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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. MATTHEW BROWN III, Defendant and Appellant.	E070462 (Super.Ct.No. RIF1700304) OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey Prevost, Judge. Affirmed.

Aaron J. Schechter, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Eric A. Swenson, Allison V. Acosta, and Teresa G.M. Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant and appellant, Matthew Brown III, guilty as charged of one count of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)),[1] but found not true an allegation that defendant inflicted great bodily injury on the victim, K.P. (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8)). Defendant admitted one prior strike conviction, one prior serious felony conviction, and two prison priors. (§§ 667, subds. (b)-(i), 667, subd. (a), 667.5, subd. (b).)[2]

In this appeal, defendant raises to two claims of prejudicial error. He first claims the court erroneously modified the pattern instruction on simple assault, CALCRIM No. 915 (§ 240)—which was given as a lesser included offense to the charge of assault by means of force likely to produce great bodily injury—by replacing the term "assault" with "simple assault" throughout the instruction. He claims this modification rendered the instruction "confusing, misleading and argumentative," "steered the jury towards the greater offense," and was prejudicial under any standard. Second, he claims the court erroneously failed to obtain and consider a supplemental probation report before sentencing him, in violation of his statutory and constitutional due process rights.

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[1] Undesignated statutory references are to the Penal Code.

[2] Defendant was sentenced to six years in state prison—the middle term of three years, doubled to six based on the prior strike—but the court stayed sentences on the two prison priors. The court struck the prior serious felony conviction, which was based on the same offense as the prior strike conviction—a 2006 conviction for assault with a deadly weapon. (§ 245, subd. (a)(1).)

We find no merit to either of these claims and affirm the judgment.

II. FACTUAL BACKGROUND

A. *Prosecution Evidence*

K.P. had known defendant for several weeks before the assault because they were both homeless and living on the streets. On the night of January 21, 2017, K.P. encountered defendant while walking down a street, and defendant asked K.P. to roll a cigarette for him. At that point, defendant was no more than two feet away from K.P., and other people were five or six feet away. The next thing K.P. remembered, he was waking up on the ground, feeling dizzy and disoriented. His nose and cheek hurt, and his nose was bleeding. Defendant was riding away on his bike, appeared to be angry, and told K.P. to stay on the ground.

K.P. stayed on the ground until paramedics arrived. He was taken to a hospital emergency room, where a CT scan showed he had a right-side facial fracture, below his right eye and extending to his cheek area and nose, consistent with his having been punched in the face. His face and nose were swollen.

A couple of days before the assault, on January 18 or 19, defendant's girlfriend and K.P.'s girlfriend got into a physical altercation. K.P. broke up the fight by pushing the two women apart. Defendant's girlfriend was angry with K.P. and cursed at him.

In a January 22 police interview, which was played to the jury, defendant admitted he punched K.P. in the face with a closed fist. He said K.P. had been disrespectful to his girlfriend and pushed her to the ground. He asked K.P., "'Why you disrespect my lady?,'" just before he punched him.

B. *Defense Evidence*

The defense did not call any witnesses or present any affirmative evidence.

III. DISCUSSION

A. *The Trial Court Did Not Err in Modifying CALCRIM No. 915 on "Simple Assault," and in Any Event the Alleged Error Was Not Prejudicial Under Any Standard*

The jury was given CALCRIM No. 915, the pattern instruction on assault (§ 240), as a lesser included offense of the charged offense in count 1 of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)).

Defendant claims his conviction in count 1 must be reversed because the court modified CALCRIM No. 915 to replace the term "assault" with "simple assault" in the three places the term "assault" appears in the instruction. He claims these modifications rendered CALCRIM No. 915 "confusing, misleading and argumentative," "steered the jury towards the greater offense," and was prejudicial under any standard.

1. Relevant Background

CALCRIM No. 915 is titled "Simple Assault," but uses the term "assault" rather than "simple assault" in three places. At the People's request, and without any objection

by defense counsel, the court modified CALCRIM No. 915 to replace the word "assault" with "simple assault" in the three places where the term "assault" appears.[3] The first sentence of CALCRIM No. 915 told the jury: "The defendant is charged with *simple assault* in violation of Penal Code section 240 as a lesser included offense in Count 1." (Italics & underlining added.) The last paragraph included two additional modifications: "No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed a *simple assault*, and if so, what kind of assault it was. Voluntary intoxication is not a defense to *simple assault*." (Italics & underlining added.)

