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

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID RAY FRIEDMAN,

Defendant and Appellant.

C081180

(Super. Ct. No. CH032452)

This is an appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Having reviewed the record as required by *Wende*, we affirm the judgment. We set forth a brief description of the facts and procedural history of the case pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, 110, 124.

An information charged defendant David Ray Friedman with assault with a deadly weapon, to wit, a sharp instrument, and by means of force likely to produce great bodily

injury while confined in state prison serving less than a life term (Pen. Code, § 4501—count I)¹ and possession of a sharp instrument while confined in a penal institution (§ 4502, subd. (a)—count II).² In connection with count I, it was further alleged that defendant personally inflicted great bodily injury upon the victim. (§ 12022.7, subd. (a).) A strike prior (2012 robbery) was also alleged pursuant to section 667, subdivisions (b)-(i).

On May 23, 2014, defendant and inmate Darren Jack Merenda attacked inmate G. Vaughn in the C yard at High Desert State Prison. Correctional Officer Oscar Smith was watching the yard from an elevated position and witnessed the attack from 70 yards away. While Merenda held Vaughn’s legs, defendant punched Vaughn 10 to 15 times in the head, face, and shoulder. Officer Smith did not see a weapon.

Correctional Officer Victor Yates also witnessed the attack from 75 to 150 yards away. He saw defendant strike Vaughn in a “stabbing motion.” Officer Yates did not see a weapon in defendant’s hand or see him throw one but saw a weapon after the attack. The weapon was flat, metal, and four and a half inches long with tape on the handle.

¹ Undesignated statutory references are to the Penal Code.

² At the time of defendant’s offense, section 4501 provided: “Except as provided in section 4500, every person confined in a state prison of this state who commits 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, shall be guilty of a felony and shall be imprisoned in the state prison for two, four, or six years to be served consecutively.” (Stats. 2004, ch. 405, § 17, p. 3626.) Effective January 1, 2015, section 4501 was amended to provide for assault with a deadly weapon or instrument in subdivision (a) and for assault by any means of force likely to produce great bodily injury in subdivision (b). Both subdivisions provide for a sentencing triad of two, four, or six years, to be served consecutively. The change was described by Legislative Counsel as technical and nonsubstantive. (Stats. 2014, ch. 51, § 1.)

Correctional Officer Justin Stark also saw the fight from 100 to 125 yards away. Defendant struck Vaughn with his fists. Officer Stark did not see a weapon in defendant's hand, and did not see defendant throw anything.

Correctional Officers Clayton Prater and Martinez investigated the attack. Vaughn refused to answer questions. Several photos were taken of Vaughn's injuries that included an injury under his eye that required three stitches, lacerations on his forehead, torso, shoulder, arm, back and stomach, swelling to his hand, and abrasions on his knees.

Correctional Officer Eugene Boyd processed the scene. He described the weapon the same as Officer Yates. The weapon was found about 20 feet from defendant but closer to Vaughn. The weapon did not have any blood on it. Defendant had scratches on his neck, hands, and forearm and blood on his shorts, socks, and shoes. He did not have a wound that was bleeding. Officer Boyd opined that Merenda's job was to hold Vaughn while defendant stabbed Vaughn. Officer Boyd testified that inmates use small weapons that can be concealed in their hands so that it looks like punching rather than stabbing.

Clayton Tanner, a registered nurse at the prison, was called to testify for the defense. Vaughn's injuries included a straight-line cut or laceration to his right eye that was also bruised and swollen, pain in his right hand that was also swollen, abrasions or scratches on his knees, and scratches on his back. Tanner could not say what caused the straight-line cut over Vaughn's eye. It could have been caused by a punch or a weapon.

The parties stipulated that defendant had been convicted of a felony and was confined in state prison serving less than a life term at the time of the incident.

A jury convicted defendant on count I and found the great bodily injury allegation to be true. The jury was unable to reach a verdict on count II and it was dismissed on the prosecution's motion. In bifurcated proceedings, defendant admitted the strike prior.

The probation officer recommended the upper term of six years, doubled for the strike prior, plus three years for the enhancement for a total of 15 years. After the jury verdict and prior to sentencing, the judge who presided over trial died. In lieu of having the new sentencing judge read the trial transcripts in order to impose sentence, the parties stipulated to an agreed-upon sentence, that is, the midterm of four years doubled for the strike prior, plus three years for the great bodily injury enhancement to be served consecutively to defendant's current term in state prison. The court sentenced defendant accordingly.³

Defendant appeals.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days have elapsed, and we have received no communication from defendant. Having undertaken an examination

³ Section 1053 provides: "If after the commencement of the trial of a criminal action or proceeding in any court the judge or justice presiding at the trial shall die, become ill, or for any other reason be unable to proceed with the trial, any other judge or justice of the court in which the trial is proceeding may proceed with and finish the trial; or if there be no other judge or justice of that court available, then the clerk, sheriff, or marshal shall adjourn the court and notify the Chairman of the Judicial Council of the facts, and shall continue the case from day to day until the time that the chairman shall designate and assign a judge or justice of some other court, and the judge or justice shall arrive, to proceed with and complete the trial, or until such time as by stipulation in writing between the prosecuting attorney and the attorney for the defendant, filed with the court, a judge or justice shall be agreed upon by them, and the judge or justice shall arrive to complete the trial. The judge or justice authorized by this section to proceed with and complete the trial shall have the same power, authority, and jurisdiction as if the trial had been commenced before that judge or justice."

of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

_____ **BUTZ** _____, J.

We concur:

_____ **HULL** _____, Acting P. J.

_____ **MAURO** _____, J.