

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROY FOSTER OTIS,

Defendant and Appellant.

B275842

(Los Angeles County
Super. Ct. No. YA092508)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hector M. Guzman, Judge. Affirmed.

Alan S. Yockelson under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Nicholas J. Webster, Deputy Attorney General, for Plaintiff and Respondent.

The jury convicted defendant and appellant Roy Foster Otis in count 1 of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)),¹ and in count 2 of assault with a deadly weapon (§ 245, subd. (a)(1)). With respect to count 1, the jury found true the allegation that defendant personally inflicted great bodily injury on the victim. (§ 12022.7, subd. (a).)

The trial court sentenced defendant to six years in state prison. The sentence was composed of a three-year term in count 1, plus three years for the personal infliction of great bodily injury enhancement. Defendant received a concurrent three-year term in count 2.

Defendant contends the trial court erred by refusing to instruct on simple assault as a lesser included offense of assault by means of force likely to cause great bodily injury in count 1. He also contends the finding that he inflicted great bodily injury on the victim and his conviction for

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

assault with a deadly weapon in count 2 are not supported by substantial evidence.

We affirm.

FACTS²

On June 1, 2015, the victim, Mayra Castillo, exited Wells Fargo Bank and returned to her car, carrying her six-month-old son. Castillo was parked in the bank parking lot. The parking stall on the driver's side of her car was vacant. Castillo opened the back driver's side door and began securing her son in a child safety seat. Her open car door and her body were blocking the empty space next to her vehicle. Defendant pulled up in a black car and began turning into the parking space Castillo was blocking. Defendant honked, but Castillo ignored him and continued securing her son in the car seat. Defendant honked a second time and then began yelling at Castillo. She turned and told him to wait while she finished putting her child in the car.

Defendant got out of his car and approached Castillo, gesticulating as if he was "furious." He said something, but Castillo primarily spoke Spanish and did not fully understand him. Castillo was afraid of defendant, so she

² Defendant did not present evidence in his defense.

closed the door to protect her son.³ Defendant punched her in the eye, and then punched her more than 10 times on her face, head, back, and arms, and pulled her hair. Castillo went in and out of consciousness as defendant was hitting her. He punched her in the back, and she fell into the empty parking space. The impact of the fall injured her back. Defendant continued to attack Castillo, hitting her more as she lay on the ground. He kicked her approximately seven times in the back and ribs. Castillo felt very weak and could not fight back.

Rebecca Madrigal was waiting in a drive-through ATM line at the bank when she heard defendant honking and turned to see what was happening. She saw defendant approach Castillo and ask her to close her car door. Madrigal turned to use the ATM, but looked back when she heard Castillo screaming for help. Madrigal saw defendant punching Castillo with closed fists as if he was “fighting” or “hitting a guy.” Castillo was screaming and crying. She did not fight back. Madrigal saw defendant knock Castillo to the ground. She got out of her car and walked toward defendant, yelling for him to stop. Defendant stopped after she screamed at him. When Madrigal reached the empty parking space, Castillo hugged her legs. She tried to help Castillo stand, but Castillo could not get up, so Madrigal knelt beside her in the empty parking space.

³ Defendant is substantially larger than Castillo. He is 5 feet 11 inches tall, and weighed 270 pounds at the time of the attack. Castillo is 5 feet 4 inches tall.

Defendant looked at the women for about 10 seconds and then got into his car and resumed pulling into the spot. Castillo was still on the ground with her legs in the parking space. Madrigal was able to quickly drag her out of the way of defendant's car, which would have run over Castillo's legs if Madrigal had not taken action. Defendant pulled into the spot quickly, coming very close to hitting Castillo. He parked about one foot away from Castillo, in the place where her legs had been a moment earlier. Defendant got out of his car and went into the bank.

Officer Frank Kim was the first police officer to respond to the scene. He saw Castillo lying on the ground between two vehicles. She was on her back, crying hysterically. The cars were parked closely together on either side of Castillo's body. Officer Kim could not see Castillo well because her hair was "all over the place," but he did observe that her face was bruised and swollen, and there appeared to be blood behind one of her ears. He notified the fire department, which already had a vehicle en route, that Castillo had been punched several times and that there was a crying baby in a car seat in the rear of the vehicle.

Officer Young Choi arrived and entered the bank. Defendant was sitting calmly in a chair in the lobby. He asked the officer, "Are you looking for me?" Defendant was taken into custody shortly thereafter.

Castillo was taken to the hospital. Medical staff x-rayed her for broken bones, examined her, and cleaned her abrasions, including the wound on her back. Castillo could

not move her neck and felt a lot of pain in that area. She was placed in a cervical collar and given pain medicine. Castillo experienced lasting visual impairment in one eye, which defendant hit very hard with a closed fist. She could no longer see with the same intensity and had blurry vision as a result of the attack. Castillo suffered a black eye and bruising in several places on her face, arms, legs, and back.⁴ Her back was permanently scarred in the place where she hit the pavement when defendant knocked her to the ground.

