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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ERICA NADINE MENDOZA, Defendant and Appellant.	B266337 (Los Angeles County Super. Ct. No. VA135731)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Reversed conditionally in part and remanded with instructions, and affirmed in part.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

Erica Nadine Mendoza appeals from a judgment of conviction following a jury verdict that found her guilty, inter alia, of aggravated assault, i.e., assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)),[1] and first degree residential burglary (§ 459). The trial court sentenced her to state prison for a term of six years eight months. On appeal, Mendoza makes three claims. First, her conviction on the aggravated assault count should be reversed because the trial court committed prejudicial error in failing to instruct the jury on the definition of assault and on the lesser included offense of simple assault. Second, her conviction on the residential burglary count should be reduced from first to second degree because (a) the verdict form limited the jury to finding her guilty on that count in the first degree and thus violated section 1157, and (b) the jury's oral verdict, as recorded in the reporter's transcript, found her guilty of second degree residential burglary. Third, the court's calculation of her presentence custody credits was incorrect because it was based on an erroneous assumption that section 2933.1's limitations on credits applied.

We hold that the trial court committed prejudicial error in failing to instruct the jury on the lesser included offense of simple assault; thus, we conditionally reverse the judgment as to the aggravated assault count.[2] The judgment is affirmed in all other respects because Mendoza's challenges to her conviction on the residential burglary count and the calculation of her custody credits lack merit.

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1 All statutory references are to the Penal Code.

2 We do not address whether the trial court's failure to define assault constituted prejudicial error.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

Mendoza was charged with aggravated assault (§ 245, subd. (a)(4); count 1), identity theft (§ 530.5, subd. (a); count 3), second degree burglary (§ 459; count 4), first degree burglary (§ 459; count 6), and seven counts of identifying information theft (§ 530.5, subd. (c)(1); counts 7 through 13). Mendoza's sister Samantha was charged as her codefendant on counts 1 and 6. Samantha was the lone defendant on count 2 (§ 487, subd. (a) [grand theft of personal property]).[3] (There was no count 5.)

B. *The Prosecution's Case*

In March 2014, Jennifer Belcher moved into the Whittier, California home where David Modyman lived with his father, Grant Modyman.[4] David and Mendoza had a son together who was seven years old when Belcher moved into the house. Mendoza had lived at the Modyman house in the past.

1. *Belcher's Testimony*

Belcher testified that on March 15, 2014, at about 11:00 p.m., she returned home to find two bins of her clothing missing from her room. She was sitting on her bed and crying in the dark when she heard someone enter the house. Mendoza and Samantha entered Belcher's room. Mendoza turned on the light

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[3] The trial court granted Samantha's motion for mistrial during the proceedings. She is not a party to this appeal.

[4] We refer to the Modymans by their first names to avoid confusion.

and said, "I'm going to fuck you up, you stupid bitch. You called DPS [*sic*, the Department of Children and Family Services (DCFS)] on my kid." Belcher testified that Mendoza "grabbed my head and threw it down and then pulled my hair." "It was almost like she was going to grab my hair, but she grabbed my head instead and threw it. She used it to throw me down on the ground." Belcher testified that when she was on the ground, which was carpeted, Samantha "started kicking me. They both started punching me and both pulling my hair and just screaming and yelling obscenities." Belcher said that she "just sort of took the blows."

Asked how many times she felt the impact of someone hitting her, Belcher said "four or five times." Asked where she felt the impact of someone hitting her, Belcher said there were "a couple in the face, but I had my arms up kind of protecting, and so in the arms and in the legs where they were kicking me and definitely when they were pulling my hair."

Belcher testified "the hitting" went on for five or ten minutes. She also testified, however, that she yelled for Grant, whose room was directly across the hallway from her room, and within "a minute or two,"[5] he opened his door and came into her room to help. Grant told Mendoza and Samantha to leave. Belcher was still on the floor when Mendoza and Samantha were walking out, and as Belcher moved her arm away from her face, a foot in a tennis shoe "ma[d]e contact" with her eyebrow. She did not see whether the foot was Mendoza's or Samantha's. Both Mendoza and Samantha were wearing tennis shoes.

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[5] Belcher testified Grant had "hearing issues" and his television was "relatively loud."

Two days later, Belcher called the police because she wanted her clothing back—not because of what had happened to her "physically." At that time, Belcher testified, she had a black eye she sustained when "one of them kicked" her as they were leaving her room. Belcher also testified that she had a " bruise" on her arm from Mendoza and "[a]nother bruise, like, a scratch" on her back from either Mendoza or Samantha. When Belcher was shown a photograph at trial that she said depicted bruising on her arm from the attack, the prosecutor observed, "It's a little hard to see."[6] Belcher described her pain in the days following the encounter with Mendoza and Samantha as "just soreness, just from being, you know, hit and kicked. My body was pretty sore." Belcher did not seek medical treatment, and, by the time of trial, her eye had healed.

