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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

A136394

v.

**(Lake County
Super. Ct. No. CR928453)**

KATIE ANN KEY,

Defendant and Appellant.

_____ /
A jury convicted appellant Katie Ann Key of felony dependent adult abuse (Pen. Code, § 368, subd. (b)(1) (Count I))¹ and misdemeanor dependent adult abuse (§ 368, subd. (c) (Count II)) arising out of a single course of conduct. The trial court suspended imposition of sentence and placed appellant on probation for three years.

Appellant appeals. She contends the misdemeanor dependent adult abuse conviction (Count II) must be reversed because it is a lesser included offense of felony dependent adult abuse (Count I). The People concede and we accept their concession. We modify the judgment to strike the misdemeanor dependent adult abuse conviction (§ 368, subd. (c) (Count II)) and affirm the judgment as modified.

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2011, Christina Warrington and appellant lived in the same neighborhood in Lower Lake. Warrington suffers from anterior spondylopyosis, which forces her to use a wheelchair. On December 1, 2011, appellant yelled at Warrington, accosted her, and spat on her. Appellant also punched the back of Warrington's neck, kneed Warrington in her low back, and threw her on the ground.

The People charged appellant with felony dependent adult abuse (Pen. Code, § 368, subd. (b)(1) (Count I)), misdemeanor dependent adult abuse (§ 368, subd. (c) (Count II)), and misdemeanor battery on a dependent adult (§ 243.25 (Count III)). The jury convicted appellant of Counts I and II. The jury did not reach a verdict on Count III and the prosecution dismissed that charge. The court denied appellant's motion to reduce the felony to a misdemeanor pursuant to section 17, subdivision (b); the court suspended imposition of sentence and placed appellant on probation for three years.

DISCUSSION

“[T]he difference between felony elder abuse and misdemeanor elder abuse is whether the abuse is perpetrated ‘under circumstances or conditions likely to produce great bodily harm or death.’ If it is, the crime is a potential felony. (§ 368, subd. (b)(1).) If it is not, the crime is a misdemeanor. (§ 368, subd. (c).)” (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1334-1335.) Accordingly, “[m]isdemeanor elder abuse is a lesser included offense of felony elder abuse.” (*Id.* at p. 1335.)

Here, appellant was convicted of felony and misdemeanor dependent adult abuse arising out of a single course of conduct. As the People concede, the conviction of the lesser offense — misdemeanor dependent adult abuse — must be reversed. (*People v. Moran* (1970) 1 Cal.3d 755, 763 [if “the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser included offense must be reversed”].)

DISPOSITION

The conviction for misdemeanor dependent adult abuse (§ 368, subd. (c) (Count II)) is stricken from the judgment. As so modified, the judgment is affirmed. The trial

court is directed to amend the abstract of judgment to remove the misdemeanor dependent adult abuse conviction and to forward the amended abstract to the Department of Corrections and Rehabilitation.

Jones, P.J.

We concur:

Needham, J.

Bruiniers, J.