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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NHAN DI VO,

Defendant and Appellant.

G046340

(Super. Ct. No. 09NF2340)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Richard M. King, Judge. Affirmed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant
and Appellant.

No appearance for Plaintiff and Respondent.

* * *

Defendant Nhan Di Vo was convicted of assault by means of force likely to produce great bodily injury. Defendant was granted formal probation for a period of three years.

We appointed counsel to represent defendant on appeal. Appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), setting forth the facts of the case and requesting that we review the entire record. Pursuant to *Anders v. California* (1967) 386 U.S. 738 (*Anders*), appointed counsel suggested we consider whether the failure to instruct the jury on a lesser included offense resulted in the denial of defendant's due process rights, and whether the evidence supported the conviction.

On June 18, 2012, this court provided defendant with 30 days to file written argument on his own behalf. That period of time has passed, and we have received no communication from him.

We have examined the entire record and counsel's *Wende/Anders* brief, and find no arguable issue. (*Wende, supra*, 25 Cal.3d 436.) We therefore affirm.

BACKGROUND

During the evening and early morning of August 13 and 14, 2009, both defendant and Marc Ming were at the home of mutual friends. Ming drank a lot of alcohol that evening, and also smoked marijuana and ingested methamphetamine. Defendant was mad at Ming because he thought Ming had stolen money from defendant to buy beer. Ming tried to stay away from defendant after learning defendant was mad at him. Defendant and Ming got into an altercation, and defendant repeatedly punched Ming.

Ming lost consciousness, and was discovered by the police several blocks away. His eyes were swollen shut, his face was covered in blood and vomit, and he had a strong odor of alcohol on his breath.

Ming was transported to the hospital, where he was diagnosed with a subdural hematoma and underwent an emergency craniotomy. Ming was in the hospital for more than two months. He used a walker and then a cane for two months after being discharged from the hospital. Ming received extensive physical therapy, but still suffered from weakness on the left side of his body.

Defendant was charged in an information with aggravated assault (Pen. Code, § 245, subd. (a)(1)); the information alleged as enhancements that he personally inflicted great bodily injury on Ming, and personally inflicted great bodily injury causing Ming to become comatose due to brain injury (*id.*, § 12022.7, subs. (a), (b)). A jury found defendant guilty of aggravated assault, but found the enhancements to be not true.

The trial court suspended imposition of sentence, and placed defendant on three years' formal probation, subject to terms and conditions, including the condition he serve 270 days in county jail. Defendant was also ordered to pay various fines, assessments, and fees. Defendant timely appealed.

ANALYSIS OF POTENTIAL ISSUES

Appointed counsel suggests we consider whether the trial court's failure to instruct the jury on battery as a lesser included offense resulted in the denial of defendant's rights to due process and a fair trial. Battery is not a lesser included offense of aggravated assault, and the trial court, therefore, did not have a sua sponte duty to instruct the jury on battery. (*People v. Jones* (1981) 119 Cal.App.3d 749, 754.)

Appointed counsel also suggests we consider whether the evidence that defendant struck Ming with his bare hands supported the conviction for aggravated assault, because the jury found not true the enhancement allegations that defendant personally caused great bodily injury to Ming. The use of hands or fists alone is sufficient to support a conviction for aggravated assault. (*People v. Fierro* (1991)

1 Cal.4th 173, 251, fn. 27.) To prove defendant committed aggravated assault, the prosecution was required to prove defendant did an act that by its nature would directly and probably result in the application of force to Ming, and that the force used by defendant was likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1); CALCRIM No. 875.) The prosecution was not required to prove Ming did, in fact, suffer great bodily injury, which is an element of the enhancements the jury found to be not true. (Pen. Code, § 12022.7, subds. (a), (b).) Therefore, there is no inconsistency between the jury's guilty verdict on the aggravated assault charge, and the not true findings on the great bodily injury enhancement allegations.

Our review of the record pursuant to *Wende, supra*, 25 Cal.3d 436 and *Anders, supra*, 386 U.S. 738, including the possible issues referred to by appointed counsel, has disclosed no reasonably arguable appellate issue. Competent counsel has represented defendant in this appeal.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.