2. *Police Detective's Testimony Regarding Statements Mendoza Gave in a Police Interview*

Detective Brenna Dineen of the Whittier Police Department testified that on April 29, 2014, she served a search warrant at the address where Mendoza, Samantha, their mother, and Mendoza's son lived; the police recovered in Samantha's room clothing matching Belcher's description of her missing property and documents bearing on the identity theft counts against Mendoza.

Mendoza was advised of her *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]).

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6 The officer who came to the house to take Belcher's report photographed Belcher, and these photographs were shown to the jury.

Dineen and a colleague then interviewed Mendoza. Dineen asked Mendoza if she had gone to the Modymans' house on March 15, 2014. Mendoza initially denied she had, but then admitted she had gone there twice. She told Dineen that Belcher had "called [DCFS] on her," and she was upset when she found out Belcher had moved into the Modyman home. She went to the house the first time at 8:00 p.m., saw the bin full of Belcher's clothes and took it. She went back again later because she "wanted to confront" Belcher.

Dineen testified that Mendoza told her that Belcher was sitting on her bed and crying in the dark when Mendoza turned on the light and walked into the room and that Samantha punched Belcher when she stood up.[7] Mendoza said she called Belcher "a bad name, possibly bitch." She grabbed Belcher's hair and pulled her to the ground; her ring got stuck in Belcher's hair so she "kept yanking" to get her ring free. Grant walked in and told them to get out, and she and Samantha left. Mendoza was "surprised" when Dineen showed her the photographs of Belcher's injuries. Mendoza said "it was just hair pulling" and "denied doing any further injuries."

C. *The Defense Case*

1. *Mendoza's Testimony*

Mendoza testified in her own defense. She said that she got into an argument with Belcher about Mendoza's son, but she was loud so after "a few seconds," Grant told her to "get the F

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[7] Samantha's motion for mistrial was granted at this point because the trial court had instructed Dineen not to refer to Mendoza's statement regarding her sister.

out" and she left "immediately." Mendoza acknowledged telling Dineen in the interview that she got upset when she saw Belcher, she pulled Belcher's hair "a lot," and she was "fighting" with her when Grant walked in and she stopped. She testified, however, that she did not cause Belcher's injuries. She also testified she had "lied" when she told Dineen that Samantha had been there "to make it look like it wasn't all just me; she knew it was wrong and a "terrible thing to do," but she was "scared" about her situation with her son's custody and had been "selfish."

On cross-examination, the prosecutor asked Mendoza if she had told Dineen her ring got caught in Belcher's hair so she "w[as]n't able to punch her as much as [she] wanted. Mendoza responded, "I don't remember saying particularly that but, yeah, I guess."

Mendoza admitted that she had three misdemeanor convictions for petty theft (two in 2008 and one in 2013).

2. *The Modymans' Testimony*

Grant testified Mendoza and Belcher were "arguing" or "yelling" on the night of what he deemed the "so-called fight." He saw no physical contact and did "not really" see any injuries on Belcher. Grant also testified he did not remember speaking with police at the time; he had suffered a stroke and his memory was "shot." By stipulation, the jury learned that on March 17, 2014, Grant told a police officer that on the night of March 15, he heard "wrestling" coming from Belcher's room, and he came out of his bedroom as soon as he could when Belcher called for him. Belcher was on the floor, and Mendoza and Samantha were standing over her. It appeared to Grant that they had been beating Belcher, but they were no longer doing so.

David testified Belcher was an "old friend" from high school, but they had not been in contact for years. They got back in touch around the time she got "kicked out" of her place, and he said she could stay at his father's house for a few days. David further testified he had made "bad decisions," referring to a sexual relationship with Belcher—"just kind of a few times," and "just for sex." He had no "emotional ties" to her and "thought she didn't" have emotional ties to him either.[8] David said that he was in the garage and did not know Belcher was home when he saw Mendoza leave the house on March 15, 2014. He did not see any bruises on Belcher's face or arms after Mendoza left.

D. *The Prosecution's Rebuttal*

In rebuttal, the prosecution played for the jury seven minutes of Mendoza's 40-minute interview with Dineen and her colleague, which had been videotaped and transcribed. Contrary to her trial testimony, in the recorded interview, Mendoza stated that Samantha was with her when she went to confront Belcher. Samantha walked in first and "just hit her." "[T]hen . . . Grant comes in and we stopped it." It was a "chick fight"—"there was hair pulling and more hair loss than anything." Mendoza said her ring got caught in Belcher's hair, and she "couldn't find [her] finger." When she got her ring free, Grant was already in the room telling her to stop, and she and Samantha left. "I really didn't do much."

