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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Appellant, v. JORDAN LEE VERTS, Defendant and Respondent.	2d Crim. No. B283845 (Super. Ct. No. 2014018374) (Ventura County)

Jordan Lee Verts was charged with committing a battery with serious bodily injury (Pen. Code,[1] § 243, subd. (d)), a crime punishable as either a felony or a misdemeanor. During deliberations, the jury informed the court it was "[h]ung at 7-5 for not guilty." Out of the jury's presence, Verts moved to dismiss the charge pursuant to section 1385. The court denied Verts's request but on its own motion declared the charge "a misdemeanor, for all purposes" pursuant to section 17, subdivision (b) (hereinafter section 17(b)). After questioning the

[1] All statutory references are to the Penal Code.

jurors, the court determined that the jury was "hopelessly deadlocked" and declared a mistrial. The People now purport to appeal from the court's declaration, asserting it is "[a]n order modifying the verdict or finding by . . . modifying the offense to a lesser offense." (§ 1238, subd. (a)(6).) Verts claims that the challenged ruling is not such an order. We agree and dismiss the appeal.

FACTS AND PROCEDURAL HISTORY

In March 2015, Verts was charged with committing a battery with serious bodily injury. The charge was based on a June 2014 altercation between Verts, who had been asked to leave a bar at the "The Collection" shopping complex in Oxnard, and Byron Lockridge, a security guard at the complex.

Prior to trial, the prosecution filed an amended information adding a three-year great bodily injury enhancement allegation. (§ 667.5, subd. (c)(8).) The enhancement was struck on the prosecution's motion before the jury was impaneled.

The evidence at trial included surveillance videos of the incident. The defense argued that although Verts had punched Lockridge causing significant injuries, the evidence showed Lockridge was the aggressor and that Verts had acted in self-defense.

While the jury was deliberating, it sent the court a note stating that "we are at a standstill. Both sides are very passionate and not moving. Hung at 7-5 for not guilty." After the court informed counsel of the note outside the jury's presence, Verts's attorney asked the court to declare a mistrial and dismiss the matter in the interests of justice under section 1385.

The court responded: "I don't think I would do that, but . . . I've thought a lot about this. I don't think this is a felony case.

. . . You know, I've done a lot of cases as a prosecutor and a judge, and I think what happened here is that the security guard was the aggressor and the defendant did have a right to defend himself. And he did, in what appeared to be a reasonable fashion, but it resulted in an unreasonable harm to the victim. That's the way I see it. I think that the defendant here was really not doing anything wrong. He was – all of this is on film. So I suppose anyone can dispute it if they want, but clearly the jury can't figure it out. But it looks like there was [*sic*] people at a bar and they were doing what they do at bars, and someone else got drunk, not this defendant, they went outside to the parking lot, they were talking about whatever, and the security people get notified about some guy who was drunk inside the bar. And, you know, I think they contacted [Verts] because they observed these people standing in the lot. He was connected with the drunk person, but he was not the drunk person."

The court continued: "[Verts] had been drinking. He had five beers. He's in the Navy. Big deal. And when he was asked to leave, it looks, in the video, like he's leaving. And there's this big question about whether he's walking back to the bar or not. He's clearly not walking back to the bar. He walks into a couple of cars. He's doing exactly what he's told, walking across the grassy knoll, and that's where the security guard batters him. That's clear, too. And the result is the security guard . . . probably didn't expect what happened to happen. I'm not saying what the defendant did is right. It's just that it's not felony conduct. That's what I think."

After a brief recess, Verts' attorney reiterated his request for a section 1385 dismissal. The prosecutor responded: "I agree generally with the Court's characterization of the conduct here.

The conduct here is not serious. And I think what makes this a felony case and the reason it was charged as a felony is not because of how egregious or how poorly Mr. Verts acted that night. It was simply because the battery resulted in a serious bodily injury. And here it's never been . . . my position since I've been D.A. that this was ever going to be . . . anything more than a probation case with a very small level of custody, if any. The issue has been restitution because although I . . . appreciate Mr. Verts has gone through a lot here, the victim has, too. . . . So for that reason, I would object to this being dismissed outright."

The court replied: "It's not [dismissed] – but it is a misdemeanor, for all purposes, under Penal Code section 17(b). Now we're going to bring the jury in and ask them what they want to do. So Count 1 is a misdemeanor now. The jury doesn't need to know that. But it is, based on my review of the facts. So if you want to continue with these proceedings, that's what we're going to do.[2]"

The court asked each of the jurors if they thought further deliberations would lead to a verdict. All answered in the negative and a mistrial was declared. After the jurors exited the courtroom, the prosecutor "object[ed] to the 17(b) motion just on

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[2] The record shows (1) the trial judge declaring that the purported victim was the aggressor and that Verts "did have a right to defend himself" in what appeared to be "a reasonable fashion;" (2) the prosecutor "generally" agreeing with the trial judge, conceding that "the conduct here is not serious," and that the purpose of the prosecution was restitution; and (3) the jury stating in its note to the court that it could not reach a verdict and were divided 7-5 for acquittal. Nonetheless, the matter was reset for jury trial, albeit as a misdemeanor, and Verts' section 1385 motion to dismiss was denied.

the grounds of the victim does have a right to be present at any important decision or proceedings, which I believe a 17(b) motion would be as well." The court responded, "So would a verdict, and he's not here." The matter was set for retrial.