2. The Modifications to CALCRIM No. 915 Did Not Render the Instruction Confusing, Misleading or Argumentative, or Steer the Jury Toward the Greater Offense

We review claims of instructional error de novo. (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838.) "'It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions.' [Citation.] '"A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]" [Citation.] "'[T]he correctness of jury

[3] The People claim defendant has forfeited his claim of instructional error because his counsel did not object to the modifications. They also claim defendant has not shown his counsel rendered ineffective assistance in failing to object to the modifications, or that the modifications were prejudicial. Despite defense counsel's failure to object to the modifications, we exercise our discretion to consider defendant's claim of instruction error to the extent defendant claims the error affected his substantial rights. (§ 1259; *People v. Covarrubias* (2016) 1 Cal.5th 838, 905.)

instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.’”’ [Citation.]” (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 433.)

In the context of the entire charge of the court or the instructions as a whole, modifying CALCRIM No. 915 to replace the term “assault” with “simple assault” did not, as defendant claims, render any of the instructions “confusing,” “misleading,” or “argumentative,” and did not “steer the jury” toward finding defendant guilty of the charged offense of assault by means of force likely to produce great bodily injury, rather than the lesser included offense of simple assault.

The jury was instructed, pursuant to CALCRIM No. 200, to “pay careful attention to all of the instructions and consider them together.” And as noted, the first sentence of the modified version of CALCRIM No. 915 told the jury that defendant was “charged with *simple assault* . . . as a lesser included offense in Count 1.” (Italics added.) The jury was correctly instructed on the elements of the charged offense pursuant to CALCRIM No. 875, and CALCRIM No. 915, as modified, correctly instructed the jury on the elements of the lesser included offense of assault, or simple assault. The jury was further instructed pursuant to CALCRIM No. 3517 on how to consider the charged offense and the lesser offense and the verdict forms for the offenses. CALCRIM No. 3517 also mirrored CALCRIM No. 915 by telling the jury, “[s]imple assault is a lesser crime of assault with great bodily injury charged in Count 1.”

Together, the instructions correctly instructed the jury on the differences between the charged offense of assault by means of force likely to produce great bodily injury and the lesser included offense of assault, or simple assault. Based on the entire charge of the court or the instructions as a whole, we discern no reasonable likelihood—or even a reasonable possibility—that modifying CALCRIM No. 915 to replace "assault" with "simple assault" rendered CALCRIM No. 915 or any of the instructions "confusing," "misleading," or "argumentative," or in any way "steered the jury" toward finding defendant guilty of the charged offense rather than the lesser offense.

At most, the last paragraph of the modified version of CALCRIM No. 915 was *somewhat confusing* to the extent it read: "No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed a *simple assault, and if so, what kind of assault it was*." (Italics & underlining added.) The phrase, "and if so, what kind of assault it was" is a bracketed phrase in the pattern instruction of CALCRIM No. 915 which was given here—ostensibly to differentiate the charged offense of assault by means of force likely to produce great bodily injury from the lesser included offense of simple assault, or assault. Viewed in isolation, this portion of the instruction was confusing to the extent it suggested there is more than one kind of simple assault. But the instructions as a whole plainly distinguished the charged offense from the lesser included offense of simple assault, or assault. And given that the jury was instructed to consider

the instructions together, we discern no reasonable likelihood that the jury was confused by the last phrase of the last sentence of CALCRIM No. 915.

3. Defendant's Arguments Lack Merit

Defendant correctly points out that "Simple Assault" is the title of CALCRIM No. 915, and that "instruction titles 'are directed to lawyers and sometimes use words and phrases not used in the instructions themselves. The title is not part of the instruction. The titles may be removed before presentation to the jury.'" (*People v. Torres* (2011) 198 Cal.App.4th 1131, 1147, fn. 11.) For this reason, he claims that replacing the term "assault" with "simple assault" in CALCRIM No. 915 "highly suggests" that the term "simple assault" was "confusing and misleading" to the jury. For the reasons discussed, we disagree. Again, the instructions concerning simple assault and assault by means of force likely to produce great bodily injury were not confusing and misleading because they plainly distinguished the two crimes for the jury.