In the recorded interview, Mendoza also told Dineen that Belcher had "made [her] life hell" by calling "CPS [*sic*, DCFS] on [her]" four times, and she was "worried" Belcher was "being

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8 Belcher testified she and David were "just friends."

really hard on [her] son." She said she went to the house to "confront [Belcher] and ask her why she's doing this so my son is taken away from me"; when she flipped on the light in Belcher's room, she yelled, "what's your problem?" and called Belcher "a bitch maybe," asking her "why she was doing this" and "why she was picking on [her] son."

After the videotape was played, the prosecutor recalled Dineen to the witness stand. Dineen testified Mendoza was "distraught" and "crying most of the time" during the interview. Dineen stated that as far as she knew, Mendoza "essentially told [her] everything that she thought happened that night."

E. *Verdict and Sentencing*

The jury found Mendoza guilty as charged on all counts. The trial court sentenced her to state prison for a term of six years eight months, calculated as follows: the upper term of six years on count 6 (first degree residential burglary) plus a consecutive term of eight months (one-third the two-year middle term) on count 3 (identity theft); a concurrent three-year middle term on count 1 (assault by means likely to produce great bodily injury) was ordered stayed (§ 654) along with concurrent 180-day terms in county jail on the misdemeanor counts 4 and 7 through 13 (second degree burglary and the possession of personal identifying information with intent to defraud).

DISCUSSION

A. *The Claim of Instructional Error on the Assault Charge*

Mendoza was charged in count 1 with assault by means likely to produce great bodily injury, also known as aggravated

assault. (§ 245, subd. (a)(4).) The trial court correctly instructed the jury that "'[g]reat bodily injury' refers to significant or substantial bodily injury or damage; it does not refer to trivial or insignificant injury or moderate harm. [¶] . . . [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person was assaulted; and [¶] 2. The assault was committed by means of force likely to produce great bodily injury." (CALJIC No. 9.02.) Mendoza did not request an instruction on the lesser included offense of simple assault (§ 240); indeed, her counsel stated to the trial court, "I don't think there are any lessers." Mendoza claims that the trial court's failure to give the simple assault instruction sua sponte constituted prejudicial error. We agree.[9]

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[9] In failing to instruct on simple assault, the trial court omitted CALJIC No. 9.00, which defines assault. Mendoza claims the court also erred in failing to define assault because the definition must be given as precursor to an instruction on aggravated assault. The People concede that the trial court erred in this regard, but argue that the error was not prejudicial because Mendoza's own testimony about her altercation with Belcher was in essence an admission that an assault occurred, and thus the jury necessarily found in convicting Mendoza that the elements of assault, as defined in CALJIC No. 9.00, were met. We need not decide if the failure to define assault was prejudicial error because, for the reasons stated in the text, we find that the failure to give the jury the option of convicting Mendoza of simple assault as a lesser included offense of aggravated assault constituted prejudicial error.

1. *The trial court had a sua sponte duty to instruct the jury on simple assault as a lesser included offense of aggravated assault.*

Even absent a request from a party, the trial court must instruct the jury "'on any lesser offense "necessarily included" in the charged offense[] if there is substantial evidence that only the lesser crime was committed.'" (*People v. Smith* (2013) 57 Cal.4th 232, 239; accord, *People v. Breverman* (1998) 19 Cal.4th 142, 162 ["'[s]ubstantial evidence' in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]'" that the lesser offense, but not the greater, was committed"].) This "sua sponte instructional rule" ensures the jury will consider the "'*full range of possible verdicts*' included in the charge" (*Breverman,* at p. 155), and "'prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other'" (*Smith*, at p. 239).

Simple assault "is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) It is a lesser included offense of aggravated assault, which is an assault by means likely to produce great bodily injury. (§ 245, subd. (a)(4); see *People v. McDaniel* (2008) 159 Cal.App.4th 736, 747 ["one cannot commit [aggravated assault] without also committing a simple assault"].) While the use of hands, fists or feet in an altercation may support an aggravated assault conviction (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028), whether such actions "would be likely to cause great bodily injury is to be determined by the force of the impact, the manner in which it was used and the circumstances under which the force was applied." (*McDaniel*, at p. 749; see

People v. Baker (1999) 74 Cal.App.4th 243, 252 ["to 'kick ass' and 'jump 'em'" may mean simple assault].) No injury is required for aggravated assault. However, if there are injuries, their extent is "'often highly probative of the amount of force used.'" (*McDaniel*, at p. 748; see *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086 [injury is not required, but if injuries result, the extent and location of such injuries are relevant facts]; *People v. Duke* (1985) 174 Cal.App.3d 296, 302-303 ["'if hands, fists or feet, etc., are the means employed, the charge will normally be assault with force likely to produce great bodily injury'"; in determining whether the force used was of that character, "'the nature and extent of the injuries inflicted will often be the controlling factor'"].)

