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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. DELFINA VALASQUEZ ROMO, Defendant and Appellant.	E071348 (Super.Ct.No. INF1701263) OPINION

APPEAL from the Superior Court of Riverside County. Richard A. Erwood, Judge. Affirmed with directions.

Rachel Varnell, 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, Michael Pulos and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Delfina Romo struck an acquaintance in the head with a rock weighing 2.7 pounds. A jury convicted her of assault with a deadly weapon.

Romo appeals, arguing the trial court erred by allowing a police officer to testify the rock could be used as a deadly weapon. She says the officer's testimony was an improper legal conclusion regarding appellant's guilt, and led the jury to convict. We conclude the trial court did not abuse its discretion and, in any event, any error was harmless.

Romo also asks us to remand to the trial court for resentencing because a change in the statutory law now allows the trial court to exercise its discretion and strike her two prior serious felony conviction enhancements. The People concede, and we agree. We will therefore remand the case for the trial court to exercise its discretion.

I

FACTS

A. *The Offense*

On June 5, 2017, Romo approached Moses B., who was sitting outside a Chinese restaurant in Indio. She asked him for money, and when Moses declined, appellant picked up a rock and struck him in the head multiple times, causing him to lose consciousness.

Patricia H. discovered Romo standing over Moses. Patricia and a friend tried to detain Romo until police arrived, but Romo escaped. When Officer S. arrived on the scene, Patricia pointed out Romo, and Officer S. placed her in custody. Moses didn't go

to the hospital for his injuries, but he had a one-inch gash on his forehead, which paramedics treated. Officer S. took a photo of the rock appellant used to attack Moses, which had blood on it.

At trial, Romo claimed Moses had touched her legs near her pelvic area, and said she hit him in self-defense. However, both Moses and another eyewitness said he didn't provoke her before she struck him.

B. *Police Expert Testimony*

Officer S. testified he had previously investigated hundreds of assault cases where victims sustained injuries causing them to bleed. He said he collected and weighed the rock appellant used to strike Moses. The rock weighed 2.7 pounds and was stained with blood. The prosecutor introduced photos of the rock, and Officer S. brought the rock to the courtroom and showed it to the jury.

The prosecutor asked Officer S., "Based on your prior experience being a police officer for ten years, could a rock of this size be used as a deadly weapon?" Officer S. answered, "Absolutely." Defense counsel objected and moved to strike Officer S.'s testimony, arguing the question invaded "the province of the finder of facts." The trial court overruled the objection. The prosecutor then asked Officer S. how a 2.7-pound rock could cause deadly injury. Officer S. said the rock could be thrown or used as a blunt object. He said there is enough weight behind a rock weighing over two and a half-pounds for it to cause injury if swung at a person.

In closing argument, the prosecutor reminded the jury of this testimony. "I had to ask the officer, 'Is it a deadly weapon?' And [it] sounds silly because when you ask if it's a deadly weapon, of course it is a deadly weapon. You are the trier of facts. The record is not going to show what the rock looks like. The officer has to describe it. That is why I have to ask those questions. It's an easy answer, absolutely a 2.7-pound rock to the forehead can kill you. But you have to make that decision."

The trial court instructed the jury with CALCRIM Number 875 on the elements of assault with a deadly weapon other than a firearm: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant did an act with a deadly weapon other than a firearm 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, she was aware of facts that would lead a reasonable person to realize that her act by its nature would directly and probably result in the application of force to someone; [¶] AND [¶] 4. When the defendant acted, she had the present ability to apply force with a deadly weapon other than a firearm to a person; [¶] AND [¶] 5. The defendant did not act in self-defense." The trial court also instructed the jury that "A deadly weapon other than a firearm is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."

C. *Verdict and Sentence*

The jury convicted Romo of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).) The trial court found it to be true Romo had suffered two prior serious felony convictions (Pen. Code, § 667, subd. (a)) and two prior strike convictions (Pen. Code, §§ 667, subds. (c), (e)(1) & 1170.12, subd. (c)(1)).

The court granted Romo's motion to strike her two prior strike convictions under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court then sentenced Romo to 12 years in prison, a sentence which consisted of the low term of two years, plus five years for each of her two prior serious felony convictions.

Romo filed a timely notice of appeal.

II

ANALYSIS

A. *Assault with a Deadly Weapon Conviction*

Romo argues the trial court erred by admitting Officer S.'s expert opinion that a rock weighing 2.7 pounds could be used as a deadly weapon. She says the testimony was tantamount to an opinion on guilt and usurped the function of the jury.

'"A witness is qualified to testify about a matter calling for an expert opinion if his peculiar skill, training, or experience enable him to form an opinion that will be useful to the jury.' [Citation.] The question becomes whether the expert opinion given was helpful to the trier of fact. The reception of expert opinion testimony is within the sound discretion of the trial court. [Citations.] Even though facts may be within the knowledge

or understanding of the trier of fact, the conclusions to be drawn therefrom may require expert testimony. [Citations.] 'The decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [Citation.] An expert's opinion is admissible when '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*People v. Harvey* (1991) 233 Cal.App.3d 1206, 1226-1227.)

