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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID JOSEPH ALLEN,

Defendant and Appellant.

C068155

(Super. Ct. No. 10SCR06559)

A jury found defendant David Joseph Allen guilty of assault with a deadly weapon and attempting to make a criminal threat. (Pen. Code, §§ 245, subd. (a)(1), 664, 422.)¹ The conviction was based on the prosecution’s evidence that defendant had assaulted the victim by grabbing, hitting, punching, and choking her; and that he had threatened to kill her. Defendant contends reversal is required because the prosecution relied on, and the jury was instructed with, a legally incorrect theory of aggravated

¹ Undesignated statutory references are to those sections of the Penal Code in effect at the time of defendant’s April 1, 2011 sentencing.

assault, i.e., feet and hands as deadly weapons. We agree and shall reverse his conviction for aggravated assault.

DISCUSSION

Although recently amended effective January 1, 2012, at all times relevant herein, aggravated assault was defined by section 245, subdivision (a)(1) as an "assault upon the person of another with a deadly weapon or instrument . . . or by any means of force likely to produce great bodily injury." (Stats. 2004, ch. 494, § 1; see now § 245, subd. (a)(4).) Thus, the statute provided for two separate legal theories or alternatives for the same crime. (*In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5; Stats. 2011, ch. 15 § 1.)

The amended information here charged defendant with assault "with a deadly weapon, to wit, FEET AND/OR HANDS, in violation of [s]ection 245, subdivision (a)(1)." The prosecution proceeded under this theory and the trial court so instructed the jury.

However, in 1997, the California Supreme Court determined that "'deadly weapon' within the meaning of section 245, [subdivision (a)(1)] must be an object extrinsic to the human body. Bare hands or feet . . . cannot be deadly weapons" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1034 (*Aguilar*)). Thus, the prosecutor here proceeded under a legally erroneous theory. The People concede as much, but contend that, as in *Aguilar*, the error was not prejudicial. *Aguilar*, however, is distinguishable in nearly every relevant way.

In *Aguilar*, the defendant had assaulted the victim with his hands and feet. (*Aguilar, supra*, 16 Cal.4th at p. 1027.) The jury found him guilty of assault with a deadly weapon or by means likely to produce great bodily injury in violation of section 245, subdivision (a)(1). (*Aguilar*, at p. 1027.) The *Aguilar* court found the prosecutor's erroneous argument that hands and feet may be deadly weapons did not lead the jury down an analytically improper path. (*Id.* at pp. 1035-1038.) The prosecutor had argued that only if the jury found the defendant inflicted kicks and blows in a manner that created a likelihood of great bodily injury could it conclude the defendant had used a deadly weapon. (*Id.* at p. 1036.)

The jury in *Aguilar* was instructed that "'Every person who commits an assault upon the person of another with a deadly weapon or instrument or by means of force likely to produce great bodily injury is guilty of a violation of section 245, subdivision (a)(1) of the Penal Code, a crime.'" (*Aguilar, supra*, 16 Cal.4th at p. 1037, italics omitted.) The instruction further provided that, in order to prove aggravated assault, it must be proved that "'One, a person was assaulted, and two, the assault was committed by the use of a deadly weapon or instrument or by means of force likely to produce great bodily injury. A deadly weapon is any object, instrument, or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury.'" (*Ibid.*) The *Aguilar* jury was further instructed that "'[a]n assault by

means of force likely to produce great bodily injury may be committed with the hand or fists. Proof of such an assault need not show that the defendant actually injured the other person. However, there must be proof that as a result of physical force used or attempted to be used, and the manner of such use or of such . . . attempt, there was a likelihood of great bodily injury being inflicted upon another person.'" (*Id.* at pp. 1037-1038.) The Supreme Court concluded, "The instructions thus specifically invited the jury to consider the evidence of any blows from fists under the correct rubric ('force likely to produce great bodily injury')." (*Id.* at p. 1038.)

Thus, in *Aguilar*, both the prosecutor's argument and the instructions called upon the jury to find that the defendant's conduct had the probability of inflicting great bodily injury, under either a "deadly weapon" or "force likely" theory. (*Aguilar, supra*, 16 Cal.4th at pp. 1036-1037.) Accordingly, "[e]ven . . . if the jury used the fact of the blows with hands [or feet] to find [the] defendant committed assault with a deadly weapon, it necessarily would have found . . . that [the] defendant used his hands [or feet] in a manner *likely to produce great bodily injury.*" (*Id.* at p. 1037.) Regardless of which path the jury took to a finding of guilt, it still, necessarily, found the defendant had used force likely to create great bodily injury. (*Id.* at pp. 1036-1037.)

Here, unlike *Aguilar*, the information did not allege aggravated assault with the alternative language of "or by any

means of force likely to produce great bodily injury” and the jury instruction was limited to omit the language in *Aguilar* referencing “force likely to produce great bodily injury.” (*Aguilar, supra*, 16 Cal.4th at p. 1026, quoting § 245, former subd. (a)(1) [now subd. (a)(4)], italics omitted; see CALCRIM No. 875.)

Moreover, unlike *Aguilar*, the prosecutor here did not qualify his remarks to argue that defendant’s hands or feet could be deadly weapons *only if* used in a manner to cause great bodily injury. (*Aguilar, supra*, 16 Cal.4th at p. 1036.) Instead, the prosecutor stated that, although not traditionally thought of as deadly weapons, feet and hands could be used to kill; that the damage done to the victim was done with sufficient force that it could have caused great bodily injury; and then concluded that defendant’s feet and hands “at that time, under those circumstances, were being used as weapons—deadly weapons.”

Finally, and most significantly, departing from the facts in *Aguilar*, although the jury was instructed with the definition of a “deadly weapon” as “any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury” (CALCRIM No. 875) the jury was then immediately informed that it was stipulated that “feet and hands are a deadly weapon as to Count V [(assault with a deadly weapon)].” Thus, the question of whether defendant used his

feet or hands in a manner likely to produce great bodily injury was expressly removed from consideration by the jury in this case. Indeed, in light of the jury instruction and stipulation, the instant case is akin to the exception stated in *Aguilar* for inherently dangerous weapons. (See *Aguilar, supra*, 16 Cal.4th at pp. 1035, 1037, fn. 10.)

For these reasons, defendant's conviction for aggravated assault, based on the finding that he used a deadly weapon, must be reversed.

Regardless of whether the People choose to retry defendant for aggravated assault, defendant will need to be resentenced. Accordingly, we need not address defendant's other contentions, which relate to his sentence, raised in his appeal.

DISPOSITION

Defendant's conviction for aggravated assault (§ 245, subd. (a)(1)) is reversed and the matter is remanded for further proceedings consistent with this opinion.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

NICHOLSON, J.