Because the trial court did not instruct the jury on simple assault, and the jury convicted Mendoza of aggravated assault, the question is whether there is substantial evidence from which a reasonable jury could find the force Mendoza used in assaulting Belcher was less than the level of force likely to produce great bodily injury. (*People v. McDaniel*, *supra*, 159 Cal.App.4th at p. 748.) In our view, the answer to that question is yes.

We begin with Mendoza's account of the altercation with Belcher. According to Mendoza, Samantha hit Belcher, she and Samantha both pulled Belcher's hair, the altercation was over quickly, and she denied she caused the injuries shown in the photographs of Belcher. As Mendoza described it, "there was hair pulling and more hair loss than anything." A reasonable jury could have concluded from this testimony that Mendoza was guilty of simple assault, not aggravated assault, because the force she used was lesser in degree than that likely to produce great bodily injury. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1222 ["'where the blows are serious, but still leave a question of fact as

to the character of the force used, the defendant is entitled to an instruction on the included offense of simple assault'"]; *People v. McDaniel*, *supra*, 159 Cal.App.4th at p. 748 [""'The issue . . . is not whether serious injury was caused, but whether the force used was such as would be likely to cause it'""].)

The People focus on Belcher's testimony, not Mendoza's, and argue a simple assault instruction was not supported by substantial evidence because Belcher's testimony indicates that Mendoza "personally directed blows to sensitive parts of [Belcher's] body that necessarily created a likelihood of producing great bodily injury." The argument overlooks that Mendoza's version of events alone constitutes substantial evidence of simple assault. (*People v. Wyatt* (2012) 55 Cal.4th 694, 698 ["the testimony of a single witness, including that of a defendant, may suffice to require lesser included offense instructions"].) To be sure, there was some tension between Mendoza's trial testimony and what she said in her police interview, and Belcher's version of events is different from Mendoza's. But substantial evidence to support an instruction on a lesser included offense may exist "even in the face of inconsistencies presented by the defense itself." (*People v. Breverman, supra,* 19 Cal.4th at p. 163.) And whether Belcher's alternative version of events was more credible than Mendoza's has no bearing on whether there was substantial evidence to support an instruction on simple assault. That is because in determining if the evidence lends itself to an instruction on a lesser included offense, "[c]ourts must assess . . . the evidence without evaluating the credibility of witnesses, for that is a task reserved for the jury." (*Wyatt*, at p. 698.)

The People's argument also overlooks that the jury reasonably could have found simple assault based on Belcher's

version of events. In Belcher's account, Mendoza used more force than in Mendoza's account. But while Belcher testified that Mendoza pulled her hair and punched her, she was uncertain whether it was Mendoza or Samantha who delivered the kick that caused her black eye.[10] Thus, even fully crediting Belcher's account of what Mendoza did, the jury still could have concluded that the force Mendoza used did not rise to the level of aggravated assault. (See *People v. Rupert* (1971) 20 Cal.App.3d 961, 966, 968 [simple assault instruction should have been given because the jury may have concluded that the defendant did not use force likely to produce great bodily injury notwithstanding the victim's testimony that the defendant "struck her at least five times, knocking her to the floor," and continued to strike her while she was on the floor].)

Belcher's testimony lends itself to a simple assault instruction for two additional reasons: her testimony was not free of inconsistencies itself and it was not irreconcilable with Mendoza's testimony. Belcher testified the "attack" went on for five or 10 minutes, but she also said she felt the impact of someone hitting her only four or five times, and that Grant came from his room (which was directly across from hers) not long after she called out for assistance, and the altercation ended shortly after his entry into her room. Belcher's description of Mendoza's conduct (reaching for her hair and pulling her head down) was

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[10] Because the prosecution did not proceed on an aiding and abetting theory and the jury was not instructed on aiding and abetting, Mendoza could be held responsible for the kick that caused Belcher's black eye only if the jury concluded that Mendoza, rather than Samantha, delivered that kick.

reconcilable with Mendoza's claim she got her ring caught in Belcher's hair and was trying to free her hand.

