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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO REYES,

Defendant and Appellant.

E053764

(Super.Ct.No. RIF108955)

OPINION

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. Affirmed.

Ann Bergen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Susan Miller and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Alfredo Reyes guilty of willfully inflicting cruel or inhumane corporal punishment on a child (Pen. Code, § 273d, subd. (a)),¹ and assault by means of force likely to produce great bodily injury (former § 245, subd. (a)(1) [eff. Jan. 2000]). The trial court sentenced defendant to prison for a term of two years. Defendant contends substantial evidence does not support his conviction for assault by means of force likely to produce great bodily injury. (Former § 245, subd. (a)(1).) We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

In 2003, defendant was married to L. (Mother), and they shared three children: (1) A., (2) Al., and (3) An.. In 2003, Al. was 14 years old, and An. was 13 years old.

On the night of February 15, 2003, Mother was at home watching television with Al. and An., in An.'s bedroom. Defendant asked Mother to make him dinner. Defendant had been drinking, and Al. told Mother not to give defendant dinner. Defendant told Al. to be quiet. Mother went to the kitchen, while her daughters stayed in the bedroom. Defendant followed Mother. Once in the kitchen, Mother and defendant began arguing about defendant having an extramarital affair. Defendant yelled profanities at Mother.

Al. heard the screaming from the argument and went to the kitchen. Al. stood between her parents, holding a telephone receiver, and said she would call the police. The telephone receiver was connected to a fax machine by a long cord; the fax machine

¹ All subsequent statutory reference will be to the Penal Code unless otherwise indicated.

was on the kitchen counter. Defendant told Al. not to call the police. Defendant wrapped the telephone cord around his arm, yanked on the telephone cord, and took the receiver from Al. Defendant used the telephone cord to swing the telephone receiver high in the air, before swinging it down at Al.'s head, causing a cut at the "back of the crown of the head," which bled. Defendant then struck Al.'s head two more times, although it is unclear if he used the receiver to strike her again or if she was pushed into a wall. Al. screamed. Mother told defendant to leave.

An. heard Mother telling defendant to leave, and she went to the kitchen. Mother told An. to call for paramedics. Because she was scared, An. locked herself in her bedroom and called 911. Mother held Al. and tried to clean up the blood. Defendant left the house with the telephone cord still wrapped around his arm.

On the night of the incident, Riverside County Sheriff's Deputy Evan Petersen saw a one-half- to one-inch cut on the back of Al.'s head, which was bleeding. Al. was crying and "very upset" while speaking to Deputy Petersen. Deputy Petersen searched the house for the telephone receiver and cord, but they were missing. Deputy Petersen believed one of the photographs of the scene might have reflected blood splatter, but he was not sure. The deputy explained Al. had "a full head of hair, and so it would have soaked up any blood." Al. went to the hospital. Mother accompanied Al. to the hospital "in case it was necessary to take x-rays or something like that." Al. had three marks on her head, but did not require stitches. The medical personnel said the cut on Al.'s head would close on its own.

After the foregoing incident, during 2003, defendant moved to Mexico to take care of his brothers and parents. Defendant returned to the United States in 2011. Mother and the three children did not see defendant during the eight years he was in Mexico. At trial, in 2011, Mother described the telephone strike as an accident, as opposed to an intentional act on defendant's part. The People had Mother's 2003 preliminary hearing testimony read into the record, which described the telephone strike as an intentional act.

DISCUSSION

Defendant contends substantial evidence does not support his conviction for assault by means of force likely to produce great bodily injury. (Former § 245, subd. (a)(1).) We disagree.

“When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] We determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] In so doing, a reviewing court ‘presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

Former “[s]ection 245 ‘prohibits an assault by means of force *likely* to produce great bodily injury, not the use of force which does in fact produce such injury. While . . . the results of an assault are often highly probative of the amount of force used, they cannot be conclusive.’ [Citation.] Great bodily injury is bodily injury which is significant or substantial, not insignificant, trivial or moderate. [Citation.] “‘The crime . . ., like other assaults may be committed without the infliction of any physical injury, and even though no blow is actually struck. [Citation.] The issue therefore is not whether serious injury was caused, but whether the force used was such that it would be likely to cause it.’” [Citation.] The focus is on the force actually exerted by the defendant” (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 748.) In determining whether a strike to a person’s body is likely to produce great bodily injury, we evaluate (1) the force of the impact, (2) the manner in which the force was used, and (3) the circumstances under which the force was applied. (*Id.* at pp. 748-749.)

