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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JASPER ANDERSON, Defendant and Appellant.	B233721 (Los Angeles County Super. Ct. No. TA114707)

APPEAL from a judgment of the Superior Court of Los Angeles County. Patrick Connolly, Judge. Affirmed in part; reversed in part.

Raffi J. Manuelian for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Jasper Anderson appeals from the judgment after a jury convicted him of one count each of assault with a firearm, assault with a deadly weapon and assault by means likely to produce great bodily injury and found true as to each count that Anderson personally inflicted great bodily injury on the victim. We reverse the conviction as to assault by means likely to produce great bodily injury because it is not a separate offense from assault with a deadly weapon but merely a separate theory of aggravated assault. In all other respects we affirm.

FACTS AND PROCEEDINGS BELOW

A. The Prosecution's Case

At approximately 3:00 a.m. on October 4, 2010, Los Angeles County Sheriff's deputies responded to a 911 call reporting a man assaulting a person at a residence in Compton. The first deputy to arrive at the scene stopped a car he saw pulling out of the driveway of the residence and detained Anderson, the driver.

Meanwhile, Deputy Anthony Federico and his partner arrived at the residence and found Shakeena Hardeman outside the house bleeding and holding a cloth to her head. Hardeman told the deputies that her ex-girlfriend, Alexis Smith, was now Anderson's girlfriend and lived with Anderson at the address given in the 911 call. Hardeman identified Anderson as the person who hit her. The deputies found a gun part known as a "butt plate" on the porch and a shell casing underneath a coffee table in the living room, approximately five feet from the front door.

Deputy Federico and his partner took Anderson into custody and drove him to a booking facility. Deputy Federico testified that on the way he advised Anderson of his *Miranda* rights and Anderson agreed to speak to the deputy. Anderson admitted that he hit Hardeman "across the face" with his hands. He did not say he hit her with a gun.

Later that day deputies executed a search warrant at Anderson's residence. They did not find any guns or objects that looked like guns. They did, however, find surveillance equipment in Anderson's bedroom including a video recording of the events

earlier that morning involving Anderson and Hardeman. The tape, which had no audio component, was played to the jury.

Los Angeles County Sheriff's Detective Miguel Balderrama, who executed the search warrant and found the surveillance equipment, narrated the tape as it was shown to the jury. Detective Balderrama testified as follows. The tape shows Anderson pulling into his driveway, getting out of his car and going inside his house. Later a car pulls up and parks in front of the house and a second car double parks next to it. Hardeman gets out of the first car and walks up to the front door. She rings the doorbell and then rings it again and again for about four minutes. The tape then shows Anderson opening the front door and stepping out on the porch holding a gun. Anderson starts hitting Hardeman with the gun and the gun appears to accidently fire "as he's punching the victim in the face." Detective Balderrama testified that one reason he concluded Anderson was hitting Hardeman with a gun was because the gun went off as shown by "the cobwebs in that whole area right there where the camera was at, you can see debris, and you see gun smoke, and you can see the powder." After hitting Hardeman on the head with the gun several times, Anderson goes back inside his house still carrying the gun.[1] Hardeman sits down on a bench on the porch. Sometime later Anderson comes out of the house and talks to Hardeman. They both walk to Anderson's car and get in. While the car is still in the driveway, Hardeman gets out and starts walking down the street. Anderson drives off in the opposite direction. Shortly thereafter four deputies arrive in their squad cars.

Dr. Andrew Stanitsas testified that at approximately 4:00 a.m. on October 4, 2010 he treated Hardeman for deep lacerations over her left eyebrow and a cut on the left side of her chin. Hardeman told Dr. Stanitsas she had been "pistol whipped to the head." Dr. Stanitsas stated that Hardeman's forehead laceration was consistent with being hit in the

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[1] The police did not perform a gun residue test on Anderson because by the time Detective Balderrama viewed the surveillance video and saw the gun discharge Anderson had already been fingerprinted which would have compromised the gun residue test.

face with a gun but her chin injury was not. The doctor sewed up Hardeman's wounds with 19 stitches, gave her a tetanus shot and prescribed pain medication and antibiotics.

B. The Defense Case

Anderson testified in his own defense and claimed that he struck Hardeman only once, thinking she was a man, and did so in defense of himself, his girlfriend Smith and his property.

