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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS BUENO,

Defendant and Appellant.

2d Crim. No. B235374
(Super. Ct. No BA377468)
(Los Angeles County)

Luis Bueno appeals from the judgment following his conviction by jury of assault with a deadly weapon (Pen. Code, §245, subd. (a)),¹ possession of a weapon by an inmate (§ 4502, subd. (a)), and of misdemeanor battery and misdemeanor assault (§§ 242, 240) as lesser included offenses of the charged offense of mayhem (§ 203). The court found true allegations that appellant had one prior strike conviction (§ 1170.12, subdivisions (a)-(d)), one prior serious felony conviction (§ 667, subd. (a)) and two prior prison terms (§ 667.5, subd. (b)). The court sentenced him to 15 years in prison (8 years for assault with a deadly weapon, a 4-year term, doubled under the Three Strikes law; a 5-year prior serious felony enhancement; and two 1-year prior prison term enhancements).

¹ All statutory references are to the Penal Code unless otherwise stated.

Pursuant to § 654, the court stayed imposition of the sentences for possession of the weapon, and for the battery and the assault.

Los Angeles County Jail inmate trustees serve meals to other inmates by passing food through slots in the jail cells. On March 20, 2010, while trustee Constantino Pimental was in the hallway serving milk, appellant reached through the iron bars of his cell and slashed Pimentel's face with a jail-issued razor blade.

Appellant's sole contention on appeal is that he cannot be convicted of both the battery and the assault since they both arose out of the same act and the assault was a necessarily lesser included offense of the battery. (*People v McDaniels* (1902) 137 Cal. 192, 194-195.) The People concede the point and we agree. "In general, a person may be *convicted of*, although not *punished for*, more than one crime arising out of the same act or course of conduct. . . . [¶] A judicially created exception to the general rule permitting multiple conviction 'prohibits multiple convictions based on necessarily included offenses.' [Citation.] '[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citation.]" (*People v Reed* (2006) 38 Cal.4th 1224, 1227.) The People correctly concede the point.

Appellant was convicted of misdemeanor battery and assault. Battery necessarily includes assault. (*People v. McDaniels, supra*, 137 Cal. at pp 194-195.) California law "'prohibits multiple convictions based on necessarily included offenses.'" (*People v. Reed, supra*, 38 Cal.4th at p. 1227; accord, *People v. Correa* (2012) 54 Cal.4th 331, 337.) Accordingly, we reverse appellant's misdemeanor assault conviction.

DISPOSITION

The misdemeanor assault conviction is reversed and stricken. In all other respects, the judgment is affirmed. The trial court is directed to modify the

abstract of judgment accordingly and forward an amended abstract of judgment to the Department of Corrections and Rehabilitation.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Gail Ruderman Feuer, Judge
Superior Court County of Los Angeles

Sarvenaz Bahar, under appointment by the Court of Appeal, for
Defendant and Appellant.

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