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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE S. MORENO,

Defendant and Appellant.

D060183

(Super. Ct. No. SCD226640)

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed.

A jury convicted Jorge S. Moreno of assault by means of force likely to produce great bodily injury. The jury also found not true the allegation that Moreno personally inflicted great bodily injury on the victim. (Pen. Code,<sup>1</sup> § 245, subd. (a)(1), 1192.7, subd. (c)(8).) Moreno admitted he had suffered three prior serious/violent felony convictions within the meaning of section 667, subdivisions (b) through (i); two prison

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

priors (§ 667.5, subd. (b)), and two serious felony prior convictions within the meaning of section 667, subdivision (a)(1). The two serious felony priors were subsequently dismissed in light of the jury's rejection of the great bodily injury allegation. Moreno was sentenced to an indeterminate term of 25 years to life in prison, plus two consecutive determinate years for the two prison priors.

Moreno appeals contending the evidence does not support aggravated assault because the jury rejected the great bodily injury allegation and that there was prejudicial juror misconduct. We will reject both contentions and affirm the judgment.

#### STATEMENT OF FACTS

When the events in this case took place, Moreno and the victim were both inmates at the San Diego County central jail facility. They were both housed in the administrative segregation section.

On February 21, 2010, Moreno was outside of his cell in the day room area of the unit. The victim was still inside his separate cell. When the doors of the cells are closed there is apparently a gap between one edge of the door and the wall. On this occasion, Moreno approached the victim's cell and engaged the victim in conversation. Moreno had a cup of hot water with him at the time.

Moreno was able to persuade the victim to get close to the door so he could hear Moreno. When the victim pressed his face against the gap in the door, Moreno threw the cup of hot water onto the victim's face. When he was hit with the hot water the victim screamed in pain and called for help.

After they completed their security check, sheriff's deputies escorted the victim to the jail medical facility.

The medical examination of the victim established he was in some pain and had evidence of burns to his face. The symptoms included redness, swelling and some blistering. The examining doctor concluded that the victim had suffered first and second degree burns to his face and believed the water thrown onto his face must have been at least 150 degrees Fahrenheit.

Moreno did not present a defense and counsel admitted Moreno committed the assault. Moreno simply argued the force used was not likely to cause great bodily injury as required for the charged aggravated assault. The jury convicted Moreno of assault with force likely to cause great bodily injury, but found not true the allegation that Moreno personally inflicted great bodily injury.

## DISCUSSION

### I

#### *SUFFICIENCY OF THE EVIDENCE TO PROVE AGGRAVATED ASSAULT*

Moreno makes a straightforward, but unpersuasive claim which, simply stated, is that since the jury found the great bodily injury allegation to be not true, the jury must have only found him guilty of the misdemeanor crime of simple assault. As Moreno recognizes, assault with force likely to cause great bodily injury is an inchoate offense that focuses on the nature of the force used, rather than upon the injury. (*People v. Colantuono* (1994) 7 Cal.4th 206, 216.) For some reason, which frankly escapes us,

Moreno seems to contend that where the "assault [is] fully consummated, and the jury determined the force actually used did not cause great bodily injury" that of necessity the force used was "not likely to cause great bodily injury." Such argument is contrary to established law, and thus we reject it.

When we consider a claim of insufficient evidence, we review the entire record in the light most favorable to the trial court decision. We do not make credibility determinations and we do not reweigh the evidence. Our question is simply whether there is sufficient substantial evidence from which a reasonable jury could find each element of the offense to have been proved beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576; *People v. Staten* (2000) 24 Cal.4th 434, 460.)

Assault is an unlawful attempt, coupled with a present ability to commit a violent injury upon another. (§ 240.) Assault is aggravated when the basic crime is coupled with another element. In this case the additional element is the use of force, which is likely to produce great bodily injury. (§ 245, subd. (a)(1).) The focus of section 245, subdivision (a)(1), is the force used, not on whether an injury actually occurred. (*People v. Roberts* (1981) 114 Cal.App.3d 960, 964; *People v. Colantuono, supra*, 7 Cal.4th at p. 217; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.)

Applying the appropriate legal standards, it is clear there is sufficient evidence to support the jury verdict. Moreno threw very hot water onto the victim's face. Medical testimony showed that at such temperature hot water could have caused second degree burns and possible scarring. The fact that the actual injury inflicted was not all that could

have resulted from Moreno's actions does not detract from the jury's reasonable conclusion that such act was "likely" to produce great bodily injury. The fact the degree of injury turned out to be lesser does not detract from the jury's finding. Had Moreno thrown boiling water or acid at the victim's face, but had fortuitously missed, that would not change the nature of the force used. Accordingly, we reject Moreno's claim that the evidence did not prove aggravated assault.

