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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.

CHRISTIAN MICHAEL PAULK,

Defendant and Appellant.

B267991

(Los Angeles County
Super. Ct. No. MA062189)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric P. Harmon, Judge. Affirmed as modified.

Theresa Osterman Stevenson, 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, Senior Assistant Attorney General, Marc A. Kohm and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Christian Michael Paulk of robbery, burglary and two counts of assault with a deadly weapon and

found true special allegations Paulk had personally used a deadly weapon in committing the offenses. On appeal Paulk contends the evidence was insufficient to support his conviction on one of the aggravated assault counts, the deadly weapon enhancement was improperly imposed on the aggravated assault counts because use of a deadly weapon was an element of those offenses and the jury instruction on the crime of assault with a deadly weapon was prejudicially misleading. We modify the judgment to strike the deadly weapon enhancement on the aggravated assault counts and, as modified, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Amended Information

Paulk was charged in an amended information with, among other things, one count of robbery (Pen. Code, § 211)¹ (count 1), one count of burglary (§ 459) (count 2), and two counts of assault with a deadly weapon (§ 245, subd. (a)(1)) (counts 17, 18). The information specially alleged Paulk had used a deadly weapon, a BB gun, in committing the offenses in counts 1, 2, 17 and 18 and Paulk had suffered a prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(j), 1170.12) and a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). Paulk pleaded not guilty and denied the special allegations.²

¹ Statutory references are to this code.

² The amended information also included charges of first degree burglary (count 6), making criminal threats (counts 7 and 8), assault with a deadly weapon (counts 9 and 10), false imprisonment by violence (counts 13 and 14) and first degree residential robbery (counts 15 and 16) in connection with crimes

2. The Trial

According to the evidence at trial relating to counts 1, 2, 17 and 18, on February 20, 2012 Joseph Lenon was at home with his teenage brother, Jalen³ and his sister when Gary Thomas, Joseph's friend, arrived with Eric Mack to smoke marijuana and listen to music. Before Thomas and Mack went to Joseph's home, they had planned with Paulk and another person, Joshua Garciabuck, to rob Joseph.

After arriving at Joseph's home Mack excused himself under the pretense of using the restroom and opened the backdoor, letting Paulk and Garciabuck in the house. Paulk and Garciabuck wore bandanas that covered the lower half of their faces; and each carried a BB gun that looked like, and Joseph believed to be, a firearm. One of the intruders "cocked" his weapon and demanded money from Joseph. Joseph pleaded, "Don't shoot." The intruder immediately hit Joseph hard in the face with his gun, causing a substantial gash on Joseph's chin that required medical treatment. The same man also kicked Joseph in the head. Joseph was afraid for his life. He gave the intruders some marijuana, cash and jewelry. Paulk, Garciabuck, Thomas and Mack ran out the door and fled on scooters and bicycles.

allegedly committed against Jorge and Victoria Ventura. The jury deadlocked as to these counts. Following the jury's verdict on counts 1, 2, 17 and 18, Paulk pleaded guilty to count 16 as part of a negotiated plea agreement; and the court declared a mistrial on counts 6 through 10 and 13 through 15 and dismissed them.

³ Because Joseph and Jalen share the same surname, we refer to them by their first names for clarity and convenience.

Jalen testified he came downstairs and saw a masked intruder beating up his brother and taking his brother's things. A second masked man turned and immediately pointed a gun at Jalen and demanded he hand over money. Jalen raised his hands in the air and, frightened, told the robber he did not have any money. Thomas picked up the money, marijuana and jewelry Joseph had turned over; and all four of the intruders fled. Police found Joseph's items later that night.

Thomas and Mack testified for the prosecution. Thomas stated Joseph owed him money. He also knew Joseph kept cash and marijuana at his house and devised the plan, along with Mack, Garciabuck and Paulk, who was introduced to Thomas as "Mico," to rob Joseph. Thomas testified "Mico" hit Joseph in the face and took his money, marijuana and jewelry. Mack testified both Garciabuck and Paulk beat up Joseph. Thomas confirmed Joseph and Jalen's testimony that both Paulk and Garciabuck had guns; Mack said he did not have or see any guns.

Paulk did not testify or call any witnesses in his defense.

3. The Jury Instructions, Verdict and Sentence

The jury was instructed, in part, as to the elements of assault with a deadly weapon other than a firearm (CALCRIM No. 875) (counts 17 and 18), home invasion robbery by acting in concert with two or more persons (CALCRIM No. 1601) (count 1), burglary (CALCRIM No. 1700) (count 2) and aiding and abetting (CALCRIM Nos. 400, 401).