According to Anderson, he was asleep in his bed when he heard the doorbell ringing and someone "hollering." When he looked at his surveillance monitor, he saw a person who appeared to be a man standing at his front door. He went downstairs and saw Smith in the living room. Smith told him that "somebody was fucking with her at the club" and that the person followed her home. Anderson could hear the doorbell still ringing and the person outside saying, "come out, let me talk to you, open the door . . . Alexis." Anderson opened the wood front door but left the metal screen door in front of it closed. He asked the person, later identified as Hardeman, "what are you here for?" And Hardeman "just started cussing and making threats[.]" Hardeman said, among other things, "[t]ell the bitch to come outside," "I'll burn this mother fucking house down," and "I'll have somebody shoot this house up[.]" Anderson testified that he tried to find out who the person was who was making these threats and what the person wanted but the person "wouldn't say nothing about the actual situation. She just kept making threats and talking crazy."

Anderson testified that he turned from the door and walked back into the living room where he picked up a metal object that looks like a gun but is actually a cigarette lighter. He returned to the front door and again told Hardeman to leave. Instead of leaving, Hardeman kept making threats. Anderson admitted that he opened the metal screen door and struck Hardeman "once" or "twice" with the cigarette lighter. He told the jury he did so because he took Hardeman's threats seriously.

After hitting Hardeman, Anderson went inside his house but soon came back out and sat down next to Hardeman on the porch. After talking to Hardeman, Anderson

realized she was a female. He brought out a towel for her to place on her wounded forehead. Anderson offered to take Hardeman to get medical help. She got into Anderson's car with him but then got out and started walking down the street alone. Anderson drove off in the other direction.

Aranessa Detiege testified for the defense. She told the jury that she was acquainted with Hardeman and Smith and that they were in a romantic relationship approximately five years earlier. Detiege said that she was at a club called the Boom Boom Room a few hours before the altercation between Anderson and Hardeman. She saw Hardeman and Smith at the club and they were arguing. Hardeman pulled on Smith and then slapped her. Detiege left the club and got into her car. She then saw Smith and Hardeman come out of the club. Smith got into her car and drove off. Hardeman got into her car and followed Smith. Detiege followed Hardeman. When Smith got to the home she shared with Anderson she parked, walked to the house and went inside. Hardeman parked her car and followed Smith "ranting and raving." Detiege testified she parked three houses away and she could hear Hardeman "hollering" from there. After Detiege saw Smith go into her house she believed Smith was safe and so she left.

C. The Jury Instructions

As relevant to this appeal, the court instructed the jury on the three crimes charged in the information: assault with a firearm; assault with a deadly weapon; and assault with force likely to produce great bodily injury. It did not instruct on simple assault. The court instructed on the defense theory of self-defense. Finally, the court instructed the jury that because the defense failed to disclose Detiege's name and statement to the prosecution, the jury could decide the effect, if any, of that failure in evaluating the weight and significance of her testimony.

D. The Verdict and Sentence

The jury convicted Anderson of assault with a firearm, assault with a deadly weapon and assault with force likely to produce great bodily injury. As to each count, it

found true the allegation that in committing the offense, Anderson personally inflicted great bodily injury upon Hardeman but found not true as to each count the allegation that Anderson personally used a firearm in the commission of the offense.

The court sentenced Anderson to the midterm of three years on the conviction for assault with a firearm plus three years for the great bodily injury enhancement. The court imposed the midterm sentence on the other assault counts and stayed punishment under Penal Code section 654.

DISCUSSION

I. ANDERSON WAIVED ANY OBJECTION TO THE AUTHENTICITY OF THE VIDEOTAPE AND IN ANY EVENT THE VIDEOTAPE WAS SUFFICIENTLY AUTHENTICATED

Anderson maintains that the court erred in admitting the videotape showing him striking Hardeman on her face as she stood outside his front door. He argues that the video was not authenticated because the prosecution did not present the testimony of any witness who had been present during the altercation and could testify that the video accurately represents what occurred. Furthermore, no expert testified that the video had not been altered. As we explain, Anderson waived his objection to the video by stipulating to its authenticity at trial and, in any event, the record contains evidence sufficient to sustain a finding that the video "is [what] the proponent of the evidence claims it is . . ." (Evid. Code, § 1400.)

Prior to trial Anderson objected to the admission of a 60 minute surveillance videotape which includes a scene approximately four minutes long showing Anderson's altercation with Hardeman and his striking Hardeman. Anderson maintained that the video was not sufficiently authenticated and that its probative value was outweighed by its prejudicial nature. The court overruled those objections. At trial Anderson agreed that there was an adequate foundation for the hour-long video and stipulated that it "is a true and accurate depiction of the events of that date, and a proper foundation has been laid for it, for the date and time stamps[.]"