Mother testified that defendant wrapped the telephone cord around his arm, and then swung the receiver high in the air before bringing it down on Al.’s head. The strike cut Al.’s scalp, causing her to bleed. Defendant then struck Al. two more times, either with the telephone receiver or by hitting her head against the wall. Al. screamed. Mother said she went to the hospital with Al. in case Al. needed “x-rays or something like that.” Al. complained of pain.

The jury could reasonably conclude defendant used great force in striking Al. with the telephone receiver, because it was a hard object that was swung high in the air, so as to hit Al.’s head with greater speed and force. After the strike to her head with a

hard object, defendant struck Al.'s head with a hard object two more times—either with the wall or the telephone receiver. The strike from the receiver, a blunt object, was strong enough to cut Al.'s head. The additional strikes caused Mother to think Al. might need X-rays, thus implying Mother thought that Al. might have a fractured skull due to the force of the strikes. Accordingly, there is substantial evidence of defendant using great force when striking Al.

Further, the force of the strikes was directed at Al.'s head, which could have resulted in a fractured skull, which is a significant or substantial injury. Also, the force was used in the midst of a heated argument in which defendant was yelling profanities at Mother, and Al. was threatening to call law enforcement. Given the evidence set forth *ante*, concerning the amount of force used; the fact that the force was directed at Al.'s head; and the circumstances of the strikes, we conclude substantial evidence supports defendant's conviction for assault likely to produce great bodily injury.

Defendant asserts the evidence does not meet the substantial evidence standard because Al. suffered only a small cut to her scalp, which did not require stitches. While the injury actually sustained by Al. is highly relevant evidence in determining the amount of force used, the injury is not conclusive evidence. (*People v. Russell* (2005) 129 Cal.App.4th 776, 787.) As explained *ante*, the focus is on the evidence of the force used and whether it was *likely* to cause an injury, not the injury sustained—an injury is not required for assault. (*People v. McDaniel, supra*, 159 Cal.App.4th at p. 748.) In this case, Mother thought the force was great enough that Al. might need X-rays, thus implying that the force was strong enough to possibly fracture Al.'s skull. The fact that

Al.'s skull was not fractured is not the focus—the focus is that there is evidence reflecting the force used was strong enough that it *likely* could have caused a serious injury, such as a skull fracture.

Defendant cites *People v. Beasley* (2003) 105 Cal.App.4th 1078 to support his argument that the evidence does not reflect he used force likely to produce great bodily injury. In *Beasley*, the appellate court considered whether striking a person's arms and shoulders with a broomstick caused the broomstick to be a deadly weapon. (*Id.* at p. 1087.) The appellate court reasoned that a broomstick could be a deadly weapon if used to strike a person's face or head, but not a person's arms and shoulders. The appellate court also took issue with the lack of evidence concerning the force used to strike the victim with the broomstick, as well as the lack of evidence concerning the composition of the broomstick, e.g. wood, plastic, metal. (*Id.* at pp. 1087-1088.) The appellate court concluded the evidence was insufficient to show the defendant used the broomstick as a deadly weapon. (*Id.* at p. 1088.)

We conclude *Beasley* is distinguishable from the instant case, because defendant struck Al.'s head three times—not her arms or shoulders—which the *Beasley* court recognized as a lethal location to strike a person. (*People v. Beasley, supra*, 105 Cal.App.4th at p. 1087.) Further, there is evidence in this case of defendant swinging the telephone receiver high in the air before bringing it down on Al.'s head, and of the blunt, hard, object cutting Al.'s scalp, which implies great force was used in the assault. In sum, we find defendant's reliance on *Beasley* to be unpersuasive.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.