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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS CHAVEZ PINEDO,

Defendant and Appellant.

F079467

(Super. Ct. No. F19900186)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Jennifer Oleksa and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Detjen, J. and Franson, J.

Defendant Carlos Chavez Pinedo was convicted of assault with force likely to cause great bodily injury (force-likely assault) as a lesser included offense of assault with a deadly weapon. He contends on appeal that force-likely assault is a lesser related offense (not a lesser included offense) to the charged assault with a deadly weapon and the trial court therefore erred in instructing the jury on that offense sua sponte. The People respond that force-likely assault is a lesser included offense of the specific assault with a deadly weapon offense alleged in the information and therefore there was no instructional error. We affirm.

PROCEDURAL SUMMARY

On March 14, 2019,¹ the Fresno County District Attorney charged defendant with two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1);² counts 1 & 2), two counts of criminal threats (§ 422, subd (a); counts 3 & 4), and one count of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); count 5). As to counts 3 and 4, the information alleged defendant had personally used a deadly weapon (§ 12022, subd. (b)(1)).

On May 10, the jury found defendant not guilty of assault with a deadly weapon on count 1 but guilty of force-likely assault (§ 245, subd. (a)(4)). The jury found defendant not guilty on the remaining charges.

On June 11, the trial court sentenced defendant to two years in state prison.

On June 12, defendant filed a notice of appeal.

FACTUAL SUMMARY

Edward Amerson owned an unoccupied residence in southeast Fresno. On January 4, a neighbor told Edward about a potential fire at the residence. Edward and his son, Joshua Amerson, went to the residence and found defendant and a woman sleeping

¹ All further dates refer to the year 2019 unless otherwise stated.

² All further statutory references are to the Penal Code unless otherwise stated.

inside. Edward and Joshua told defendant and the woman to leave and they left. As defendant and the woman left the residence, defendant grabbed a “stick or ... a broom handle ... that had nails stuck in it.” When defendant exited the residence someone outside took the stick or broom handle from him. When defendant reached the sidewalk in front of the residence, he removed a folding knife from his pocket, opened it, stepped toward Edward and Joshua, said “ ‘I’ll be back,’ ” and then left. Neither Edward nor Joshua made a police report that night.

On January 6, at roughly 1:30 p.m., Edward and Joshua returned to the residence to repair the fence separating the back yard from the alley behind the house. They brought a baseball bat with them for protection. At about 2:30 p.m., defendant and four other people approached Edward and Joshua in the alley, blocking Edward and Joshua’s path to their vehicle. Defendant asked whether Edward had proof that he owned the residence. Edward responded that he did have proof that he owned the residence. Defendant then said that he was going to “go inside and tear [the residence] up” and then started to walk around the fence and toward the residence. Edward and Joshua followed defendant toward the residence and Edward asked him not to go inside. Edward and Joshua momentarily lost sight of defendant behind the fence. As they continued to follow defendant, he came back toward them with a four- to five-foot steel pipe. Defendant tried to hit Edward and Joshua with the pipe but did not hit either of them. Defendant then threw the pipe at them but missed.

After defendant threw the pipe, one of the people with defendant threw a golf club to him. Defendant swung the golf club at Edward and Joshua but did not make contact with either of them. Defendant then struck the trailer attached to their vehicle with the golf club, breaking off the head. Defendant threw the shaft of the club at Edward and Joshua. Defendant next removed a folding knife from his pocket, saying, “ ‘I’m going to stick you. I’m going to ... kill you.’ ” As defendant moved toward them, Joshua used the baseball bat to keep defendant at a distance. Eventually, defendant stumbled into the

street, picked up pieces of rock and threw them at Edward and Joshua, and crossed the street away from them into a vacant field. Edward and Joshua pursued defendant, Joshua hit defendant in the head with the baseball bat, and Edward jumped on defendant to detain him until the police arrived.

DISCUSSION

Defendant argues the trial court erroneously determined that force-likely assault is a lesser included offense of assault with a deadly weapon. As a result, the trial court instructed the jury sua sponte on force-likely assault as a lesser included offense, “lower[ing] the prosecutor’s burden of proof” and thereby violating the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The People respond that force-likely assault is a lesser included offense of assault with a deadly weapon under the accusatory pleading test in light of the allegations of count 1. In the alternative, assuming arguendo instructing the jury on force-likely assault was error, the conviction should be reduced to simple assault. We agree with the People that force-likely assault was a lesser included offense of assault with a deadly weapon as charged in count 1 under the accusatory pleading test. As a result, we find no instructional error.

“A criminal defendant has a constitutional right to have the jury determine every material issue presented by the evidence, and an erroneous failure to instruct on a lesser included offense constitutes a denial of that right. To protect this right and the broader interest of safeguarding the jury’s function of ascertaining the truth, a trial court must instruct on an uncharged offense that is less serious than, and included in, a charged greater offense, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged greater offense are present.” (*People v. Huggins* (2006) 38 Cal.4th 175, 215.)

On the other hand, a defendant has no right to have the jury instructed on lesser related offenses—offenses that are related to but not necessarily included in the stated charge. (*People v. Birks* (1998) 19 Cal.4th 108, 136–137.) A trial court has no

sua sponte instructional obligation regarding lesser related offenses and, indeed, is not permitted to instruct on lesser related offenses without agreement of the parties. (*People v. Salazar* (2016) 63 Cal.4th 214, 251–252; *People v. Majors* (1998) 18 Cal.4th 385, 408–409.)

