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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSE MANUEL MICHEL, Defendant and Appellant.	2d Crim. No. B229011 (Super. Ct. No. BA369015-01) (Los Angeles County)

Jose Manuel Michel appeals his conviction, by jury, of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, former subd. (a)(1), now subd. (a)(4))[1], and of making criminal threats. (§ 422.) The jury found not true the sentence enhancement allegation that appellant personally inflicted great bodily injury on the victim, (§ 12022.7, subd. (a)), but found true the allegation that he did not remain free of custody for at least five years after a prior felony conviction. (§ 667.5, subd. (b); Health & Saf. Code, § 11351.) The trial court sentenced appellant to a total term in state prison of four years. He contends there is no substantial evidence that he used force likely to cause great bodily injury and that the trial court erred when it failed to instruct

[1] Effective January 1, 2012, the subdivisions of section 245 were renumbered and the prohibition against assault by means of force likely to produce great bodily injury was moved from subdivision (a)(1) to subdivision (a)(4). All further statutory references are to the current version of the Penal Code, unless otherwise stated.

the jury sua sponte on the lesser included offense of assault. Finally, appellant contends the abstract of judgment must be modified to impose a court security fee of $60, rather than $600. We modify the abstract of judgment and, as modified, affirm.

Facts

Appellant worked in a wholesale beverage warehouse with Cesar Melgar. One day, appellant asked Melgar for help filling an order and Melgar did not respond. Appellant got angry. Melgar apologized, explaining he hadn't heard the request. Appellant was not satisfied.

After their shift ended, appellant asked Melgar to join him at a public park to play basketball. They played for awhile and then Melgar said he was going home. Appellant followed Melgar to his car. He said he had really invited Melgar to the park to fight over the incident at work that day. Melgar refused to fight. Appellant told Melgar to defend himself or appellant was going to hit him. Melgar refused and started walking away. Appellant hit him behind the right ear. Melgar turned toward appellant and tried to hold appellant in a bear hug, to avoid getting hit again. As appellant struggled to get free, Melgar tripped and fell to the ground. The left side of Melgar's head hit the pavement. Appellant knelt over Melgar and hit him in the face about five times. When he finished pummeling Melgar, appellant stood up and went back to his car. Driving past Melgar on his way out of the park, appellant told Melgar he'd kill him if Melgar said anything about the attack.

Two bystanders saw the men fighting and heard Melgar yell for help. They did not intervene in the fight, but one of the bystanders went to the park office, to get help and call police. Both bystanders saw Melgar bleeding and heard appellant threaten him. Police and paramedics reached Melgar shortly after appellant left the park. The police officer who interviewed Melgar testified that he seemed "dazed." Melgar drove himself to the emergency room later that day where he received five stitches to close a wound on his forehead. He testified that he had a headache for several days and missed about a week of work.

Appellant was arrested the next day. He initially denied being in the park, or having any problem with Melgar. When the officer asked appellant about injuries on his knuckles and forehead, appellant said he was a skater and that he fell down. He refused to allow his hands to be photographed.

Appellant was later interviewed by his parole officer. He told the parole officer that he exchanged words with Melgar at the park and then Melgar "lunged towards" appellant. Appellant struck him in the head twice. They fell to the ground and fought for awhile longer. Eventually they stopped and appellant got up and drove to a friend's house. He admitted lying to the police officer because he did not want to go back to prison.

At trial, appellant testified that Melgar threw the first punch, after appellant teased him about being bad at basketball. They fought briefly and then appellant went to his car. As appellant was leaving, he stopped the car near Melgar to make sure he was all right, not to threaten him.

Discussion

Appellant contends there is no substantial evidence that he used force likely to produce great bodily injury and that the trial court erred when it failed to instruct the jury on simple assault as a lesser included offense of assault by means of force likely to cause great bodily injury. He further contends the abstract of judgment should be corrected to impose a security fee in the correct amount. Only the latter point has merit.