Another factor supporting a simple assault instruction is the relatively modest nature of Belcher's injuries. Belcher testified that she did not consider her injuries significant enough to require medical attention or even the submission of a police report; and all her injuries had healed by the time of trial. Furthermore, the bruise on Belcher's arm, which the prosecutor described as difficult to see in the contemporaneous photograph shown to the jury, was the only documented injury Belcher specifically attributed to Mendoza's conduct. As to Belcher's black eye, the perpetrator of which (Mendoza or Samantha) was uncertain, the prosecutor conceded in her closing argument that this injury may not have looked all that severe. Thus, to the extent Belcher's injuries were indicative of the level of force used, the jury could have concluded that Mendoza committed simple assault, not aggravated assault.

All told, there was substantial evidence of aggravated assault. But there also was substantial evidence of simple assault. Because the evidence could support either result, the trial court had a sua sponte duty to instruct the jury on simple assault.[11]

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[11] The People argue a simple assault instruction was unwarranted because Mendoza purportedly mounted an "all-or-nothing defense," which posited that "if [Mendoza] was guilty at all, she was guilty of the greater offense of assault by means of force likely to produce great bodily injury" only. This argument is unavailing because "[t]he trial court must instruct on lesser included offenses when there is substantial evidence to support the instruction, regardless of the theories of the case proffered by

2. *The trial court's failure to instruct the jury on the lesser included offense of simple assault was prejudicial.*

Trial court error in failing to instruct on all lesser included offenses supported by the evidence is reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836-837, which requires reversal of the conviction if the defendant shows that it is "'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred."[12] (*People v. Breverman, supra,* 19 Cal.4th at p. 178; accord, *People v. Prince*, *supra*, 40 Cal.4th at p. 1267.) "'[P]robability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

A conviction of simple assault is more favorable for a defendant than a conviction for aggravated assault because simple assault is punishable as a misdemeanor (§ 241), whereas aggravated assault is punishable as a felony (§ 245, subd. (a)(4)).

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the parties" or the arguments of counsel. (*People v. Barton* (1995) 12 Cal.4th 186, 203.)

[12] The California Supreme Court has in other cases "characteriz[ed the] erroneous failure to instruct on a lesser included offense as a denial of due process of law to be evaluated [for prejudice] on appeal under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824]." (*People v. Prince* (2007) 40 Cal.4th 1179, 1267; see also *People v. Elliot* (2005) 37 Cal.4th 453, 475.) Under that more stringent standard, the conviction must be reversed "unless it appears beyond a reasonable doubt that the error did not contribute to the verdict." (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1143.)

Mendoza contends there is a "reasonable chance" she would have obtained a more favorable outcome if the trial court had instructed the jury on the lesser included offense of simple assault. Mendoza cites Belcher's testimony to support her prejudice claim. Specifically, according to Belcher's account, Mendoza pulled Belcher down by her hair, both Mendoza and Samantha punched her and pulled her hair; but Belcher did not see whether it had been Mendoza or Samantha who kicked her, causing her black eye. Mendoza asserts that based on this testimony, it was reasonably probable that the jury would have convicted her of simple assault, not aggravated assault. The People counter that, given the "overwhelming evidence" Mendoza "physically attacked [Belcher] and . . . lacked credibility," the guilty verdict means the jury rejected Mendoza's testimony, and therefore any instructional error was harmless.

The People misconstrue the prejudice analysis. In assessing whether an error was prejudicial, it does not matter that the jury chose to convict the defendant of the greater offense over acquittal or that the defendant was convicted of the greater offense on sufficient evidence. What matters is whether it is reasonably probable that the jury would have convicted the defendant of the lesser offense had it been afforded that option. (See *People v. Racy* (2007) 148 Cal.App.4th 1327, 1335-1336.) "[T]he very purpose of the rule is to allow the jurors to convict of *either* the greater or the lesser offense where the evidence might support either. That the jury chose the greater over acquittal, and that the evidence technically permits conviction of the greater, does not resolve the question whether, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears reasonably probable the jury

would nonetheless have elected the lesser if given that choice." (*People v. Breverman, supra,* 19 Cal.4th at p. 178, fn. 25.) We believe it is reasonably probable that the jury would have convicted Mendoza of simple assault had that option been available because the level of force that Mendoza exerted was not that significant and Belcher's injuries were relatively modest.

Equally unavailing is the People's argument that Mendoza could not have been prejudiced because, through her concessions that she pulled Belcher's hair "a lot," and "w[as]n't able to punch [Belcher] as much as [she] wanted," she essentially confessed that she assaulted Belcher. In fact, Mendoza's admission to an assault serves to highlight the prejudice she suffered from the failure of the trial court to instruct on simple assault. The jury likely was inclined to convict Mendoza of assault precisely because of her admission. (*People v. Hughes* (2002) 27 Cal.4th 287, 365 ["'Where . . . the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction'"].) But the jury was given only one option for conviction: aggravated assault.