In a recorded interview with Officer Michael Ross, defendant explained that he had gone to the bank because someone had accessed his account.⁵ He was angry already and could not understand why Castillo would not close her door so that he could park. He said she kept “flapping her jaws” and “talking crazy.” He “probably” hit her three to four times. He could not remember if he hit her with a closed fist, but he did not think he did. He may have continued to hit her after she fell to the ground.

⁴ Photographs of Castillo’s injuries were shown to the jury.

⁵ A recording of the interview was played for the jury, which was also provided with a transcript.

DISCUSSION

Simple Assault Instruction

Defendant first contends the trial court erred by refusing to instruct the jury on simple assault as a lesser included offense of assault by means likely to produce great bodily injury. We conclude the trial court correctly ruled there was no substantial evidence to support a verdict on simple assault.

“[T]he trial court normally must, even in the absence of a request, instruct on general principles of law that are closely and openly connected to the facts and that are necessary for the jury’s understanding of the case.’ (*People v. Carter* (2003) 30 Cal.4th 1166, 1219.) The obligation to instruct includes giving instructions on lesser included offenses when warranted by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [(*Breverman*)].)” (*People v. Valentine* (2006) 143 Cal.App.4th 1383, 1386–1387.) “On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support.” (*Breverman, supra*, 19 Cal.4th at p. 162.) ““Substantial evidence” in this context is “evidence from which a jury composed of reasonable [persons] could . . . conclude[]” that the lesser offense, but not the greater, was committed. [Citations.]” (*People v. Manriquez* (2005) 37 Cal.4th 547, 584 (*Manriquez*), quoting *Breverman, supra*, 19 Cal.4th at p. 162.) “[I]f there is no proof, other than an unexplainable

rejection of the prosecution's evidence, that the offense was less than that charged, such instructions shall not be given.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1063; see also *People v. Wilson* (1992) 3 Cal.4th 926, 942 [“Speculation is an insufficient basis upon which to require the trial court to give an instruction on a lesser included offense.”].) We independently review whether the trial court's refusal to instruct on a lesser included offense is error. (*Manriquez, supra*, 37 Cal.4th at p. 584.)

“An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.) Simple assault is a lesser included offense of assault by means of force likely to produce great bodily injury, the crimes differing only in that the greater offense requires a likelihood that the means employed will produce great bodily injury. (See *People v. McDaniel* (2008) 159 Cal.App.4th 736, 748 (*McDaniel*).) “[G]reat bodily injury” is defined as ‘a significant or substantial physical injury’ beyond that which is inherent in the underlying offense. (§ 12022.7, subd. (f), 667, see § 667, subd. (a)(1).)” (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047.)

“While . . . the results of an assault are often highly probative of the amount of force used, they cannot be conclusive.’ [Citation.] . . . “The crime [of assault by means likely to produce great bodily injury], like other assaults, may be committed without infliction of any physical injury, and even though no blow is actually struck. [Citation.] The issue, therefore, is not whether serious injury was caused,

but whether the force used was such as would be likely to cause it.” (*People v. Duke* (1985) 174 Cal.App.3d 296, 302, italics omitted.) The focus is on the force actually exerted by the defendant, not the amount of force that could have been used. (*Id.* at p. 303.) The force likely to produce bodily injury can be found where the attack is made by use of hands or fists. (*People v. Kinman* (1955) 134 Cal.App.2d 419, 422.) Whether a fist used in striking a person would be likely to cause great bodily injury is to be determined by the force of the impact, the manner in which it was used and the circumstances under which the force was applied. (*Id.* at p. 419.)” (*McDaniel, supra*, 159 Cal.App.4th at pp. 748–749.)

Defendant relies on the statement he made to Officer Ross that he hit Castillo “[p]robably 3 or 4 times” as substantial evidence that the crime committed was simple assault. We disagree. Defendant spoke very briefly to the officer about the attack, indicating several times that he did not have a clear memory of what happened:

“[Defendant]: [S]he said, something, I can’t even remember what she said but she said something to me and it just and then I just, just smacked her. And it looked like the first time I smacked her, it just, I don’t know – she just . . .

“[Officer Ross]: I know. You kinda lost control. How many times do you think you hit her?

“[Defendant]: Probably 3 or 4 times.

“[Officer Ross]: With a closed fist?

“[Defendant]: I don’t even remember. I don’t have no soreness. I- I- I think I slapped her. I don’t think I punched her”

The officer then asked if defendant hit Castillo again after she fell to the ground, and he responded, “I may have.”

Viewed in the light most favorable to defendant, his statements evidence that he (1) hit Castillo, (2) “probably” did so three to four times while she was standing, (3) did not “even remember” whether he used a closed fist, and (4) “may” have continued to hit her after she fell to the ground. These statements are too vague and speculative to constitute substantial evidence of a simple assault. The statements do not establish what defendant claimed to have actually done. They do not refute Castillo’s testimony that defendant’s blows caused her to fall to the ground or that he kicked her numerous times as she lay in the parking lot, nor do they refute Madrigal’s description of defendant hitting Castillo as if he were fighting a man. Defendant’s statements do not address the extent of the injuries Castillo suffered, which included brief losses of consciousness, a black eye, extensive bruising on her face and body in multiple areas, a cut to her back that caused permanent scarring, and lasting damage to her vision. The court did not err in concluding that instructions on simple assault were unwarranted by the evidence.

