts arising from the same act must be stayed. (*People v. Liu (1996) 46 Cal.App.4th 1119, 1134*.) Here, defendant contends that his acts of assaulting Zuniga with a deadly weapon and assaulting him by means of force likely to produce great bodily injury were incidental to his single objective of removing Zuniga from the work site and therefore sentence cannot be imposed on both counts. We disagree.

> 7 Section 654, subdivision (a), provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

The Supreme Court has explained that "'the proscription against double punishment in section 654 is applicable where there is a course of conduct which . . . comprises an indivisible **[*28]** transaction punishable under more than one statute . . . . The divisibility of a course of conduct depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one.' [Citation.]" (*People v. Coleman (1989) 48 Cal.3d 112, 162, 255 Cal. Rptr. 813*.) But if the defendant

"harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison (1989) 48 Cal.3d 321, 335, 256 Cal. Rptr. 401.*) The question of whether a defendant harbored multiple objectives within the meaning of section 654 is a question of fact, and we will affirm if there is substantial evidence to support the trial court's implicit finding that defendant in this case had different objectives with regard to the two assaults. (*People v. Osband (1996) 13 Cal.4th 622, 730-731.*)

Substantial evidence **[*29]** supports the trial court's implied finding that defendant had different objectives with regard to the two assaults. The assault with the deadly weapon was the culmination of an argument between defendant and Zuniga that began because defendant was angry that Zuniga had failed to complete his assigned work on the Tansey job as quickly as defendant expected. After defendant and Zuniga argued for some period, and Zuniga told defendant he was going to walk off the job, defendant retrieved the pipe from his truck and struck Zuniga with it. As defendant continued to assault Zuniga with the pipe, Zuniga fell or jumped off the driveway wall injuring himself. Defendant walked over to Zuniga and continued to assault him with the pipe until Sabastian interceded and disarmed defendant. At that point, defendant broke off his attack and walked away.

The assault by means of force likely to produce great bodily injury occurred as part of defendant's removal of Zuniga from the property after defendant ended his assault on Zuniga with the pipe and had walked away. Unable to get up, Zuniga screamed and pleaded for help. Defendant declined to help Zuniga and Zuniga crawled towards the steps in front **[*30]** of the house where he called for help from someone inside. Someone inside the house said, "Get him off my property." Defendant then grabbed Zuniga and removed him from the property, assaulting him by means of force likely to produce great bodily injury in the process.

III. Defendant's Prosecutorial Misconduct Claim

Defendant claims that the prosecutor committed misconduct by asking defendant whether Arenaza and Owen lied in their testimony. Defendant cites the following testimony:

"[Prosecutor:] You never had any kind of tool or weapon in your hands?

"[Defendant:] No.

"[Prosecutor:] That little boy we just heard, he was lying then?

"[Defendant:] Yeah.

"[Prosecutor:] Mr. Tansey, he told us that when he came out Mr. Zuniga appeared to be in a great deal of pain. Is that true or was he lying too?

"[Defendant:] I don't know if that is what he said. I don't recall him saying that."

Defendant concedes that defense counsel failed to object to the prosecutor's questions or ask the trial court to admonish the jury to disregard the prosecutor's alleged misconduct, and acknowledges that, generally, such failures prevent appellate review of prosecutorial misconduct **[*31]**

claims. (See *People v. Hill (1998) 17 Cal.4th 800, 820* (*Hill*) ["'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion-and on the same ground-the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' [Citation.]"]; see also *People v. Rodrigues (1994) 8 Cal.4th 1060, 1125*.) Defendant argues, however, that review of his prosecutorial misconduct claim is appropriate because an objection or admonition would have been futile as the resulting "massive prejudice could not have been cured by any admonition." "The futility exception to the rule requiring an objection and request for curative admonition is to be applied only in 'unusual circumstances.' (*People v. Hill, supra, 17 Cal.4th at p. 821*; *People v. Riel (2000) 22 Cal.4th 1153, 1212-1213* [(*Riel*)].)" (*People v. Zambrano (2004) 124 Cal.App.4th 228, 237* (*Zambrano*).) In *Riel*, the California Supreme Court indicated that the futility exception should be reserved for "extreme cases" such as *Hill*, where **[*32]** defense counsel made a number of objections, but did not continually object to pervasive misconduct, and "the prosecutor's 'continual misconduct, coupled with the trial court's failure to rein in her excesses, created a trial atmosphere so poisonous' that continual objections 'would have been futile and counterproductive to his client.' [Citations.]" (*Riel, supra, 22 Cal.4th at p. 1212*.) Defendant's case does not present unusual circumstances meriting application of the futility exception. The trial atmosphere was not poisoned by continual misconduct by the prosecutor-the prosecutor asked only two allegedly improper questions, defense counsel failed to object to either question, and the record does not suggest that an objection to either question would have been futile. (*Zambrano, supra, 124 Cal.App.4th at p. 237*.)

Defendant next argues that if review of his prosecutorial misconduct claim was forfeited by defense counsel's failure to object and to request an admonition, then defense counsel's assistance was constitutionally deficient. "'Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the **[*33]** defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.' (*People v. Rodrigues, supra, 8 Cal.4th at p. 1126*; see also *People v. Cunningham (2001) 25 Cal.4th 926, 1003* [explaining that first component is established by demonstrating 'that counsel's performance did not meet the standard to be expected of a reasonably competent attorney'].)" (*People v. Foster (2003) 111 Cal.App.4th 379, 383* (*Foster*).)