In sum, the trial court's failure to instruct the jury on simple assault was prejudicial error under the *Watson* standard,[13] and we conditionally reverse Mendoza's conviction on the aggravated assault count.[14] Our reversal is conditional

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[13] Because we conclude the error was not harmless under *Watson*, it follows that the error was not harmless beyond a reasonable doubt under *Chapman*.

[14] The trial court's error in failing to instruct the jury on simple assault also may have tainted Mendoza's residential burglary conviction. To convict Mendoza of residential burglary, the jury had to find that she entered Belcher's room with the

because "[w]hen a greater offense must be reversed, but a lesser included offense could be affirmed, we give the prosecutor the option of retrying the greater offense, or accepting a reduction to the lesser offense." (*People v. Kelly* (1992) 1 Cal.4th 495, 528; accord, *People v. Edwards* (1985) 39 Cal.3d 107, 118.)

B. *The Claim of the Flawed Verdict on the Residential Burglary Count*

1. *Because residential burglary is not distinguished into degrees, section 1157 is inapplicable.*

Under section 1157, "Whenever a defendant is convicted of a crime . . . which is distinguished into degrees, the jury . . . must find the degree of the crime . . . of which he [or she] is guilty. Upon the failure of the jury . . . to so determine, the degree of the crime . . . of which the defendant is guilty, shall be deemed to be of the lesser degree." (§ 1157.) Mendoza claims that the trial court committed section 1157 error because the verdict form for the residential burglary count limited the jury to convicting her of that offense in the first degree only; therefore, her conviction

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intent to commit larceny or any felony. (§ 459.) During closing argument, the prosecutor stated that the People's residential burglary theory was that Mendoza entered Belcher's room with the intent of confronting Belcher, i.e., feloniously assaulting her; the prosecutor told the jury she was not arguing that Mendoza entered with the intent to commit larceny, i.e., taking Belcher's clothing. Had the trial court instructed the jury on simple assault, a misdemeanor, as a lesser included offense of aggravated assault, a felony, then the jury may have concluded for purposes of the residential burglary count that Mendoza did not enter Belcher's room with the intent to commit a felony. Mendoza did not raise this issue on appeal.

on that count should be reduced to the second degree. This claim is meritless.

Section 1157 is inapplicable because residential burglary is *not* distinguished into degrees. "'[E]very' residential burglary is first degree burglary and any 'other' burglary is second degree burglary . . . ." (*People v. Maestas* (2006) 143 Cal.App.4th 247, 252; see *People v. Deay* (1987) 194 Cal.App.3d 280, 284 ["With the elimination on January 1, 1983, of the requirement that a first degree burglary be committed in the nighttime, all burglaries of residences are first degree pursuant to section 460."].) In short, there is no such thing as second degree residential burglary. And therefore, section 1157 has no bearing here. (See *People v. Goodwin* (1988) 202 Cal.App.3d 940, 947 [the rationale for § 1157 is to protect the defendant from the risk that the degree of the crime could be increased after judgment, but burglary of a residence is, by definition, first degree burglary]; see also *People v. Mendoza* (2000) 23 Cal.4th 896, 910 [§ 1157 is inapplicable when as a matter of law the jury can convict the defendant of the charged crime in the first degree only; the purpose of § 1157 "is to ensure that where a verdict *other than first degree is permissible*, the jury's determination of degree is clear"].)[15]

Here, the trial court gave the jury two verdict forms for the residential burglary count—a guilty verdict form and a not guilty verdict form; the forms tracked the language in the information and stated: "We, the Jury in the above-entitled action, find the

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[15] Mendoza's reliance on *People v. Williams* (1984) 157 Cal.App.3d 145 is misplaced. The defendant in that case was charged with murder, which is distinguished into degrees; thus, section 1157 applies to a murder charge. (*Williams*, at pp. 154-155.)

defendant, ERICA MENDOZA, Guilty [or Not Guilty] of the crime of FIRST DEGREE RESIDENTIAL BURGLARY who did enter an inhabited dwelling house occupied by JENNIFER BELCHER with the intent to commit larceny and [*sic*, or] any felony in violation of Section 459 of the Penal Code of California, a felony, as charged in COUNT 6 of the Information." The jury returned the guilty version of the verdict form with the foreperson's signature, jury number, and date. The jury thus found Mendoza guilty of the only possible degree of residential burglary—first degree. For this reason, Mendoza's contention that the verdict form was improperly "hardwired" to permit the jury to find nothing but first degree residential burglary is mistaken.[16]