DISCUSSION

The People contend the court erred in reducing Verts's charge to a misdemeanor under section 17(b).[3] We agree with Verts that the challenged ruling is not appealable.

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[3] Section 17(b) provides: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] (1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. [¶] (2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense to be a misdemeanor. [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor. [¶] (4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint. [¶] (5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint."

"The prosecution in a criminal case has no right to appeal except as provided by statute. [Citation.] 'The Legislature has determined that except under certain limited circumstances the People shall have no right of appeal in criminal cases. [Citations.] . . . [¶] The restriction on the People's right to appeal . . . is a substantive limitation on review of trial court determinations in criminal trials.' [Citation.] 'Appellate review at the request of the People necessarily imposes substantial burdens on an accused, and the extent to which such burdens should be imposed to review claimed errors involves a delicate balancing of the competing considerations of preventing harassment of the accused as against correcting possible errors.' [Citation.] Courts must respect the limits on review imposed by the Legislature 'although the People may thereby suffer a wrong without a remedy.' [Citation.]" (*People v. Williams* (2005) 35 Cal.4th 817, 822-823.)

The People's statutory rights to appeal are governed by section 1238, subdivision (a). They claim the appeal is authorized under subdivision (a)(6) of section 1238 because the challenged ruling is "[a]n order modifying the verdict or finding by . . . modifying the offense to a lesser offense."[4] The People reason

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[4] Section 1238 provides: "(a) An appeal may be taken by the people from any of the following: [¶] (1) An order setting aside all or any portion of the indictment, information, or complaint. [¶] (2) An order sustaining a demurrer to all or any portion of the indictment, accusation, or information. [¶] (3) An order granting a new trial. [¶] (4) An order arresting judgment. [¶] (5) An order made after judgment, affecting the substantial rights of the people. [¶] (6) An order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed or modifying the offense to a lesser offense. [¶] (7) An order

that the court's ruling effectively modified the magistrate's finding at the preliminary hearing that there was sufficient evidence to hold Verts to answer on the charge.

We are not persuaded. The magistrate made a determination based on the limited evidence presented that there was "a strong suspicion," i.e., probable cause, to believe Verts committed the charged offense. (See *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 251-252, italics omitted ["the magistrate's role is limited to determining whether a reasonable person could harbor a strong suspicion of the defendant's guilt, i.e., whether such a person could reasonably weigh the evidence, resolve conflicts, and give or withhold credence to particular witnesses in favor of harboring such a suspicion"].) The challenged ruling did not "modify" the magistrate's finding of probable cause made following the preliminary hearing. The court's ruling, however, found the evidence offered at trial—which included a video

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dismissing a case prior to trial made upon motion of the court pursuant to Section 1385 whenever such order is based upon an order granting the defendant's motion to return or suppress property or evidence made at a special hearing as provided in this code. [¶] (8) An order or judgment dismissing or otherwise terminating all or any portion of the action including such an order or judgment after a verdict or finding of guilty or an order or judgment entered before the defendant has been placed in jeopardy or where the defendant has waived jeopardy. [¶] (9) An order denying the motion of the people to reinstate the complaint or a portion thereof pursuant to Section 871.5. [¶] (10) The imposition of an unlawful sentence, whether or not the court suspends the execution of the sentence . . . . [¶] (11) An order recusing the district attorney pursuant to Section 1424."

recording of the incident—insufficient to sustain a verdict on a felony charge of battery under section 243, subdivision (d).[5]

Because the challenged order did not modify the magistrate's finding of probable cause to hold Verts over for trial, it is not appealable on that basis. Moreover, the People do not contend the order is otherwise appealable. We must accordingly dismiss the appeal, notwithstanding whether the People have thus suffered a wrong without a remedy. (*People v. Williams*, *supra*, 35 Cal.4th at pp. 822-823.)

DISPOSITION

The appeal is dismissed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

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[5] Indeed, the court's comments appear to reflect a finding that the evidence was insufficient to support a *conviction*, much less a felony conviction, so as to warrant a dismissal under section 1385.

Jeffrey G. Bennett, Judge
Superior Court County of Ventura

Gregory D. Totten, District Attorney, Lisa O. Lyytikainen, Senior Deputy District Attorney, for Plaintiff and Appellant.

Todd W. Howeth, Public Defender, William M. Quest, Senior Deputy Public Defender, for Defendant and Respondent.