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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MARCUS PARKER, Defendant and Appellant.	B232352 (Los Angeles County Super. Ct. No. NA087250)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Sheldon, Judge. Affirmed.

Jeffrey J. Douglas, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Blythe J. Leszkay and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Marcus Parker was convicted, following a jury trial, of one count of assault with a deadly weapon in violation of Penal Code[1] section 245, subdivision (a)(1) and one count of first degree burglary in violation of section 459. The jury found true the allegations that appellant personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). The trial court found that appellant had suffered one prior serious felony conviction within the meaning of the "Three Strikes" law (§ 667, subds. (b) through (i) and 1170.12), which was also a serious felony within the meaning of section 667, subdivision (a). The court also found that appellant had served four prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced appellant to a total of 21 years in state prison, consisting of the high term of six years for the burglary conviction, doubled to 12 years pursuant to the Three Strikes law, plus a five-year enhancement term for the prior conviction pursuant to section 667, subdivision (a), plus a three-year term for great bodily injury pursuant to section 12022.7, plus a one-year enhancement term for one of the prior prison terms.[2] The court stayed sentence on the assault conviction pursuant to section 654.

Appellant appeals from the judgment of conviction, contending that the trial court erred in permitting Detective Bezart to offer opinion testimony and further erred in failing to instruct the jury on the definition of assault and on simple assault as a lesser included offense of aggravated assault. We affirm the judgment of conviction.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] One of the four prior prison terms was for the prior serious felony conviction within the meaning of section 667, subdivision (a). The trial court imposed the five-year term provided by section 667, subdivision (a) for the conviction and could not also impose a one-year term pursuant to section 667.5. The trial court stated that it would impose a one-year section 667.5 enhancement term for only one of the three remaining prison terms, specifically for appellant's most recent prison term. The court did not stay the remaining two section 667.5 convictions. We deem them stricken.

Facts

In 2010, 21-year-old Ebony Boyette had a sexual relationship with 65-year-old Charles Matthews. Ebony and her two children lived with Matthews in his apartment for about a year and a half. During this time appellant, the father of Ebony's children, was in prison. Ebony moved out of Matthews's apartment a few days before appellant was released from prison. Ebony did not want appellant to know about her relationship with Matthews.

On August 29, 2010, Ebony and her brother Frank Boyette visited Matthews in his apartment. They left about 11:00 p.m. Minutes later, appellant entered Matthews's apartment and approached Matthews, who was washing dishes in the kitchen. Appellant said, "Hey, I want to know what's going on with you and my girl." Appellant then pushed Matthews into a corner of the kitchen and began punching him in the face repeatedly. Matthews began bleeding. At some point, appellant stopped punching Matthews, retrieved a knife, pointed it at Matthews and said, "I ought to kill you right now." Appellant then put the knife down and resumed punching Matthews. Matthews heard Ebony scream, "Why are you doing that to him? . . . You're on parole." She begged appellant to stop, and he did. Appellant then left the apartment. Matthews called 911.

Long Beach Police Officer Jonathan Lucero responded to the call and arrived at Matthews's apartment about 11:15 p.m. Frank and Ebony were not in the apartment when the officer arrived. Officer Lucero observed that Matthews was visibly injured, with a swollen area around his eye and blood dripping from that eye. Matthews told Officer Lucero that appellant had entered his apartment, asked him what he was doing with appellant's girl and hit him 10 to 15 times in the face. Matthews told Officer Lucero that both he and appellant had been dating the same girl, and that she lived in Apartment 1. Officer Lucero went to Apartment 1, but no one answered.

Officer Lucero wanted to take photographs of Matthews's injuries, but Matthews said that he just wanted to go to the hospital, due to pain. At some point after that, Frank took photos of Matthews's injuries with his cell phone camera.

On October 21, 2010, Los Angeles Police Detective Jacqueline Bezart showed Matthews a photographic lineup. He identified appellant as his attacker. She also interviewed Matthews. He gave her a substantially similar account of the attack as he had given Officer Lucero, with one addition. Matthews told Detective Bezart that in addition to hitting him, appellant grabbed a knife from the kitchen counter, held it close to Matthews and said, "I ought to kill you right now." Matthews emailed the photos of his injury to Detective Bezart.

On November 4, 2010, after appellant was arrested, Detective Bezart interviewed Ebony. She told the detective that the fight had occurred outdoors, starting at the car and moving to near a gate. Detective Bezart then employed a ruse and told Matthews that security cameras showed that his fight with appellant had occurred outside. Matthews was adamant that the fight occurred in his apartment.