2. *Mendoza forfeited any claim of error based on the discrepancy between the verdict form used for the residential burglary count and the transcription of the oral verdict on that count, which was a technical defect in any event.*

Even though the written verdict form for count 6 stated that Mendoza was found guilty of first degree residential burglary, according to the court reporter's transcript, the clerk read the jury's verdict on that count as follows: "We, the jury in the above-entitled action, find the defendant, Erica Mendoza, guilty of [the] crime of *second* degree residential burglary who did enter a habited [*sic*, an inhabited] dwelling house occupied by

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16 Mendoza's counsel "review[ed] and approve[d] the verdict forms" ("off the record"), and thus Mendoza arguably has forfeited any section 1157 claim.

Jennifer Belcher with the intent to commit larceny and any felony, in violation of section 459 of the Penal Code of California, a felony, as charged in count 6 of the information." (Italics added.) Mendoza contends that the discrepancy between the "oral verdict," as reflected in the reporter's transcript, and the verdict form requires the reduction of her conviction on the residential burglary count from first degree to second degree. We disagree for two reasons.

First, Mendoza forfeited any claim of error arising from the discrepancy. After the clerk finished reading the verdict on the final count, the court asked Mendoza's counsel if he wanted the jury polled, and he said he did. In response to the court's question to each juror, "Are these your verdicts?" the court received 12 "yes" votes. The jurors were thanked and released without any objection from Mendoza's counsel. If there was uncertainty between the oral and written verdict, Mendoza had the chance to raise it, but failed to do so. (See *People v. Johnson* (2015) 61 Cal.4th 734, 784 [the defendant had the opportunity to clarify any misunderstanding in the jury's verdict but failed to do so].)

Second, forfeiture aside, there never was any uncertainty that count 6 charged Mendoza with first degree residential burglary, the only possible degree of guilt for residential burglary. The information, the prosecutor's opening and closing statements, the opening and closing arguments of Mendoza's counsel, the jury instructions, and the completed verdict form all referred to count 6 as charging first degree residential burglary. It is unclear from the record whether the recorded oral verdict of a finding of guilt in the second degree on that count reflected a mistake by the clerk in reading the written verdict form or a

mistake by the reporter in transcribing what the clerk read.[17] Either way, the discrepancy does not warrant reduction of the first degree residential burglary conviction, which the jury plainly intended to impose, to a second degree residential burglary conviction, which is not even a recognized offense. (*People v. Johnson*, *supra*, 61 Cal.4th at p. 785 [technical defects may be disregarded where the jury's intent to convict of a specified offense within the charges is unmistakably clear and the defendant's substantial rights suffered no prejudice].)

C. *The Custody Credit Claim*

At sentencing, Mendoza's counsel advised the trial court she was entitled to "52 actual plus 15 percent limitation of 8 for total of 60 days" in custody credit, and the trial court awarded credit in this amount. On appeal, Mendoza contends that her counsel's calculations were incorrect and that she did not receive the presentence custody credits to which she was entitled. According to Mendoza, this was due to an erroneous assumption that her custody credit calculation was subject to the limitations of section 2933.1. Mendoza is mistaken. Section 2933.1 does apply.[18]

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[17] In count 4, Mendoza was charged with, and convicted of, second degree commercial burglary arising from her use at a gas station of Belcher's ATM card, which David had given her. It is possible that either the clerk or the reporter conflated count 4 and count 6.

[18] Although she raised no objection below to the trial court's calculation of her credits, we can consider Mendoza's challenge to the calculation for the first time on appeal. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427 ["when the object in view of the

Section 2933.1 limits presentence conduct credits of a person in custody to "15 percent of the actual period of confinement" for "any person who is convicted of a felony offense listed in subdivision (c) of [s]ection 667.5." (§ 2933.1, subds. (a), (c).) One such offense is first degree residential burglary, "wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary." (§ 667.5, subd. (c)(21).)[19] Because Mendoza was charged with and convicted of "first degree residential burglary" of an "inhabited dwelling . . . occupied by Jennifer Belcher," she is a "person who is convicted of a felony offense listed in subdivision (c) of [s]ection 667.5" and is subject to section 2933.1's limitation on conduct credits as a result.

Citing due process concerns regarding the calculation of credits that were articulated in *People v. Lara* (2012) 54 Cal.4th

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Legislature is considered," section 1237.1 is "properly construed" to require the filing of a motion in the trial court as a prerequisite to raising a presentence credit issue on appeal if there are no other issues, while requiring no such motion when other issues are litigated on appeal].)