Defendant next argues that the term "simple assault" has "'a technical meaning peculiar to the law,'" and this technical meaning "reinforced" "[t]he confusing and misleading nature of the term 'simple assault.'" He points out that "[t]he term 'simple' has common-sense, ordinary meanings such as 'not complicated' and 'inconsequential or rudimentary.' (Random House Webster's Unabridged Dict. (2d ed. 2001) p. 1783.)" Thus, he reasons that "a juror who sees the term 'simple assault' may be distracted by the term 'simple' and associate assault under section 240 with an insignificant scuffle, such as minor pushing and shoving. As such, jurors would have [had] difficulty characterizing

[his] criminal act—a punch to the face that resulted in a facial fracture—as 'simple.' Therefore, [he argues,] CALCRIM No. 915's use of the term 'simple assault' is likely to have confused and misled the jury."

We find this argument wholly unpersuasive because it assumes the jury ignored the definition of simple assault in CALCRIM No. 915. CALCRIM No. 915 defined simple assault by telling the jury: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant did an act that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] AND [¶] 4. When the defendant acted, [he] had the present ability to apply force to a person; [¶] AND [¶] 5. The defendant did not [act] in defense of someone else." Given that CALCRIM No. 915 correctly defined simple assault, or assault, there is no reasonable likelihood that the jury misinterpreted "simple assault" to mean anything along the lines of "an insignificant scuffle, such as minor pushing and shoving." As noted, we presume the jurors were intelligent and capable of understanding and applying the court's instructions (*People v. Bryant, Smith, and Wheeler*, *supra*, 60 Cal.4th at p. 433), including the definition of simple assault in CALCRIM No. 915.

Lastly, defendant claims that the "simple assault" modifications to CALCRIM No. 915 rendered the instruction improperly argumentative. (*People v. Mincey* (1992) 2

Cal.4th 408, 437 [court has duty to reject argumentative instructions].) He argues, "[t]he only conceivable purpose of [modifying CALCRIM No. 915 was] to steer the jury toward finding [him guilty of] the greater offense . . . because the lesser offense of assault . . . is 'simple.'" Again, the instructions as a whole clearly distinguished the charged offense from the lesser included offense of simple assault, and thus eliminated any reasonable likelihood that the jury misinterpreted "simple assault" as diminishing CALCRIM No. 915's definition of simple assault.

4. The Alleged Instructional Error Was Not Prejudicial

In the event the trial court erred in modifying CALCRIM No. 915 by replacing the term "assault" with "simple assault," the error was not prejudicial under the standards of review for assessing federal constitutional error and state law error. (*Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional error is prejudicial, i.e., not harmless beyond a reasonable doubt, if there is a reasonable possibility the error affected the outcome]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [state law error is prejudicial if there is a reasonable probability the error affected the outcome].)

First, and as discussed, the instructions as a whole both correctly defined and plainly distinguished the charged offense of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)) from the lesser included offense of assault, or simple assault (§ 240). Second, both the prosecutor and defense counsel clearly distinguished the two crimes in arguing the case to the jury.

The prosecutor concluded her initial closing argument by saying: "To be clear, on the verdict forms, I'm asking you to find him guilty on Count 1. It's listed as an assault with force likely to cause great bodily injury, [section] 245[, subdivision] (a)(4). Guilty. And then to find guilty on the allegation that Defendant personally inflicted and actually inflicted great bodily injury under . . . Section 12202.7. And I'm asking you to not even consider the lesser in this case of an assault, [section] 240."

Defense counsel similarly distinguished the two crimes in arguing: "What the Judge was talking about earlier, just so you know, the verdict forms that you guys are going to be getting look something like this. So what the Judge is talking about is, look, if you find him guilty of the charge of assault with force likely to cause great bodily injury . . . then you're not looking at the lesser anymore. The lesser charge is the assault. And you go to the lesser if you find him not guilty of the greater."

