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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID GAMEZ,

Defendant and Appellant.

2d Crim. No. B231572
(Super. Ct. No. 1345935)
(Santa Barbara County)

David Gamez appeals from the judgment entered after his conviction by a jury of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1),¹ misdemeanor child endangerment (§ 273a, subd. (b)), and felony vandalism. (§ 594, subd. (b)(1).) The trial court found true allegations of three prior prison terms within the meaning of section 667.5, subdivision (b).) Appellant was sentenced to prison for six years.

The trial court erroneously instructed the jury on the offense of aggravated assault in violation of section 245, subdivision (a)(1). Appellant argues that the erroneous instruction, together with improper verdict forms, confused the jury, "resulting in appellant being both convicted and acquitted for the same crime [aggravated assault]." Appellant further argues that the acquittal should stand and the conviction should be reversed. We affirm.

¹ All statutory references are to the Penal Code.

Factual and Procedural Background

The information alleged that appellant had committed an assault "with a deadly and dangerous weapon, a SHOVEL, or by means of force likely to produce great bodily injury." The evidence showed that appellant had swung a shovel at an occupied vehicle. The shovel struck the vehicle's rear window shattering it and spraying shards of glass into the passenger compartment. A child was seated in a car seat in the back of the vehicle. The child's mother, who was sitting in the front passenger seat, testified that appellant had "almost hit [her] daughter's head."

The erroneous jury instruction stated that assault by means of force likely to produce great bodily injury (assault GBI) is a lesser offense necessarily included within the greater offense of assault with a deadly weapon (ADW). Out of the jury's presence, the court explained: "We have included assault by means of force likely to produce great bodily injury as a lesser of assault with a deadly weapon because assault with a deadly weapon is a strike"

The jury was given separate verdict forms for ADW, assault GBI, and the lesser included offense of simple assault. The verdict form for assault GBI specified the offense as "ASSAULT BY MEANS OF FORCE LIKELY, a violation of section 240 of the Penal Code, a Misdemeanor." The assault GBI verdict form omitted the "great bodily injury" language.

The jury initially returned verdicts finding appellant not guilty of ADW; guilty of "ASSAULT BY MEANS OF FORCE LIKELY," in violation of section 240, a misdemeanor; and not guilty of simple assault in violation of section 240, a misdemeanor. The court told the jury that the assault GBI verdict form had mistakenly indicated that the offense is a misdemeanor. It corrected the verdict form to read: "We, the jury . . . find the Defendant . . . GUILTY of ASSAULT BY MEANS OF FORCE LIKELY TO CAUSE GREAT BODILY INJURY, a violation of section 245(a)(1) of the Penal Code, a felony"

The court directed the jury to reconsider its verdict on the assault GBI charge in the light of the corrected verdict form. The jury subsequently returned a verdict finding appellant guilty of assault GBI in violation of section 245(a)(1), a felony.

Discussion

The trial court's jury instruction was erroneous because assault GBI is not a lesser included offense of ADW. When appellant was convicted, section 245, subdivision (a)(1) made "it a felony offense to 'commit[] an assault upon the person of another with a deadly weapon or instrument other than a firearm *or* by any means of force likely to produce great bodily injury.' [Citation.]"² (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065.) The statute "covers in the alternative two slightly different offenses, only one of which [ADW] is defined as a serious felony. . . ." ³ (*Id.*, at p. 1072.) But both offenses are punishable by imprisonment in the state prison for two, three, or four years. (§ 245, subd. (a)(1).) Therefore, assault GBI is "certainly not an offense lesser than and included within . . . the offense of assault with a deadly weapon." (*In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5.)

Appellant forfeited his claim of instructional error because he acquiesced in the erroneous instruction. "[F]ailure to object to instructional error forfeits the objection on appeal unless the defendant's substantial rights are affected. [Citations.] 'Substantial rights' are equated with errors resulting in a miscarriage of justice under *People v. Watson* [1956] 46 Cal.2d 818 [Citation.]" (*People v. Mitchell* (2008) 164 Cal.App.4th 442,

² Effective January 1, 2012, section 245, subdivision (a)(1) was amended to apply only to ADW. Assault GBI is now covered in subdivision (a)(4). (Stats.2011, c. 183, § 1.) All references herein to section 245, subdivision (a)(1), are to the version of the statute in effect when appellant was convicted.

³ " '[A]ssault with a deadly weapon' is a serious felony. (§ 1192.7, subd. (c)(31).) On the other hand, while serious felonies include all those 'in which the defendant *personally inflicts* great bodily injury on any person' [citation], assault merely by *means likely to produce* GBI, without the additional element of personal infliction, is not included in the list of serious felonies. Hence, . . . a conviction under the deadly weapon prong of section 245(a)(1) is a serious felony, but a conviction under the GBI prong is not." (*People v. Delgado, supra*, 43 Cal.4th at p. 1065.)

465.) "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

The erroneous instruction did not affect appellant's substantial rights. The trial court correctly instructed the jury on the elements of ADW and assault GBI. The jury found beyond a reasonable doubt that, although appellant had not committed ADW, he had committed assault GBI. The instructional error, therefore, was a mere technicality that did not result in a miscarriage of justice under *People v. Watson, supra*, 46 Cal.2d at p. 836.

In any event, the error was harmless beyond a reasonable doubt. The jury would still have found appellant guilty if it had been correctly instructed that, instead of being a lesser included offense of ADW, assault GBI is an alternative way of stating a violation of section 245, subdivision (a)(1).

We reject appellant's contention that his acquittal of ADW should have been deemed to be an acquittal of the charged violation of section 245, subdivision (a)(1), so that the trial court erroneously "permitted the jury to redeliberate on the [assault GBI] charge." In support of his contention, appellant cites the following excerpt from section 1161: "[W]hen there is a verdict of acquittal, the court cannot require the jury to reconsider it."

The trial court did not violate section 1161. The acquittal was only on the ADW theory of a violation of section 245, subdivision (a)(1). The court did not require the jury to reconsider its acquittal. The court required the jury to reconsider its guilty verdict on what was supposed to be the assault GBI theory, but which had been inaccurately described in the original verdict form as a violation of section 240 (simple assault), a misdemeanor.

Despite the inaccurate description, the jury clearly intended to convict appellant of assault GBI. The original verdict form specified the offense as "ASSAULT BY MEANS OF FORCE LIKELY." The jury should have known that this was simply a shorthand

way of referring to assault GBI. The jury had been instructed that it could find appellant guilty of the lesser included offense of "[a]ssault with force likely to produce great bodily injury," a lesser included offense of ADW. " [T]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice. [Citations.]' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Furthermore, appellant forfeited any claim of error as to the original assault GBI verdict form because he did not object when the form was submitted to the jury. (*People v. Webster* (1991) 54 Cal.3d 411, 446.) Appellant objected only after the jury had returned a guilty verdict on the original assault GBI verdict form.

Any possible ambiguity in the original verdict form was clarified when the jury returned a guilty verdict on the corrected verdict form. Accordingly, the jury's acquittal of ADW cannot be deemed to be an acquittal of the charged violation of section 245, subdivision (a)(1). Appellant was properly convicted of violating the statute under an assault GBI theory.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Jed Beebe, Judge

Superior Court County of Santa Barbara

Mark R. Feeser, under appointment by the Court of Appeal, for Defendant and Appellant.

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