Even if the trial court erred, there is not a reasonable probability that the outcome would have been more favorable to defendant if the simple assault instruction had

been given. (See *Breverman, supra*, 19 Cal.4th at pp. 177–178; *People v. Watson* (1956) 46 Cal.2d 818.) In evaluating whether a trial court’s failure to instruct on a lesser included offense was harmless, a reviewing court considers “whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.” (*Breverman, supra*, at p. 177.)

The record shows that defendant was 5 feet 11 inches tall and weighed 270 pounds when he assaulted Castillo. He admitted striking a woman smaller in stature who was making no attempt to fight back, knocking her to the hard asphalt. Madrigal described the force of the blows as strong—the type of punches that a man would hurl at another man in a fist fight. While Castillo lay in the parking spot, defendant kicked her multiple times. The force he used was sufficient to cause her to drift in and out of consciousness while the attack was occurring. After the attack ended, Castillo was unable to stand. The injuries she suffered are highly probative of the level of force used by defendant. Castillo’s body and face were littered with bruises, she had a black eye, a permanent scar, and lasting visual impairment. Considering the force of the impact, the manner in which the force was used, and the circumstances under which the force was applied in conjunction with the injuries Castillo suffered, we conclude that the jury would

not have reached a conclusion more favorable to defendant if it had been instructed on simple assault.

Sufficiency of the Evidence

Defendant next contends there is insufficient evidence to support the finding that he inflicted great bodily injury on Castillo (§12022.7, subd. (a)), or his conviction for assault with a deadly weapon (count 2). We disagree.

“In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses 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. [Citations.] Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Infliction of Great Bodily Injury

Section 12022.7, subdivision (a), provides: “Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.” “The determination whether a particular

victim has suffered physical harm that amounts to ‘great bodily injury’ is typically a question of fact to be resolved by the jury. (*People v. Cross* (2008) 45 Cal.4th 58, 63 (*Cross*).) Great bodily injury is defined in section 12022.7, subdivision (f), as ‘significant or substantial physical injury.’ However, ‘the injury need not be so grave as to cause the victim “permanent,” “prolonged,” or “protracted” bodily damage.’ (*Cross, supra*, at p. 64.) ‘Proof that a victim’s bodily injury is “great” . . . is commonly established by evidence of the severity of the victim’s physical injury, the resulting pain, or the medical care required to treat or repair the injury.’ (*Id.* at p. 66.)” (*People v. Woods* (2015) 241 Cal.App.4th 461, 486.)

“An examination of California case law reveals that some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of ‘great bodily injury.’ (*People v. Jaramillo* (1979) 98 Cal.App.3d 830, 836–837 [multiple contusions, swelling and discoloration of the body, and extensive bruises were sufficient to show ‘great bodily injury’]; see *People v. Sanchez* (1982) 131 Cal.App.3d 718, disapproved on other grounds in *People v. Escobar* (1992) 3 Cal.4th 740, 751, fn. 5 [evidence of multiple abrasions and lacerations to the victim’s back and bruising of the eye and cheek sustained a finding of ‘great bodily injury’]; see also *People v. Corona* (1989) 213 Cal.App.3d 589 [a swollen jaw, bruises to head and neck and sore ribs were sufficient to show ‘great bodily injury’].)” (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047–1048.)

Castillo's injuries were equal to or more serious than those in the cases cited above. In addition to extensive bruising, abrasions, a black eye, and a cut behind the ear—which alone would be substantial evidence of great bodily injury—she lost consciousness at points during the attack, and sustained a permanent scar and lasting visual impairment. All of the evidence presented showed that these injuries were the direct result of defendant's physical attack on Castillo. Substantial evidence supports the jury's finding under section 12022.7, subdivision (a), that defendant personally inflicted great bodily injury.

Assault with a Deadly Weapon

“As used in section 245, subdivision (a)(1), a ‘deadly weapon’ is ‘any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.’ (*In re Jose R.* (1982) 137 Cal.App.3d 269, 275–276.) Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. (*People v. Graham* (1969) 71 Cal.2d 303, 327, disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 32.) Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of

fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. (*In re Jose R.*, *supra*, 137 Cal.App.3d at p. 276; see *People v. Nealis* (1991) 232 Cal.App.3d Supp. 1, 4, fn. 2 [citing California decisions holding various objects, not deadly per se, to be deadly weapons under the particular circumstances].)” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029.)

Madrigal and Castillo’s uncontradicted testimony established that defendant intentionally pulled his car into the parking space where he knew Castillo was lying injured, and avoided hitting her only because Madrigal was able to drag her out of the way. Although a car is not inherently a deadly weapon, there is no doubt that it can be used to cause death or great bodily injury. Intentionally driving a car directly toward a victim who is trying to escape, as defendant did here, constitutes assault with a deadly weapon. (See *People v. Golde* (2008) 163 Cal.App.4th 101, 116.) Substantial evidence supports the jury’s conviction in count 2.

DISPOSITION

We affirm the judgment.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

KIN, J.*

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