Based on the entire record, including the instructions and counsels' arguments, we discern no reasonable possibility under *Chapman*, or any reasonable probability under *Watson*, that the modifications to CALCRIM No. 915 affected the jury's guilty verdict on the charged offense of assault by means of force likely to produce great bodily injury.

B. *Defendant Has Forfeited His Claim that He Was Entitled to a Supplemental Probation Report, and He Has Not Shown He Was Prejudiced by the Alleged Error*

Defendant claims the court violated his statutory and constitutional due process rights by failing to obtain and consider a supplemental probation report at sentencing. He complains the court sentenced him based on a "stale pre-plea probation report that was

over seven months old," and due to the passage of these seven months, the court was required to obtain and consider a supplemental probation report prior to sentencing him. (See § 1203, subds. (b)(1), (g); Cal. Rules of Court, rule 4.411.)

As we explain, defendant has forfeited this claim of error because his counsel did not object when the court stated for the record at sentencing that the parties had stipulated that defendant could be sentenced based on the preplea report and without a supplemental probation report. In addition, defendant has not shown he was prejudiced by his counsel's failure to insist on a supplemental probation report prior to sentencing.

1. Relevant Background

A "pre-plea" probation report was filed on August 18, 2017. (§ 1203.7.) On January 24, 2018, the day the jury returned its guilty verdict on the charged offense and its not true finding on the great bodily injury enhancement allegation, the court referred the matter to the probation department to prepare a supplemental probation report. The preplea report was *refiled* on March 16, 2018, the date of sentencing, nearly seven months after it was originally filed on August 18, 2017. The record does not contain a supplemental probation report and does not indicate whether a supplemental probation report was prepared. Defendant's sentencing memorandum—which was also filed on March 16, 2018—referred to "the probation officer's report," meaning the preplea report.

At sentencing on March 16, 2018, the court said that the court and counsel had just conferred in the court's chambers regarding the court's indicated sentence. The court proceeded to sentence defendant based on the preplea report, and before doing so noted:

"And I should have the record reflect I've read and considered the pre-plea report, which the parties stipulated could be considered by the Court as a probation referral." Defense counsel did not object to the court's statements or insist that defendant not be sentenced without a supplemental probation report.

2. Forfeiture

Defendant has forfeited his claim that the court was required to obtain or abused its discretion in failing to obtain and consider a supplemental probation report, because defense counsel did not object when the court stated at sentencing that the parties had just stipulated, in the court's chambers, to sentence defendant based on the preplea report. (*People v. Franco* (2014) 232 Cal.App.4th 831, 834 [failure of defendant who is ineligible for probation to object to being sentenced without a supplemental probation report "result[s] in waiver of a supplemental report in the trial court and forfeiture of the right to object to the absence of such a report on appeal."].)[4]

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[4] Thus, we do not address defendant's forfeited claim that the court was *required* to obtain and consider a supplemental probation report before sentencing defendant—even though defendant was statutorily ineligible for probation based on his prior strike conviction. (§ 667, subd. (c)(2); see § 1203, subds. (b)(1), (g); Cal. Rules of Court, rule 4.411; *People v. Franco, supra*, 232 Cal.App.4th at p. 834; *People v. Llamas* (1998) 67 Cal.App.4th 35, 39-40.) It also unnecessary to determine whether, as defendant claims, the parties' apparent in-chambers stipulation that defendant could be sentenced based on the preplea report was an invalid waiver of defendant's right, if any, to a supplemental probation report, because the stipulation was neither (1) made in writing and filed with the court or (2) made orally *in open court* and entered into the court's minutes. (§ 1203, subd. (b)(4); Cal. Rules of Court, rule 4.411(b).)