A reviewing court defers to counsel's reasonable tactical decisions when examining a claim of ineffective assistance of counsel (see *People v. Wright (1990) 52 Cal.3d 367, 412, 276 Cal. Rptr. 731*), and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland v. Washington (1984) 466 U.S. 668, 689, 80 L. Ed. 2d 674*.) **[*34]** "'Reviewing courts will reverse convictions

[on appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his [or her] act or omission.'" (*People v. Zapien (1993) 4 Cal.4th 929, 980*, quoting *People v. Fosselman (1983) 33 Cal.3d 572, 581, 189 Cal. Rptr. 855*.)

In *Foster*, we considered a claim of ineffective assistance of counsel based on a defense attorney's failure to object when a prosecutor asked the defendant if certain prosecution witnesses had lied in their testimony. (*Foster, supra, 111 Cal.App.4th at pp. 383-385*.) We rejected Foster's ineffective assistance claim, in part, because Foster could not establish that his attorney's representation "'fell below an objective standard of reasonableness[,]'" as there was "no California authority establishing whether or not the [were they lying] questions were proper." (*Id. at p. 385*.)

We declined, in *Foster*, to decide whether "were they lying" questions are prosecutorial misconduct, and no California case decided this issue prior to defendant's conviction. [8] (*Foster, supra, 111 Cal.App.4th at p. 385*.) **[*35]** Nevertheless, defendant contends that defense counsel should have objected because our discussion of the issue in *Foster* "put counsel in this state on notice that there were two lines of cases which support a finding that a 'were the witnesses lying' line of cross-examination constitutes prosecutorial misconduct in certain instances." Citing *United States v. Geston (9th Cir. 2002) 299 F.3d 1130* and *United States v. Sanchez (9th Cir. 1999) 176 F.3d 1214, 1220*, defendant also contends that Ninth Circuit Court of Appeals authority at the time of his trial held that it was error for a prosecutor to ask a defendant on cross-examination whether prosecution witnesses were lying. Defendant's contentions are unavailing because, notwithstanding our discussion in *Foster* and then-current Ninth Circuit authority, "there was a lack of clearly established California authority that 'were they lying' questions were improper and constituted prosecutorial misconduct" at the time of defendant's trial. (*Zambrano, supra, 124 Cal.App.4th at p. 238*; *Foster, supra, 111 Cal.App.4th at p. 385*; see also *Smith v. Lewis (1975) 13 Cal.3d 349, 358, 118 Cal. Rptr. 621* **[*36]** ["If the law on a particular subject is doubtful or debatable, an attorney will not be held responsible for failing to anticipate the manner in which the uncertainty will be resolved"].) Moreover, we cannot say, on the record before us, that counsel did not have a tactical purpose for not objecting to the prosecutor's questions. (*People v. Zapien, supra, 4 Cal.4th at p. 980*.) Accordingly, defendant's ineffective assistance of counsel argument fails.

> 8 *Zambrano, supra, 124 Cal.App.4th at page 242*, which held that "were they lying" questions can constitute misconduct under some circumstances, was decided after defendant's conviction.

DISPOSITION

The enhancement pursuant to *section 12022.7, subdivision (a)* is reversed. The matter is remanded to the trial court for purposes of a limited retrial on the great bodily injury allegation. If the prosecution elects not to retry the great bodily injury allegation, or if it is found not true, defendant shall be awarded custody credits **[*37]** consistent with sections 2900.5, subdivision (a), and 4019, subdivisions (b) and (c). In all other respects, the judgment

is affirmed.

KRIEGLER, J.

I concur:

TURNER, P.J.

MOSK, J.

CONCUR BY: MOSK

CONCUR

MOSK, J., Dissenting and Concurring.

I respectfully dissent from the majority's holding that there was sufficient evidence to support the great bodily injury enhancement under *Penal Code section 12022.7, subdivision (a)*. I concur in the remainder of the majority's opinion.

Although there was substantial evidence in this case that defendant proximately caused Zuniga's broken ankle, the evidence was insufficient for a reasonable or rational juror to have found that defendant personally inflicted the injury to Zuniga's ankle beyond a reasonable doubt. (*People v. Rodriguez (1999) 20 Cal.4th 1, 11*; *People v. Rayford (1994) 9 Cal.4th 1, 23*, disapproved on another ground in *People v. Acosta (2002) 29 Cal.4th 105, 120, fn. 7*.) As the prosecutor argued to the jury, there was no evidence that defendant pushed Zuniga over the wall or that he hit Zuniga's ankle with the pipe causing Zuniga's ankle to break, and there was **[*38]** no evidence that defendant otherwise directly caused the injury to Zuniga's ankle. Because a defendant who only proximately causes great bodily injury as opposed to personally inflicting it has not violated *Penal Code section 12022.7, subdivision (a)*, I would reverse the jury's true finding on defendant's personal infliction of great bodily injury enhancement. (See *People v. Bland (2002) 28 Cal.4th 313, 336*; *People v. Cole (1982) 31 Cal.3d 568, 572, 183 Cal. Rptr. 350*; *People v. Rodriguez (1999) 69 Cal.App.4th 341, 347-352*.)

Accordingly, as I would reverse the true finding on the great bodily injury enhancement under *Penal Code section 12022.7, subdivision (a)*, I would remand only for a recalculation of defendant's presentence credits consistent with the majority's opinion.

MOSK, J.

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Accordingly, as I would reverse the true finding on the great bodily injury enhancement under *Penal Code section 12022.7, subdivision (a)*, I would remand only for a recalculation of defendant's presentence credits consistent with the majority's opinion.

MOSK, J.