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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL RAUL GOMEZ,

Defendant and Appellant.

B266841

(Los Angeles County
Super. Ct. No. BA434367)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Ronald S. Coen, Judge. Affirmed.

Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Lance E. Winters, Senior Assistant Attorney General, Steve Matthews,
Supervising Deputy Attorney General, and Ilana Herscovitz, Deputy Attorney General,
for Plaintiff and Respondent.

A jury convicted Daniel Raul Gomez (Gomez) of assault by means likely to produce great bodily injury in violation of Penal Code section 245, subdivision (a)(4),¹ found an allegation of great bodily injury not true, and acquitted Gomez on a criminal threat charge. The court found true four prior convictions within the meaning of sections 667.5, subdivisions (b) through (i) and 1170, subdivision (a) through (d), and sentenced Gomez to eight years in state prison.

Gomez appeals from the judgment, contending only that section 245, subdivision (a)(4) is void for vagueness. We disagree and affirm.

The evidence at trial was that in December 2014 Wilmer Contreras (Contreras) turned into a Los Angeles side street, got out of his car, and asked Gomez's girlfriend (who was walking her dog) for directions. Gomez then walked up behind Contreras and beat him with his fists around the head while Contreras begged him to stop. Contreras passed out and came to on the ground, rolled up in a ball to protect himself. Gomez was straddling Contreras with his elbow in Contreras's rib cage. Gomez punched Contreras with his closed fist 15 to 20 times, kneed him in the waist, said he would pull out his eyes, and put his fingers in Contreras's eye socket. Gomez then said he was going to steal Contreras's car and got into the passenger seat, but Contreras followed him and got into the driver's seat. Gomez ordered Contreras to drive him to the corner because the police were coming but Contreras refused. Gomez's girlfriend pulled Gomez out of the car, and Gomez threatened to get a gun and kill Contreras. Gomez walked away and Contreras dialed 911. When the police arrived, they found Contreras with his face covered in blood, swelling to his right eye, blood coming out of his ear, and a laceration on his lip. Contreras declined an ambulance to the hospital because he did not want to leave his car there, but when he got home, he felt dizzy and decided he had better go. The emergency room doctor stated that Contreras may have had a concussion and had tenderness, swelling, bruising, and blood on his head. At the time of trial in July 2015, Contreras still experienced pain, headaches, dizziness, and memory problems.

¹ All further statutory references are to the Penal Code.

Gomez argues that the phrase “likely to produce,” as used in section 245 and in the instructions given to the jury, is so vague that the statute violates due process and requires the reversal of his conviction. Section 245, subdivision (a)(4) penalizes “[a]ny person who commits an assault upon the person of another by any means of force likely to produce great bodily injury” The court instructed the jury: “Every person who commits an assault upon the person of another by means of force likely to produce great bodily injury is guilty of a violation of section 245 subdivision (a)(4) of the Penal Code, a crime. [¶] ‘Great bodily injury’ refers to significant or substantial bodily injury or damage; it does not refer to trivial or insignificant injury or moderate harm.” The court also instructed: “An assault by means of force likely to produce great bodily injury may be committed with the hands or fists. Proof of such an assault need not show that the defendant actually injured the other person. However, there must be proof that the manner of the assault was likely to produce great bodily injury upon another person.”

Gomez’s due process challenge to section 245, subdivision (a)(4) is without merit. “[A] defendant who falls ‘squarely within’ the reach of a statute lacks standing to challenge its vagueness as it ‘might be hypothetically applied to the conduct of others’ [Citation.] We ‘are not obliged’ to consider every conceivable situation that might arise under a statute’s language if we can give it a “‘reasonable and practical construction’” that accords with the drafters’ probable intent and encompasses the defendant’s conduct.” (*People v. Murphy* (2001) 25 Cal.4th 136, 149.) Gomez’s conduct falls squarely within the reach of force likely to produce great bodily injury. “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.” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) Gomez came up behind Contreras and punched him about the head. After Contreras lost consciousness and fell to the ground, Gomez pinioned Contreras and continued to punch him 15 to 20 times. Such an assault involving repeated blows to the head of the victim is within the reach of section 245, subdivision (a)(4)’s prohibition of conduct “likely to produce great bodily injury,” and that language encompasses Gomez’s conduct.

Gomez argues that the word “likely” can mean anything from probable to possible to expected. Under any of those definitions, however, Gomez’s savage attack on Contreras was likely to cause great bodily injury. It is irrelevant that the jury found not true that Contreras actually suffered great bodily injury. “It is the likelihood, not the actual production of injury, which is the focus of Penal Code section 245, subdivision (a).” “[A]n injury is not an element of the crime, and the extent of any injury is not determinative.” (*People v. Roberts* (1981) 114 Cal.App.3d 960, 964, 965.) Section 245 “focuses . . . on force *likely* to produce great bodily injury, [and] whether the victim in fact suffers any harm is immaterial.” (*People v. Aguilar, supra*, 16 Cal.4th at p. 1028.) Repeatedly punching the head “of a largely defenseless man on the ground appears to us to be unmistakably an assault which a jury could reasonably find was likely to produce great bodily harm.” (*Roberts*, at p. 965.) Like the court in *Roberts*, “[w]e do not believe that any instructional amplification on the word[] ‘likely’ . . . would have significantly enlightened the jury.” (*Ibid.*)

Gomez contends that his offense conduct is irrelevant to the vagueness analysis, citing *Johnson v. United States* (2015) ___ U.S. ___ (135 S.Ct. 2551) for the proposition that it does not matter that his particular conduct fell within the constitutional reach of the statute. That case, however, examined the residual clause of the Armed Career Criminal Act (18 U.S.C. § 942(e)(2)(B)) which “requires courts to use a framework known as the categorical approach,” under which “a court assesses whether a crime qualifies as a violent felony ‘in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.’” (*Johnson*, at pp. 2555, 2557.) The categorical approach “requires a court to picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction presents a serious potential risk of physical injury.” (*Id.* at p. 2557.) The Court concluded that the statute was unconstitutionally vague because the judicial assessment of risk was tied to “a judicially imagined ‘ordinary case’” and required application of the “‘serious potential risk’ standard . . . to a judge-imagined abstraction.” (*Id.* at pp. 2557, 2558.) Nevertheless, “[a]s a general matter, we do not doubt the

constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct; ‘the law is full of instances where a man’s fate depends on his estimating rightly . . . some manner of degree.’” (*Id.* at p. 2561.) Unlike the court, we are not constrained to use the categorical approach, and section 245 calls for the application of its “likely to produce great bodily injury” to Gomez’s real-world conduct.

Because section 245, subdivision (a)(4) “clearly applies to [Gomez’s] conduct,” he “may not challenge it on grounds of vagueness.” (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1095.)

DISPOSITION

The judgment is affirmed.

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JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.