Ebony continued to visit Matthews frequently after the attack, mostly to eat and talk. Ebony also maintained communications with appellant who remained in jail.

Following the January 3, 2011 preliminary hearing in this matter, Matthews sent a series of text messages to Ebony, in the apparent hope of convincing her to resume their sexual relationship. Matthews believed that Ebony would have a sexual relationship with him if he dropped the charges against appellant. In his messages, Matthews told Ebony that he would drop the charges and stop lying. In one of his messages, Matthews said that the district attorney had told him to lie about appellant. Ebony had earlier told Matthews to claim that he lied at the preliminary hearing and that both the prosecutor and Detective Bezart were urging him to lie.

When Detective Bezart confronted Matthews about the texts, he initially denied sending them, then admitted that he did send them. He was embarrassed by the texts and started crying. Matthews told Detective Bezart that he had sent the messages because he was afraid. Ebony had told him that "bad things" would happen to him if he did not drop the charges. Matthews told the detective that he still had feelings for Ebony.

Detective Bezart obtained recordings of calls made by appellant from jail to Ebony and to her brother Frank. The calls showed that the relationship between appellant and

Ebony was continuing, and that Ebony was attempting to get Matthews to drop the charges against appellant.

Both Ebony and Frank testified at trial. On direct examination, Frank testified a fight took place between appellant and Matthews, but that it occurred outside. Frank claimed not to remember most things connected to the fight. He denied speaking to appellant while appellant was in jail. The prosecutor played a recording of a call between appellant and Frank, which occurred while appellant was in jail. Appellant essentially told Frank to sabotage "that nigger['s] car" before he was due to go to court. Frank agreed, but never did the sabotage. Frank testified that the "nigger" was a man named Terry. On cross-examination, Frank's memory improved and he testified that during the fight on August 29, appellant and Matthews were throwing punches and grabbing each other. Frank did not see appellant with a knife and did not see appellant unleash a flurry of punches on Matthews. Matthews was not bleeding after the fight.

Ebony gave a very detailed account of the encounter between appellant and Matthews. According to her, she and appellant drove to Matthews's apartment building on the night of August 29 so that she could visit the apartment of a woman named Renee. Matthews appeared, and he and Ebony got into an argument. Ebony went outside and Matthews followed. Matthews asked her if appellant was in the car. When she said that he was, Matthews approached the car, knocked on the door and said, "I want to talk to you." He asked, "Why you messin' with my girl?" Appellant said, "Who is your girl?" Matthews replied that Ebony was his girl and that she had been with him last night. Matthews grabbed Ebony's arm. Appellant got out of the car and said, "Don't put your hands on her." Ebony told appellant that Matthews was a drunk neighbor.

Matthews grabbed appellant and appellant hit Matthews in the chest. The two began fighting, then wrestling on the ground. Appellant repeatedly told Matthews to calm down. When appellant backed off, Matthews kept saying, "I'm gonna get you. You hit me in my eye. I'm gonna get you." Ebony told appellant that Matthews had a gun, and so appellant should leave. Appellant left. Ebony admitted that she had earlier told Detective Bezart that Matthews came out of his apartment with a knife and threatened her

and appellant. She also admitted that she in fact did not see Matthews with a weapon that night. Ebony acknowledged that she continued to see and communicate with Matthews after August 29, sometimes without appellant's knowledge.

Discussion

1. Opinion testimony

Appellant contends that the trial court erred in permitting Detective Bezart to offer lay opinion testimony. Specifically appellant contends that the court erred in permitting Bezart to testify that (1) when appellant and Ebony used the name "Kaneisha" in a telephone call they were referring to Matthews; (2) Bezart was confident about the version of events given by Matthews; and (3) in her interview with Bezart, Ebony appeared torn between appellant and Matthews but "was trying to stick with the father of her children [appellant] and whatever – whatever was going to benefit him at that point."

A trial court's decision to admit lay opinion testimony is reviewed for an abuse of discretion. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1254.)

"If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony." (Evid. Code, § 800.) Generally, lay witnesses may only testify to facts and the jury is assigned the role of drawing inferences and conclusions from those facts. (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1332.) However, ""'a lay witness may testify in the form of an opinion . . . when he cannot adequately describe his observations without using opinion wording.'" [Citation.] 'Where the witness can adequately describe his observations, his opinion or conclusion is inadmissible because it is not helpful to a clear understanding of his testimony.'" (*People v. Callahan* (1999) 74 Cal.App.4th 356, 380.)