On appeal Anderson argues that his stipulation to the video's authenticity at trial did not waive his objection to its authenticity on appeal because the court overruled his objections in pretrial proceedings and it would have been futile to renew those objections at trial. He relies on the well-established rule that an attorney who submits to the authority of an erroneous, adverse ruling after making an appropriate objection "'"does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible."'" (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213.) If Anderson's counsel had simply submitted to the authority of an erroneous ruling, he might possibly rely on the futility rule but he cannot do so because he affirmatively embraced the ruling and stipulated that the video contains a "true and accurate depiction" of his altercation with Hardeman.

Even if we were to ignore Anderson's stipulation to the authenticity of the video, we would conclude from the record that the video was properly authenticated.

We review the court's determination of authenticity for abuse of discretion. (See *People v. Kelly* (1992) 1 Cal.4th 495, 523; McCormick On Evidence (4th ed. 1992) § 214, p. 396.) A videotape, like any other writing, "is authenticated by testimony or other evidence 'that it accurately depicts what it purports to show'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 747) and that accurate depiction can be established by "[c]ircumstantial evidence, content and location[.]" (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383.)

Contrary to Anderson's argument, authentication of the videotape did not require the testimony of a percipient witness who could testify to the video's accuracy nor did it require expert testimony that the tape had not been doctored. Anderson relies on *People v. Beckley* (2010) 185 Cal.App.4th 509, 515, in which the absence of those factors played a part in our rejection of a computer image purporting to show an individual named Fulmore flashing a gang sign. But in *Beckley* we also pointed out the absence of "any other evidence sufficient to sustain a finding that [the computer image] is the

photograph that the prosecution claims it is, namely, an accurate depiction of Fulmore actually flashing a gang sign." (*Ibid*.)

Here, circumstantial evidence authenticated the video. The video was recorded on Anderson's own surveillance system, the system was working at the time of the altercation, the date and time stamps on the videotape were accurate, and the cameras picked up activity on the front porch. The possibility that the tape was altered after it came into police custody was countered by Detective Balderrama's testimony. The detective stated that upon discovering the video surveillance system in a bedroom in Anderson's house, he rewound the tape to the point where it showed the assault on Hardeman and then played that portion of the tape while simultaneously recording it off the monitor with his own video camera. The prosecution was prepared to play Detective Balderrama's video recording of Anderson's video recording to the jury but just before it was going to do so Anderson stipulated to the authenticity of the videotape that the deputies removed from his surveillance system.

II. THE COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY ON SIMPLE ASSAULT

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) If a reasonable juror could conclude that the defendant committed the lesser offense, but not the greater, the court must instruct on the lesser offense. (*People v Cruz* (2008) 44 Cal.4th 636, 664.) An instruction on a lesser offense is not appropriate, however, when there is no evidence that the offense was less than that charged. (*People v. Prettyman* (1996) 14 Cal.4th 248, 274.) Anderson contends that even though he did not request an instruction on simple assault, the court should have given it anyway.[2] We conclude that Anderson was not entitled to an instruction on

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[2] If an instruction on simple assault as a lesser included offense is supported by the evidence, the court is required to give the instruction whether or not the defendant requests it. (*People v. Barton* (1995) 12 Cal.4th 186, 196.)

simple assault because the evidence showed that if he committed any crime he committed at least an assault by means likely to produce great bodily injury.[3]

A conviction of assault by means likely to produce great bodily injury requires that "[t]he force used was likely to produce great bodily injury[.]" (CALCRIM No. 875.)

The nature and extent of the victim's injuries are evidence of such force. (See 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against The Person, § 37, p. 661.) Dr. Stanitsas testified that Hardeman suffered a "deep" wound to her forehead requiring two levels of stitches. The first level of stitches brought together the underlying tissue and the second level of stitches closed the top layer of skin. Altogether Hardeman received 19 stitches, most of which were for her forehead wound. (She also received stitches for a minor wound on her chin but Dr. Stanitsas did not record how many.) Great bodily injury includes "[a] wound or wounds requiring extensive suturing." (Former Pen. Code, § 12022.7, subd. (e); and see *People v. Wolcott* (1983) 34 Cal.3d 92, 106, fn. 7 [the Legislature's amendment of the statute to eliminate reference to specific kinds of injury was not intended to mean that those injuries no longer qualified as "great bodily injuries"].) We do not believe that a reasonable juror could have found that Hardeman's head injury was anything less than a "great bodily injury." Indeed, the jury found the great bodily injury enhancement true. Therefore the court did not err in failing to instruct on simple assault as a lesser included offense.[4]

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[3] Anderson did not object to the court giving an instruction on simple assault so the argument is not waived on appeal. (*People v. Valdez* (2004) 32 Cal.4th 73, 115.)

[4] For these same reasons we reject Anderson's argument that the enhancement for great bodily injury under Penal Code section 12022.7 is not supported by substantial evidence.