3. The Alleged Error Was Harmless

In any event, and as the People point out, the alleged error in failing to obtain and consider a supplemental probation report was harmless. To begin, there is no federal constitutional right to a supplemental probation report. (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 182.) Thus, reversal is not automatic, the alleged error only implicates California statutory law, and the *Watson* standard of reversible error applies. (*Dobbins*, *supra*, at pp. 182-183.) That is, reversal is unwarranted unless defendant has shown there is a reasonable probability he would have realized a more favorable sentence had the court obtained and considered a supplemental probation report. (*People v. Watson*, *supra*, 46 Cal.2d at pp. 834-838.) Defendant has not made this showing.

Like *Dobbins*, "this is not a case in which we must speculate concerning how information in a probation report could have affected the trial court's decision" and "there is no doubt the result would have been the same if a supplemental probation report had been prepared [and considered]." (*Dobbins*, *supra*, 127 Cal.App.4th at pp. 182-183.)

Defendant was sentenced to the middle term of three years for his current conviction for assault by means of force likely to produce great bodily injury, doubled to six years due to his prior strike conviction. (§ 667, subd. (e)(1).) At sentencing, the court denied defendant's *Romero*[5] motion to strike his prior strike conviction for sentencing purposes, and also denied his motion to reduce his current conviction to a misdemeanor. (§ 17, subd. (b)(3).)

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[5] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Because his prior strike rendered him statutorily ineligible for probation (§ 667, subd. (c)(2); Cal. Rules of Court, rule 4.413(a) ["in some cases, probation is not allowed"]), the court at best could have sentenced defendant to the low term of two years, doubled to four (§§ 245, subd. (a)(4), 667, subd. (e)(1)). But based on the entire record, it is clear the court would not have selected the low term based on any new information that might have been included in a supplemental probation report.

The preplea report included extensive information concerning defendant's background, his criminal history, and the circumstances of his current offense. Defendant was incarcerated from the time he committed his current offense on January 21, 2017, through his March 16, 2018, sentencing hearing. Thus, a supplemental probation report would not have included any new information concerning defendant's background, his criminal history, and the circumstances of his current offense that was not included in the preplea report.

Defendant claims a supplemental probation report "would have had the benefit of a probation officer's informed assessment as to [his] level of remorse at the time of sentencing." To be sure, defendant correctly points out that, in preparing the preplea report, the probation officer did not discuss the circumstances of the current offense with defendant pursuant to the court's order. The preplea report states: "As the Court prohibited probation from interviewing the defendant with regard to the instant matter, *an accurate account of the defendant's version of the offense or level of remorse, if any, was unable to be obtained*. Nevertheless, based on the incident report, and the defendant's

feelings about standing up to others, it does not appear the defendant believes he did anything wrong." (Italics added.)

But defendant did not claim, either in his sentencing memorandum or at the sentencing hearing, that he was remorseful for his current offense.[6] Instead, defense counsel pointed out that defendant admitted "his involvement" in the current offense from "the very beginning," and he did not "try to run" or "try to fabricate anything. He was very honest." Thus, as the People point out, defendant "merely speculates that he may have chosen to express remorse or make progress toward rehabilitation" during the seven months that elapsed from the time the preplea report was originally filed on August 18, 2017, through sentencing on March 16, 2018. As the People also point out, on this record "it is equally possible that [defendant's] conduct while in custody was less than exemplary and that defense counsel stipulated to the wavier of a supplemental report for that reason."

Lastly, the court's comments at sentencing indicate it would not have sentenced defendant to the low term based on any mitigating evidence that might have been included in a supplemental probation report. The court said: "I think [the present offense] was quite serious and unprovoked in terms of legal defense. I acknowledge that there's good reason to believe that [defendant] was agitated at the time that he committed the offense due to the report of previous physical confrontation between the young lady

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[6] Defendant was free to present any mitigating evidence he wished to present at his sentencing hearing. (§ 1170, subd. (b).)

[defendant's girlfriend] and the victim in the matter [K.P.], but that does not constitute a legal defense. And I think it was serious enough that a reduction to misdemeanor would not be appropriate."

For all of these reasons, there is no reasonable probability that the court's alleged error in failing to obtain and consider a supplemental probation report adversely affected defendant's sentence. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

IV. DISPOSITION

The judgment is affirmed.

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FIELDS
J.

We concur:

RAMIREZ
P. J.

MENETREZ
J.