[19] Section 667.5, subdivision (c), provides: "For the purpose of this section, 'violent felony' shall mean any of the following: [¶] . . . [¶] (21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary." Section 460, subdivision (a), specifies: "Every burglary of an inhabited dwelling house . . . is burglary of the first degree." Section 667.5, subdivision (c)'s list of "'violent felon[ies]'" includes "both specific, enumerated crimes and descriptions of criminal conduct." (*People v. Ruiz* (1999) 69 Cal.App.4th 1085, 1089.)

896, 901 and *People v. Fitzgerald* (1997) 59 Cal.App.4th 932, 936-937, Mendoza argues that although she was charged with and convicted of "first degree residential burglary" of an "inhabited dwelling . . . occupied by Jennifer Belcher," she did not receive proper notice of the possible limitation on her credits because the amended information "made no reference to . . . count [6] being a violent felony under section 667.5[, subdivision] (c)(21) and included none of the general language that a 'non-accomplice person was present'" in the residence at the time of the burglary. Citing *People v. Garcia* (2004) 121 Cal.App.4th 271, 275-276, Mendoza further argues "neither the trial court nor the jury made a specific finding that a person was present at the time of the burglary."

The cases on which Mendoza relies defeat, rather than support, her argument. In *People v. Fitzgerald*, *supra*, 59 Cal.App.4th 932, the defendant argued that denial of "the usual presentence good conduct and work credits" under section 2933.1 would deprive him of due process because "the information did not apprise him of the possibility he would only receive 15 percent of presentence conduct credits." (*Id.* at p. 936.) The court rejected the argument because such explicit notice in the information is not required; rather, it is the transcript of the preliminary hearing that "provides notice under California law as to the charges." (*Id.* at p. 936; accord, *People v. Jones* (1990) 51 Cal.3d 294, 312 ["the information has a 'limited role' of informing [the] defendant of the kinds and number of offenses; 'the time, place, and circumstances of charged offenses are left to the preliminary hearing transcript,' which represents 'the touchstone of due process notice to a defendant'"].)

Here, Mendoza was charged in count 6 of the information with "first degree residential burglary," a felony, in which she "enter[ed] an inhabited dwelling . . . and inhabited portion of a building occupied by Jennifer Belcher." At the preliminary hearing, Belcher testified she was sitting on her bed when Mendoza and her sister entered her room and started pulling her hair and hitting and kicking her. Based on that testimony, the trial court referred at the preliminary hearing to count 6 as "residential burglary, entering with the intent to commit a felony, to wit, to beat up [Belcher]." On this record, Mendoza had notice the prosecution intended to prove she committed a residential burglary at a time when Belcher, who was not an accomplice, was present. Because she was charged with an offense listed in section 667.5, subdivision (c), Mendoza was "adequately advised . . . [s]he would be subject to the reduced availability of presentence credits" under section 2933.1 if convicted of that offense. (*People v. Fitzgerald, supra*, 59 Cal.App.4th at p. 938; see also *People v. Lara*, *supra*, 54 Cal.4th at p. 901.)

Contrary to Mendoza's characterization, in *People v. Garcia*, *supra*, 121 Cal.App.4th 271, we determined the "'charged and proved'" terminology of section 667.5, subdivision (c)(21) itself does not mandate a jury determination of the issue of a nonaccomplice's presence at the time of the offense." (*Id*. at p. 278.) "As with other sentencing facts, . . . proof that a first degree burglary falls within section 667.5, subdivision (c)(21), is properly presented to the sentencing court." (*Id.* at p. 279; see *People v. Lara, supra,* 59 Cal.4th at p. 906 ["The People were *not*, as we have explained, required to plead [the] defendant's credit disabilities in the complaint or prove them to the trier of fact" (italics added)].)

In sum, Mendoza was entitled to due process in the award of credits, meaning "sufficient notice of the facts that restrict [her] ability to earn credits and, if [s]he does not admit them, a reasonable opportunity to prepare and present a defense." (*People v. Lara*, *supra*, 59 Cal.4th at p. 906.) She received that notice. Mendoza has demonstrated no error in the application of section 2933.1 in this case.

DISPOSITION

Mendoza's conviction on count 1 (assault by means likely to cause great bodily injury) is conditionally reversed; her convictions on counts 3, 4, and 6 through 13 are affirmed. The case is remanded with the following directions: If the People do not retry Mendoza on count 1 pursuant to section 1382, subdivision (a)(2), within 60 days after the remittitur is filed in the trial court, or, if the People file a written election not to retry Mendoza, the trial court shall proceed as if the remittitur modified the judgment to reflect a conviction on count 1 of simple assault (§§ 240, 241, subd. (a)) and resentence Mendoza accordingly.

SMALL, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.