III. THE JURY INSTRUCTION REGARDING ANDERSON'S LATE DISCLOSURE OF ARANESSA DETIEGE'S TESTIMONY WAS HARMLESS

Anderson's counsel admitted that he knew of Detiege's existence 30 or more days before trial but did not interview her and inform the prosecution about her until just before trial. As a sanction for the defense's late disclosure of the witness, the court instructed the jury under CALCRIM No. 306, stating in relevant part: "An attorney for the defense failed to disclose: the name of the defense witness Aranessa Detiege and the entire statement of Aranessa Detiege[.] [¶] In evaluating the weight and significance of [Detiege's testimony], you may consider the effect, if any, of that late disclosure."

We need not decide whether the court erred in giving this instruction under the circumstances of this case because, even if the court erred, there is no reasonable probability that an outcome more beneficial to Anderson would have been achieved in the absence of the instruction (*People v. Watson* (1956) 46 Cal.2d 818, 836) and any federal constitutional error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24).

Even if the jury accepted Detiege's testimony without reservation, her evidence did little to bolster Anderson's claim of self-defense. At most her testimony established that Hardeman was angry at Smith when she got to Smith's house and that Hardeman was "ranting and raving" and "[h]ollering at [Smith]" from outside the house. But Detiege did not corroborate Anderson's testimony that Hardeman threatened to harm him and Smith and burn down their house, nor did she witness Anderson's assault on Hardeman, having already driven away from the scene before that occurred. Thus, there is no reasonable possibility or probability beyond a reasonable doubt that the challenged instruction affected the outcome or fairness of Anderson's trial.

IV. ANDERSON CANNOT BE CONVICTED OF ASSAULT WITH A DEADLY WEAPON AND ASSAULT WITH FORCE LIKELY TO PRODUCE GREAT BODILY INJURY BECAUSE AT THE TIME ANDERSON COMMITTED THESE ACTS THE PENAL CODE TREATED THEM AS ONE OFFENSE

The jury convicted Anderson of assault with a firearm, assault with a deadly weapon and assault with force likely to produce great bodily injury based on the same conduct. Anderson maintains that assault with a deadly weapon and assault by means of force likely to produce great bodily injury are lesser included offenses of assault with a firearm and therefore his conviction for the latter two offenses must be reversed. The People agree that assault with a deadly weapon and assault by means of force likely to produce great bodily injury are not separate offenses (*People v. McGee* (1993) 15 Cal.App.4th 107, 110) and, therefore, Anderson could not be convicted of both. The People, however, do not agree that assault with a deadly weapon is a necessarily included offense of assault with a firearm.

The solution to this dispute lies in the language of Penal Code section 245 as it read in October 2010 when Anderson committed the assault on Hardeman. Subdivision (a)(1) of the statute provided: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment." Subdivision (a)(2) of the statute stated: "Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment." (Stats. 2004, ch. 494, § 1.)

As Justice Sullivan explained in *In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5: "[Penal Code] [s]ection 245 [(a)(1)] . . . defines only one offense, to wit, 'assault upon the person of another with a deadly weapon . . . or by means of force likely to produce

great bodily injury . . .' The offense of assault by means of force likely to produce great bodily injury is not an offense separate from—and certainly not an offense lesser than and included within—the offense of assault with a deadly weapon." Accordingly, Anderson cannot be convicted of assault with a deadly weapon and assault by means likely to produce great bodily injury. Because assault with a deadly weapon cannot be committed with a firearm, Anderson can only be convicted under section 245, subdivision (a)(1) of assault by means of force likely to produce great bodily injury.

At first glance it would appear that assault with a deadly weapon would be a necessarily included offense within assault with a firearm because "[a] loaded firearm is, as a matter of law, a deadly weapon." (*Pittman v. Superior Court* (1967) 256 Cal.App.2d 795, 797-798.)[5] The language of Penal Code section 245, subdivision (a)(1), however, precludes this result because, as we noted above, it refers to "an assault upon the person of another with a deadly weapon or instrument *other than a firearm*[.]" (Italics added.) In *People v. Aguilar* (1997) 16 Cal.4th 1023, 1033, the court held that the phrase "'other than a firearm'" modified "'deadly weapon'" and "'instrument'" otherwise subdivision (a)(2)—assault with a firearm—would be redundant. To put it simply, a firearm is not a "'deadly weapon' or . . . 'instrument other than a firearm.'" Therefore Anderson's convictions for assault with a firearm and assault by means likely to produce great bodily injury stand.

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[5] The jury could find from Detective Balderrama's testimony that the gun was loaded. (See discussion, *ante*, at page 3.)

DISPOSITION

The conviction for assault by means of force likely to produce great bodily injury is reversed. In all other respects the judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.