Substantial Evidence

To determine whether the conviction is supported by substantial evidence, we review the entire record in the light most favorable to the prosecution "to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Silva* (2001) 25 Cal.4th 345, 368.) In applying this test, we do not resolve credibility issues or evidentiary conflicts. Instead, we presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) "A reversal for insufficient evidence 'is

unwarranted unless it appears "that upon no hypothesis whatever is there sufficient evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Here, the jury convicted appellant of violating section 245, subdivision (a)(4). This subdivision prohibits an assault by means of force that is likely to produce great bodily injury, not the use of force which actually does produce great bodily injury. There is no requirement that injury actually occur. (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1065.) "Great bodily injury is bodily injury which is significant or substantial, not insignificant, trivial or moderate." (*Id.* at p. 1066.) Whether the force used meets this standard is a question of fact for the jury. (*Id.*) "While . . . the results of an assault are often highly probative of the amount of force used, they cannot be conclusive." (*People v. Muir* (1966) 244 Cal.App.2d 598, 604.) As our Supreme Court explained more recently, "One may commit an assault without making actual physical contact with the person of the victim; because the statute focuses . . . on force *likely* to produce great bodily injury, whether the victim in fact suffers any harm is immaterial. [Citation.] That the use of hands or fists alone may support a conviction of assault 'by means of force likely to produce great bodily injury' is well established . . . ." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.)

No medical expertise is required to understand that a blow to the head, whether inflicted by a person's fists or by a fall on a hard surface, has the potential to cause a concussion or some other serious bodily injury. Here, there was substantial evidence that appellant hit Melgar from behind, just below his right ear. When Melgar fell to the ground, hitting his head on the pavement, appellant knelt over him and punched him in the head at least five more times. The blows and the fall caused Melgar's forehead to cut open and bleed. He had bruises on his face and head, required stitches, suffered from headaches, and missed several days of work. A reasonable jury could infer from this evidence that appellant used a degree of force that was likely to produce great bodily injury. The conviction is supported by substantial evidence.

Instructional Error

Appellant contends the jury might have found that he committed an assault, but did not use force likely to cause great bodily injury. As a consequence, he contends, the trial court erred in failing to instruct the jury, sua sponte, on simple assault as a lesser included offense. We are not persuaded.

A trial court has a sua sponte duty to instruct on all theories of a lesser included offense which find substantial support in the evidence. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) In this context, substantial evidence is evidence from which a reasonable jury could conclude that only the lesser offense had been committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "A criminal defendant is entitled to an instruction on a lesser included offense only if [citation] ' there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense' [citation] *but not the lesser*." (*People v. Memro* (1995) 11 Cal.4th 786, 871, quoting *People v. Morrison* (1964) 228 Cal.App.2d 707, 712.)

Simple assault (§ 240) is a lesser included offense of assault by means of force likely to cause great bodily injury. (*People v. Rupert* (1971) 20 Cal.App.3d 961, 968.) The two offenses are distinguished by the degree of force used in their commission. An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240; see also *People v. Williams* (2001) 26 Cal.4th 779, 784.) A violation of section 245, subdivision (a)(4), by contrast, requires an assault committed by means of force "which is significant or substantial, not insignificant, trivial or moderate." (*People v. Armstrong*, *supra*, 8 Cal.App.4th at p. 1066.)

The trial court had a duty to instruct the jury on simple assault if there was substantial evidence that appellant used a degree of force that was "insignificant, trivial or moderate." But, as we have already described, appellant hit Melgar, from behind, near his right ear. He then continued punching Melgar in the face, with a closed fist, at least five times. Melgar suffered bruises, a cut on his forehead that required stitches, and headaches which caused him to miss several days of work. This degree of force cannot

be described as "insignificant, trivial or moderate." (*People v. Aguilar, supra,* 16 Cal.4th at p. 1028.) The trial court was therefore not obligated to instruct on the lesser included offense.

Security Fee

Section 1465.8, subdivision (a)(1) requires the trial court to impose a court security fee of $30 "on every conviction for a criminal offense . . . ." Because appellant was convicted of two offenses, the trial court should have imposed a court security fee totaling $60. Instead, the abstract of judgment reflects a court security fee of $600, an apparent typographical error. We have inherent power to correct clerical errors in the abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 184-185.) We will exercise that power here to impose the court security fee in the correct amount of $60.

Conclusion

The Clerk of the Superior Court is directed to prepare and forward to the Department of Corrections a modified abstract of judgment imposing, pursuant to section 1465.8, subdivision (a)(1), a court security fee of $30 on each of appellant's two convictions, for a total fee of $60. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Judith L. Champagne, Judge

Superior Court County of Los Angeles

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