2. Kaneisha

A February 8, 2001 telephone call between appellant and Ebony, made while appellant was in jail, was recorded. A transcript of the call was admitted into evidence. During this conversation, Ebony referred to a person named Kaneisha, "not the girl Kaneisha" but "the gay Kaneisha." Ebony referred to three text messages from Kaneisha. Kaneisha was someone who supposedly could drop the charges against appellant and who mentioned possibly going to see Detective Bezart.

Detective Bezart explained that calls from the county jail were monitored, callers were informed of this fact by a recorded message which played at intervals during the calls and callers sometimes spoke in code. Detective Bezart opined that the name Kaneisha referred to Matthews. She believed this because she had never come across a witness named Kaneisha or any references to such a person, Matthews was the only person in a position to drop charges against appellant and the call came a day after Matthews sent a number of text messages to Ebony.

Even assuming for the sake of argument that Detective Bezart's opinion that Kaneisha was a code name was improper lay opinion, there was no prejudice to appellant from this opinion. Detective Bezart's opinion was supported by a number of compelling facts. There is no reasonable probability or possibility that a jury which accepted those facts would reach a different conclusion than Detective Bezart did. Thus, even in the absence of Detective Bezart's opinion testimony that Kaneisha referred to Matthews, any reasonable jury would have reached the same conclusion on its own. In fact, Ebony herself later testified that the name Kaneisha as used in that call was code for Matthews.

3. Confidence

Appellant did not object to Detective Bezart's testimony that she was confident about Matthews's version of events. Accordingly, he has forfeited this claim. (Evid. Code, § 353; *People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7.)

Assuming for the sake of argument that this claim was not forfeited, and further assuming that the testimony should not have been admitted, we would see no prejudice to appellant.

The testimony about confidence came during direct examination of Detective Bezart. The prosecutor asked: "And were you confident as to the events that happened on August 29, 2010, having been the way that Matthews was reporting them to you?" The detective answered: "Yes, I was." Generally, a police officer's testimony that a witness who he interviewed was or was not telling the truth is inadmissible. (*People v. Sergill* (1982) 138 Cal.App.3d 34, 39-30.)

We see no prejudice to appellant from this testimony. As respondent points out, the question was asked in the past tense and referred to the detective's confidence at a particular point in time when she was performing her investigation. Detective Bezart testified that she later became concerned about Matthews's truthfulness, as a result of the text messages he sent Ebony. When the prosecutor attempted to ask if the detective had any doubts about Matthews's honesty after discussing the text messages with him, appellant's counsel objected. The court sustained the objection and stated this was a question for the jury to decide. Thus, there is no reasonable probability or possibility that Detective Bezart's mixed testimony about Matthew's credibility contributed to the jury's verdict, particularly after the court made it clear that this was an issue for the jury to decide.

4. Ebony

Appellant did not object to Detective Bezart's testimony that Ebony would stick with the father of her children. Accordingly, he has forfeited this claim. (Evid. Code, § 353; *People v. Benson*, *supra*, 52 Cal.3d at p. 786, fn. 7.)

Assuming for the sake of argument that this claim was not forfeited, and further assuming that the testimony should not have been admitted, we would see no prejudice to appellant.

The testimony about Ebony sticking with appellant occurred when the prosecutor asked Detective Bezart about her impressions of Ebony during an interview. The detective replied in part: "She originally came across as a impressionable young woman who had obviously had a couple of kids very early in life and who was trying to make her way in life at this point, and she almost came across as victimlike." The detective added: "She was sort of torn between her devotion to the father of her children, now that he was home, and her need for continued financial support by Mr. Matthews whom she had been maintaining this relationship for a year and a half. [¶] And she came in and she appeared to me like she was very much trying to stick with the father of her children and whatever – whatever was going to benefit him at that point."

We see no prejudice to appellant from this testimony. Detective Bezart was referring to an interview very early in the case, before the preliminary hearing. The comments, taken as a whole, were sympathetic to Ebony, and were primarily a comment on her personality, not her truthfulness. There was ample evidence in the case, much of it from Ebony herself, that she was trying to help appellant by getting Matthews to drop the charges against appellant. In addition, the trial court stated very shortly after this testimony that the credibility of a witness was a jury issue. The jury was also formally instructed that they were the judges of witness credibility. Thus, we see no reasonable probability or possibility that Detective Bezart's testimony contributed to the verdict against appellant.