Two tests exist to determine “whether a crime is a lesser included offense of a greater offense: the elements test and the accusatory pleadings test.” (*People v. Gonzales* (2018) 5 Cal.5th 186, 197 (*Gonzales*)). “Under the elements test, one offense is another’s ‘lesser included’ counterpart if all the elements of the lesser offense are *also* elements of the greater offense. Under the accusatory pleading test, a crime is another’s ‘lesser included’ offense if all of the elements of the lesser offense are also found in the *facts alleged* to support the greater offense in the accusatory pleading.” (*Ibid.*; accord, *People v. Smith* (2013) 57 Cal.4th 232, 240.) “Either of these tests triggers the trial court’s duty to instruct on lesser included offenses.” (*Gonzales*, at p. 197.)

We review a claim of instructional error regarding an assertedly lesser included offense de novo. (*People v. Licas* (2007) 41 Cal.4th 362, 366; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137; *People v. Hernandez* (2013) 217 Cal.App.4th 559, 568.)

The parties agree that the accusatory pleading test applies, but they disagree whether, under that test, force-likely assault is a lesser included offense of assault with a deadly weapon as alleged in count 1. The People correctly relay the purpose of the accusatory pleading test:

“The accusatory pleading test arose to ensure that defendants receive notice before they can be convicted of an uncharged crime. ‘As to a lesser included offense, the required notice is given when the specific language of the accusatory pleading adequately warns the defendant that the People will seek to prove the elements of the lesser offense.’ [Citation.] ‘Because a defendant is entitled to notice of the charges, it makes sense to look to the accusatory pleading (as well as the elements of the crimes) in deciding whether defendant had adequate notice of an uncharged lesser offense so as

to permit conviction of that uncharged offense.’ ” (*People v. Reed* (2006) 38 Cal.4th 1224, 1229.)

Thus, if the allegations of count 1 of the information warned defendant that the People sought to prove force-likely assault, then force-likely assault was a lesser included offense of assault with a deadly weapon as to count 1.

Count 1 of the information alleged: “On or about January 6, 2019, in the above named judicial district, the crime of ASSAULT WITH A DEADLY WEAPON, in violation of PENAL CODE SECTION 245(a)(1), a felony, was committed by Carlos Chavez Pinedo, who did willfully and unlawfully commit an assault upon Joshua Michael Amerson with a deadly weapon, to wit, a Pipe.”

The People contend that a pipe is not an *inherently* deadly or dangerous weapon because its ordinary use is not to inflict harm. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 (*Aguilar*); see also *People v. Simons* (1996) 42 Cal.App.4th 1100, 1107 [a screwdriver, while not an inherently dangerous weapon, can be used as a dangerous weapon].)³ Therefore, to be a dangerous weapon, the pipe must have been used in a manner likely to produce death or great bodily injury. (*People v. Simons*, 42 Cal.App.4th at p. 1107.) The People argue that by alleging that a pipe was used as a deadly weapon, the prosecutor merely alleged in a different way “that appellant used force likely to produce great bodily injury.” We agree. “[W]hen based on a defendant’s single act of

³ “[A] ‘deadly weapon’ is ‘any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.’ [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citations.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue.” (*Aguilar, supra*, 16 Cal.4th at pp. 1028–1029; accord, *People v. Aguayo* (2019) 31 Cal.App.5th 758, 765 (*Aguayo*), review granted May 1, 2019, S254554.)

using a noninherently dangerous object in a manner likely to produce great bodily injury, section 245(a)(1) and (4) are merely different statements of the same offense” (*People v. Brunton* (2018) 23 Cal.App.5th 1097, 1107.) By alleging that defendant committed assault with a deadly weapon using a pipe, the People also necessarily alleged that defendant committed force-likely assault. Because the allegations of count 1 gave defendant notice that the People would seek to prove the elements of force-likely assault, force-likely assault was a lesser included offense of count 1 under the accusatory pleading test.⁴ As a result, the trial court was required to instruct on that offense and therefore the court’s instruction was not error. (*Gonzales, supra*, 5 Cal.5th at p. 197.)

Defendant contends that, under the elements test, force-likely assault is not a lesser included offense of assault with a deadly weapon. The People do not dispute defendant’s contention. However, we need not resolve this issue because, under the accusatory pleading test based on the allegations of count 1, force-likely assault was a lesser included offense of assault with a deadly weapon as alleged in this case.⁵

⁴ We do not address the People’s alternative argument because we conclude that force-likely assault is a lesser included offense of assault with a deadly weapon as alleged in this case.

⁵ We note that the court in *Aguayo, supra*, 31 Cal.App.5th at pages 762–766, recently considered the same question, albeit in a slightly different context. The *Aguayo* court sought to resolve whether force-likely assault is a lesser included offense of assault with a deadly weapon for purposes of deciding whether multiple convictions are barred by section 654. (*Id.* at pp. 762–763.) In that situation, the court properly applied only the elements test. (*Ibid.*; accord, *People v. Reed, supra*, 38 Cal.4th at pp. 1229–1230 [“ ‘[I]t makes no sense to look to the pleading, rather than just the legal elements, in deciding whether conviction of two charged offenses is proper.’ ”].) It found that “force-likely assault is not a lesser included offense of assault with a deadly weapon [under the elements test] because, although every force-likely assault must be committed in a way that is likely to produce great bodily injury (either with or without a deadly weapon), there is a subset of assaults with deadly weapons—those committed with inherently deadly weapons—that are not necessarily likely to produce great bodily injury.” (*Aguayo*, at p. 766.) *Aguayo* is inconsistent with *In re Jonathan R.* (2016) 3 Cal.App.5th 963, 973, in which the court concluded that, under the elements test, force-likely assault is a lesser included offense of assault with a deadly weapon. Our conclusion—based on

DISPOSITION

The judgment is affirmed.

the accusatory pleading test—is not inconsistent with *Aguayo* or *In re Jonathan R.*—both decided based on the elements test.