## II

### *ALLEGED JUROR MISCONDUCT*

Moreno contends that Juror No. 3 committed prejudicial misconduct by lying or concealing relevant information during voir dire and by considering extraneous material information during deliberations. Following a rambling, and somewhat confusing discussion by the trial court, Moreno's motion for new trial was denied. While the trial court could have been more precise in its discussions, we are satisfied there was no admissible evidence of juror misconduct in deliberations. Nor, after reading equally loose and rambling voir dire by the court and counsel, do we find any misconduct on the part of Juror No. 3. Indeed, the record shows the juror directly answered the questions put to him. Unfortunately, those questions did not call for the answers that counsel, upon hindsight, would like to have obtained.

#### A. Standard of Review

When we examine a trial court's denial of a motion for new trial, which was brought on the grounds of alleged juror misconduct, we accept the trial court's factual

findings and credibility determinations that are supported by substantial evidence. Once the facts are determined we will independently determine if there was any prejudicial jury misconduct. (*People v. Dykes* (2009) 46 Cal.4th 731, 809.) However, purported statements by jurors about their mental processes in evaluating the evidence are made inadmissible by Evidence Code<sup>2</sup> section 1150. (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.)

### B. Voir Dire Issues

Moreno's principal complaint arises from a conversation defense counsel had with Juror No. 3 following the verdict. According to counsel's statement he asked the juror what he might have done to obtain a better result for his client. Among other things, the juror is alleged to have told defense counsel he did not ask the right questions during jury selection. The juror pointed out he was asked his occupation, which he correctly answered was as a pharmacist. The juror pointed out he was not asked where he worked, which was the R.J. Donovan California State Prison. Moreno claims the juror lied and/or willfully withheld material information. We disagree.

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<sup>2</sup> Evidence Code section 1150 provides: "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined. [¶] (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict."

During jury selection, neither counsel asked any direct questions of Juror No. 3. In its introductory questions the trial court asked all jurors to give their name, occupation, the occupation of other adults they live with, the age of their children, whether they had previously served as a juror, whether they had any "close friends or relatives" in law enforcement, and whether they believed they could be fair. Juror No. 3 gave his name, occupation as a pharmacist, that he lived alone and had no children, he had previously served as a juror in a civil case, he had no friends or relatives in law enforcement or the legal profession and that he believed he could be fair.

Defense counsel's affidavit in support of the new trial motion asserted the juror had made a number of statements in voir dire, that examination of the reporter's transcript proved to be inaccurate. We have set forth the entirety of Juror No. 3's responses. He was never asked where he worked. Indeed, when the juror was questioned by the court, the jury had not been told that the crime in this case occurred in the county jail. Nor was any juror asked about knowledge of jail operations.

Essentially, Moreno complains that the juror did not volunteer information about the place of his employment, but there would have been no reason for the juror to do so, unless there was something about the place of his employment that caused the juror to believe that he could not be fair. No evidence has been offered at any point in this case that the juror was biased against the defendant, that the juror thought he could not be fair or that the juror took any action to seek out or obtain any information outside of court to use in deliberation.

The conversation with Juror No. 3 after trial was in the context of the attorney's request for advice on how to do a better job. The juror pointed out the unasked question, which might have been important in jury selection, but did not indicate he personally held any bias. Likewise, there is no evidence in this record that the juror has any "close friends or relatives" in law enforcement. As a pharmacist, he may know correctional officers, but that was not the question asked of him. As far as this record demonstrates, the juror's answers were completely true.

### C. Misconduct in Deliberations

Moreno also contends the juror misused information about prison conditions which were not in evidence in this case. The prosecution objected to counsel's affidavit as to the juror's use of information as hearsay. The trial court sustained the objection. There was no sworn statement from the juror, or any other juror about the possible use by the juror of extraneous information. The first step in any analysis of alleged jury misconduct is to determine whether there is any admissible evidence of such behavior. Where the alleged misconduct arises from information considered by the juror, it must be admissible under Evidence Code section 1150. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 225; *People v. Hord* (1993) 15 Cal.App.4th 711, 724.) Here there is no such information.

First, the hearsay objection is well taken. Certainly counsel's declaration states what counsel allegedly heard, but it is hearsay as to whether, and how the juror might have considered such information. (*People v. Villagren* (1980) 106 Cal.App.3d 720, 729-

730.) Further, the defendant's obligation was to present admissible evidence of overt acts or statements that are "objectively ascertainable by sight, hearing or the other senses." (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1116.) Moreno has not carried his burden.

The information presented to the court, even if not considered hearsay, does not meet the standard of admissibility. The juror did not say he was influenced by or even considered his personal knowledge of jail procedure. He was responding to requests by counsel as to how to do a better job in the future. In short, there is no "objectively ascertainable action" by the juror, which would permit its use as an exception to the rule of Evidence Code section 1150.

We are also mindful that the credibility of counsel's assertions was questioned in the trial court. His recall of the juror's responses in jury selection was plainly inaccurate. The trial court was entitled to view the remainder of counsel's assertions with some suspicion. Thus, on the record before us there is no basis for the claim of juror misconduct, nor for the attendant claim that such misconduct denied Moreno a fair trial.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.