Romo argues this case law establishes it is erroneous to allow expert testimony which amounts to an opinion about defendant's guilt or innocence. She argues Officer S. in effect opined that she was guilty of assault with a deadly weapon when he testified a 2.7-pound rock "absolutely" could be used as a deadly weapon. This misconstrues the nature of Officer S.'s testimony. The prosecutor asked him whether based on his experience as a police officer, someone could use a 2.7-pound rock as a deadly weapon. Officer S. answered in the affirmative, and the prosecutor asked him what manner could such a rock be used to cause deadly injury. He responded, "In several way[s]. It can be thrown. It can be used as a blunt object. The rock weigh[ed] over two and a half pounds. That's enough weight behind it to cause injury if swung."

Officer S.'s testimony did not answer the question whether Romo was guilty of assault with a deadly weapon. A rock is an instrument that is not inherently a deadly

weapon, but it may become a deadly weapon if used in certain ways. (*People v. White* (1963) 212 Cal.App.2d 464, 465.) Such an "object alleged to be a deadly weapon must be used in a manner that is not only 'capable of producing' but also '"*likely to produce* death or great bodily injury."'" (*In re B.M.* (2018) 6 Cal.5th 528, 533.) Thus, evidence concerning the nature of the object (is it sharp, heavy, blunt?) and whether a person *could* use it in a manner that would cause serious injury cannot establish guilt on its own. The prosecution must also present evidence concerning "'the force *actually used*,' not 'the force that . . . *could* have [been] used.'" (*Id.* at p. 534; see also *In re David V.* (2010) 48 Cal.4th 23, 30 & fn. 5 [objects that can "be grasped while throwing a punch, like rolls of coins, batteries, or bicycle footrests" may "be deemed instruments of [aggravated] assault" only if there is "sufficient proof" the object was actually used "in a manner likely to produce death or great bodily injury"].) Thus, to find Romo guilty, the jury was required to find both that the rock *could* be used as a deadly weapon and that Romo *in fact* used it in a manner likely to produce very serious injury. Officer S. did not testify about how Romo used the rock, only about how one could cause serious injury with it.

Moreover, it was reasonable for the trial court to conclude Officer S.'s testimony would assist the jury in determining whether the rock could be used in a manner likely to produce very serious injury. Arguably, the fact that a 2.7-pound rock can inflict such an injury is sufficiently within the understanding of the jury to make his testimony unnecessary. However, Officer S. has more than 10 years of experience as a police officer, and far more experience with assaults and the kinds of injuries that can result than

a typical juror. He testified he had investigated hundreds of assault cases in which the victim was left bleeding, including assaults involving weapons. In view of these facts, we cannot conclude the trial court abused its discretion by admitting Officer S.'s opinion about how a 2.7-pound rock could be used in a manner likely to inflict death or great bodily injury.

Finally, even if admitting the testimony was error, Romo did not show it was prejudicial. (*Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 932.) A reviewing court will not reverse a judgment based on the erroneous admission of evidence unless the error or errors resulted in a miscarriage of justice. (Evid. Code, § 353, subd. (b); *People v. Harris* (2005) 37 Cal.4th 310, 336.) Setting aside Officer S.'s testimony, the prosecution established Romo struck the victim in the head with a 2.7-pound rock, which left him unconsciousness, bleeding, and with a one-inch gash on his forehead. Moreover, the jury saw the rock Romo used and saw Officer S. holding it in his hand. We conclude the evidence that the rock was capable of causing great bodily injury was very strong. As a result, it is not reasonably probable excluding Officer S.'s testimony would have affected the outcome to Romo's benefit. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. *Prior Serious Felony Enhancements*

Romo argues Senate Bill 1393 requires remand so the trial court may consider whether to strike or dismiss her Penal Code section 667, subdivision (a) prior serious

felony conviction enhancements. The People concede the new law applies to Romo retroactively and remand is proper. We agree.

Previously, trial courts had no authority to strike or dismiss prior serious felony conviction enhancements under Penal Code section 667, subdivision (a). (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045-1047.) Senate Bill 1393, which went into effect on January 1, 2019, removed the prohibition. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.).) Though Romo was sentenced before the new law went into effect, as a statutory change which reduces punishment, it applies to defendants whose judgments are not yet final on the effective date. (*In re Estrada* (1965) 63 Cal.2d 740; *People v. Brown* (2012) 54 Cal.4th 314, 323.)

This court has already held that "under the *Estrada* rule, as applied in *Lara* and *Francis*, it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 [became] effective on January 1, 2019." (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971-974.) We agree with *Garcia's* analysis and will therefore remand so the trial court may exercise its discretion whether to strike or dismiss Romo's serious violent felony priors. As the People point out, the trial court's sentencing decisions and comments about Romo's conduct indicate it would have considered striking those enhancements if it had the authority to do so. The court granted her motion to strike two strike priors and

imposed the low term sentence for the substantive offense because of the "de minimis nature" of the offense.

III

DISPOSITION

We remand for the limited purpose of allowing the trial court to exercise its discretion whether to strike or dismiss Romo's two five-year prior serious felony enhancements and, if appropriate, to enter a new sentence. We affirm the judgment in all other respects.

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SLOUGH
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.