The jury found Paulk guilty of counts 1, 2, 17 and 18. In its special verdict, the jury found true that Paulk had acted in concert with two or more people in committing the home invasion robbery and at least one person, other than an accomplice, was present in the home at the time of the burglary. The jury also

found true the special allegation Paulk had used a deadly weapon (§ 12022, subd. (b)) in committing each of those four offenses.

In a bifurcated proceeding Paulk admitted he had suffered a prior serious or violent felony conviction within the meaning of the three strikes law and a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). In addition, after the jury deadlocked on the remaining counts, Paulk pleaded guilty pursuant to a negotiated agreement to count 16 (first degree residential robbery of Jorge and Victoria Ventura).

The trial court sentenced Paulk to an aggregate state prison term of 24 years eight months.⁴

⁴ Paulk's sentence was calculated as 13 years for home invasion robbery, count 1 (the middle term of six years, doubled under the three strikes law, plus one year for the deadly weapon enhancement); plus a consecutive term of two years for aggravated assault, count 18 (one-third the middle term of three years, doubled under the three strikes law); plus a consecutive term of two years eight months for first degree robbery, count 16, pursuant to the negotiated plea agreement on that count. The court also imposed an additional five years for the section 667, subdivision (a)(1), prior serious felony enhancement. The court stayed sentencing on counts 2 and 17 and also stayed the section 12022, subdivision (b), deadly weapon enhancements for counts 2, 17 and 18. Finally, Paulk's probation in Los Angeles Superior Court case no. LA069714 was revoked, and the court sentenced him to an additional consecutive term of two years (one-third the middle term) for his earlier conviction of violating section 288, subdivision (a).

DISCUSSION

1. *Substantial Evidence Supports Paulk’s Conviction for Count 18—Assault with a Deadly Weapon*

In considering a claim of insufficient evidence in a criminal case, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.’ (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

The crime of assault with a deadly weapon under section 245, subdivision (a)(1), is an assault—an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another—accomplished with a deadly

weapon or instrument other than a firearm. (§§ 240 [defining assault] 245, subd. (a)(1) [assault with deadly weapon]; *People v. Rocha* (1971) 3 Cal.3d 893, 900, fn. 13 [assault with deadly weapon is crime of assault, accomplished with deadly weapon].) A “deadly weapon” for purposes of section 245, subdivision (a)(1), is any object, instrument, or weapon, other than a firearm, “which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029; see *People v. Brown* (2012) 210 Cal.App.4th 1, 8 [depending on how it is used, BB gun may constitute deadly weapon under section 245, subd. (a)(1)].)

Paulk contends the evidence is insufficient to support his conviction for assault with a deadly weapon against Jalen (count 18). Paulk argues, because the evidence conclusively established Paulk had attacked Joseph and Jalen testified a different assailant had pointed a weapon at him, it must have been Garciabuck that assaulted Jalen. However, Mack testified both Garciabuck and Paulk hit Joseph. On this record, that one of the intruders hit Joseph while the other assaulted Jalen does not mean, as a matter of undisputed evidence, Paulk could not have also been the direct perpetrator of the assault against Jalen.

Moreover, even assuming Paulk’s characterization of the evidence were correct and the evidence indisputable that Paulk had assaulted and robbed Joseph at the time his confederate pointed a weapon at Jalen, there is substantial evidence Paulk aided and abetted the aggravated assault against Jalen: Paulk planned the home invasion robbery with Garciabuck, Mack and Thomas and assisted the assault (and attempted robbery) against Jalen, actively keeping Joseph at bay while Garciabuck pointed his weapon at Jalen and demanded money. (See *People v.*

Nguyen (2015) 61 Cal.4th 1015, 1054 [a person aids and abets a crime when ““he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime””]; *People v. Delgado* (2013) 56 Cal.4th 480, 486 [same]; see also CALCRIM No. 401.) After the robbery the perpetrators fled together. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5 [aiding and abetting can be inferred from a variety of factors, including conduct before and after the offense]; *People v. Campbell* (1994) 25 Cal.App.4th 402, 409 [same].)

Although acknowledging this evidence that he aided and abetted the aggravated assault of Jalen, Paulk urges us not to consider it. Citing a brief portion of the prosecutor’s closing argument in which he argued Paulk was the direct perpetrator of both aggravated assaults, Paulk contends the People did not proceed on an aiding and abetting theory as to the aggravated assault against Jalen and thus the jury could not have relied on it.⁵ However, Paulk ignores that the jury was properly instructed

⁵ In closing argument the prosecutor stated, “[T]he law says you commit robbery in concert if the defendant personally committed or aided or abetted a robbery. [Paulk] took by force the property of the victim, Joseph Lenon.” “And in this home invasion robbery, residential burglary, in concert, again, that BB gun—it’s easy to say BB gun now, but as it was used, as you felt it Ladies and Gentlemen, as it struck Joseph Lenon in the face, as it was pointed at Jalen Lenon in his house, this BB gun, that looked for all intents and purposes, indistinguishable from a real gun . . . was a deadly weapon, Ladies and Gentlemen,

on aiding and abetting in accordance with CALCRIM No. 401, which did not limit that theory of culpability to certain counts. While the prosecutor in closing argument highlighted a reasonable inference from the evidence by suggesting Paulk was the direct perpetrator of both assaults, nothing he said prevented the jury from finding, based on the evidence it heard and the instructions it was given, that Paulk aided and abetted the aggravated assault against Jalen. Simply stated, substantial evidence supports the jury's verdict on this count.