5. Failure to instruct on the elements of simple assault

Appellant contends that the trial court erred in failing to instruct the jury on the elements of assault as part of its instruction on assault with a deadly weapon or by means of force likely to cause great bodily injury. Respondent agrees. We agree as well.

The trial court instructed the jury with CALJIC No. 9.02 on assault with a deadly weapon or by means of force likely to produce great bodily injury. This instruction does not define simple assault. That definition is found in CALJIC No. 9.00 and the use note for CALJIC No. 9.02 clearly states: "CALJIC No. 9.00 must be given along with this

instruction." The trial court did not give CALJIC No. 9.00 or any other instruction listing the elements of assault. The court had a sua sponte duty to define simple assault. (*People v. Simington* (1993) 19 Cal.App.4th 1374, 1380-1381 [court has a sua sponte duty to define assault when the prosecution seeks a conviction for aggravated simple assault].)

Appellant contends that the error of failing to define a crime "defies harmless error review" and is reversible per se. We do not agree.

Our colleagues in the First District Court of Appeal have considered a case where the trial court failed to define assault for purposes of the charged offense of aggravated assault, and found that error subject to a harmless review analysis. (*People v. Simington, supra,* 19 Cal.App.4th at pp. 1380-1381.) The Court held that the failure to give the instruction was harmless "if 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.' [*People v. Sedeno* (1974) 10 Cal.3d 703, 721.]" (*People v. Simington, supra*, 19 Cal.App.4th at p. 1381.) The question of fact posed by an omitted assault instruction is whether the defendant made "'an unlawful attempt coupled with the present ability, to apply physical force upon the person of another . . . .'" (*Ibid.*; § 240.)

Here, the jury was properly instructed on and found true the allegation that appellant personally inflicted great bodily injury on Matthews. Thus, the jury resolved the question of whether appellant attempted to apply force and had the present ability to apply physical force to the person of Matthews. The jury was properly instructed on the lawful use of force in self-defense. The jury rejected appellant's self-defense claim and so necessarily found that appellant's use of force was unlawful. Thus, the trial court's error in failing to define assault was harmless beyond a reasonable doubt.

6. Simple assault as a lesser included offense of aggravated assault

Appellant contends that the trial court erred in failing to instruct the jury sua sponte that simple assault is a lesser included offense of aggravated assault, and that the error requires reversal.

A trial court has a sua sponte duty to instruct on a lesser included offense "whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*People v. Huggins* (2006) 38 Cal.4th 175, 215.) "The classic formulation of this rule [has been expressed as]: 'When there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of a lesser included offense, the court must instruct upon the lesser included offense, and must allow the jury to return the lesser conviction, even if not requested to do so.'" (*Ibid*.)

We see substantial evidence which, if believed by the jury, could result in a conviction of the lesser offense of simple assault. Ebony gave a completely different account of the fight between Matthews and appellant than Matthews gave. As is relevant to this claim, she testified that appellant only punched Matthews three times total, and only once in the eye. She also testified that Matthews said that he did not want to go to the hospital and could drive himself if he did go. This evidence, if believed by the jury, could cause them to conclude Matthews did not suffer great bodily injury. Further, Matthews did not mention a knife in his 911 call or interview with Officer Lucero. He first mentioned the knife in an October 2010 interview with Detective Bezart. This omission could cause a jury to conclude that appellant did not in fact have a knife. Absent the use of a deadly weapon or force likely to produce great bodily injury, appellant would be guilty of only simple assault.

We find the error in failing to instruct on simple assault to be harmless under any standard of review. The evidence that Matthews suffered great bodily injury was overwhelming.

The jury rejected appellant's self-defense claim, showing that it found Ebony's account of events not credible. The prosecution introduced photographs of Matthews's injury, taken very soon after the assault, which showed swelling and bleeding around Matthews's eye. Officer Lucero confirmed that the photos accurately showed the condition of Matthews's eye when Officer Lucero arrived at the scene. Officer Lucero described the appearance of the injury as follows: "It was a swollen area, about one to

two inches, and the laceration was about the same size, one to two inches. But I could not tell how deep it was or anything like that, what the internal injury was, obviously. It was pretty much as in the picture. It was dripping with blood down his face." Matthews himself testified that the injury required eight stitches and that he was still suffering from blurry vision and runniness in his injured eye at the time of trial.

Further, the jury found true the allegation that appellant personally inflicted great bodily injury. This is more than is needed for a conviction for aggravated assault, which requires only that the defendant use force "likely" to produce great bodily injury. Thus there is no possibility that a properly instructed jury would have convicted appellant of only simple assault.

Disposition

The judgment is affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.