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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
EDWARD E. REID,  
  
Defendant and Appellant.

C067904  
  
(Super. Ct. No. 09F07421)

A jury found defendant Edward Reid guilty of simple assault as a lesser included offense of assault with a deadly weapon. The court placed him on four years' probation on the condition he serve 90 days in jail.

On appeal, defendant raises two contentions. First, he contends the trial court prejudicially erred in giving an instruction on the lesser included offense of simple assault. Second, he contends it was error for the trial court to impose a jail booking fee without determining whether he had the ability to pay it. We disagree with both contentions and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

During a scuffle between the victim and defendant's employer, defendant struck the victim approximately three times with an aluminum baseball bat. As a result, the victim had a 1.6-inch cut on his head that required 10 sutures.

## DISCUSSION

### I

#### *Simple Assault Instruction*

Defendant contends his conviction for simple assault must be reversed because there was insufficient evidence to support the trial court instructing on that offense. The People respond that defendant "*benefited from*, and was not prejudiced by, the giving of a lesser included offense instruction." We agree with the People.

The trial court must instruct on all theories of a lesser included offense "which find substantial support in the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "Although the offense of simple assault is technically a lesser and necessarily included offense of the crime of assault with a deadly weapon, if the evidence shows without conflict that the weapon is actually used the jury should not be instructed on it." (*People v. Crosier* (1974) 41 Cal.App.3d 712, 719, fn. 1.)

Here, the parties correctly agree the baseball bat was unquestionably a deadly weapon. Therefore, the trial court erred in giving an instruction on simple assault as a lesser included offense of assault with a deadly weapon. (See *People*

*v. Crosier*, *supra*, 41 Cal.App.3d at p. 719, fn. 1.) As we explain, however, this error benefited defendant.

A conviction can be overturned on appeal as a result of an instructional error only if the error resulted in a "miscarriage of justice." (Cal. Const., art. VI, § 13; *People v. Moya* (2009) 47 Cal.4th 537, 557-558.) As a similar case from almost a century ago demonstrates, there was no miscarriage of justice here.

In *People v. Washburn* (1921) 54 Cal.App. 124, the defendant hit the victim with an irrigation shovel, badly breaking the victim's arm. The defendant was charged with assault with a deadly weapon, claimed self-defense, and was found guilty of simple assault. (*Id.* at 124-125.) On appeal, we rejected the defendant's argument that his conviction for simple assault could not stand. (*Ibid.*) This court reasoned, "we must assume that the jury believed that he was not justified in making the assault and that if said [simple assault] instruction had not been given they would have found him guilty as charged.

[Citation.] . . . [I]t cannot be said that the error was prejudicial or resulted in a miscarriage of justice."<sup>1</sup> (*Id.* at pp. 126-127.)

The same is true here. The jury could have acquitted defendant of all charges, regardless of the simple assault

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<sup>1</sup> Washburn continues to be good law. (See, e.g., *People v. Powell* (1949) 34 Cal.2d 196, 205-206; *People v. Lee* (1999) 20 Cal.4th 47, 57; *People v. Cota* (1942) 53 Cal.App.2d 455, 457-458.)

instruction; instead, it found him guilty of simple assault. This is the crucial finding, because it shows the jury rejected his theory of defense of others. If it had accepted his defense, the jury would have been bound to acquit him. Defendant therefore has shown no miscarriage of justice.

II

*Jail Booking Fee*

Defendant contends the trial court erred when it imposed a \$287.78 jail booking fee without first determining his ability to pay. We agree with the People that defendant forfeited his challenge to the booking fee by failing to object at sentencing.

In *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357, this court held that a failure to object at sentencing to the imposition of a booking fee "waive[s]" the issue on appeal. Defendant makes no attempt to distinguish *Hodges*, and simply notes the pending review of *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513, which raises a similar issue as *Hodges*. Defendant offers no reason for us to depart from our holding in *Hodges*, and we decline to do so.

DISPOSITION

The judgment is affirmed.

We concur: \_\_\_\_\_, J.  
ROBIE

\_\_\_\_\_ , Acting P. J.  
NICHOLSON

\_\_\_\_\_ , J.  
MAURO