2. The Section 12022 Deadly Weapon Enhancement Must Be Struck as to the Assault with a Deadly Weapon Convictions

The jury found true the special allegations pursuant to section 12022, subdivision (b), that Paulk had used a deadly weapon in committing the home invasion robbery and both aggravated assaults. The court imposed the one-year enhancement in connection with the sentence for robbery (count 1) and imposed and stayed the enhancement with respect to the burglary and aggravated assaults (counts 2, 17 and 18).

Paulk contends, and the People concede, the court erred in imposing the section 12022, subdivision (b), enhancement in connection with the aggravated assault counts because use of a deadly weapon was an element of those offenses. (§ 12022, subd. (b)(1) [this enhancement does not apply when “use of a deadly or dangerous weapon is an element of th[e] offense”]; see *People v. Memory* (2010) 182 Cal.App.4th 835, 838, fn. 1 [striking section 12022, subdivision (b), enhancement as improperly

because he displayed it in a menacing manner against Jalen Lenon and he hit Joseph Lenon with it.”

imposed because use of a deadly weapon is element of section 245, subdivision (a), offense]; *People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070 [same].) We agree and strike that enhancement with respect to counts 17 and 18.

3. *CALCRIM No. 875 Was Not Misleading*

CALCRIM No. 875 provides in part: “To prove that the defendant is guilty of th[e] crime [of assault with a deadly weapon], the People must prove that: [¶] 1. The defendant did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] AND [¶] 4. When the defendant acted, he had the present ability to apply force with a deadly weapon other than a firearm to a person.”

Paulk concedes the instruction is a correct statement of the law but insists the third and fourth elements—the application of force “to someone” and the ability to apply force with a deadly weapon other than a firearm “to a person”—were misleading to the extent they suggested that the jury could find him guilty of assault with a deadly weapon on Jalen based solely on a finding he had the present ability to apply force with a deadly weapon to “someone,” namely, Joseph. Relying on *People v. Velasquez* (2012) 211 Cal.App.4th 1170 (*Velasquez*), he argues the trial court had a sua sponte duty to modify CALCRIM No. 875 to eliminate this confusion.

In *Velasquez* the defendant was charged with, and convicted of, five counts of assault with a firearm for shooting at

an inhabited dwelling while five persons were inside. On appeal the defendant argued CALCRIM No. 875's language that the defendant had the ability to apply force with a firearm to "a person" improperly suggested that if any member of the family was at risk of injury, then the defendant was guilty of each count, even if it were the same family member that was at risk each time. The Court of Appeal agreed: "The jury could have determined that when Velasquez shot at the residence, the result was a direct and probable application of force to Maria because she was located in the area at which the shots were aimed. The jury also could have concluded that none of the other members of the household were in any danger of being hit by a bullet because of their location in the residence. . . . Nonetheless, by following the letter of the instruction, the jury may have found Velasquez guilty of assaulting the other four individuals because firing the shots resulted in a direct and probable application of force to a *person* (Maria). If so, Velasquez was convicted of four counts of assault, even though the prosecution failed to prove beyond a reasonable doubt the elements of the offense." (*Velasquez, supra*, 211 Cal.App.4th at p. 1177.)

Unlike the circumstances in *Velasquez*, which involved a single act of shooting into a residence occupied by five people, here, there were two separate and distinct acts of assault the People identified: (1) Brandishing a deadly weapon and hitting Joseph with it; and (2) pointing a weapon at Jalen. The prosecutor emphasized these two distinct acts during closing argument.⁶ On this record, there is no reasonable likelihood the

⁶ As the prosecutor argued, there were two aggravated assaults during the home invasion robbery: "When the defendant

jury understood CALCRIM No. 875 in the manner Paulk asserts. (See *People v. Bryant* (2014) 60 Cal.4th 335, 433 [“[a] defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant”]; *People v. Solomon* (2010) 49 Cal.4th 792, 822 [same].)

DISPOSITION

The judgment is modified to strike the section 12022, subdivision (b), enhancements as to counts 17 and 18. As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

KEENY, J.*

struck Joseph Lenon on the face with the BB gun [and] when he pointed the BB gun at Jalen Lenon. . . .”

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