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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. ANDRE LUCKY LUZANO, Defendant and Appellant.	B253623 (Los Angeles County Super. Ct. No. BA398769)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald H. Rose, Judge. Affirmed with modifications.

Renee Rich, 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, Steven D. Matthews, and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Andre Lucky Luzano (defendant) pushed his girlfriend out of his moving car on the freeway, was charged with and convicted of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] and assault by means of force likely to cause great bodily injury (§ 245, subd. (a)(4)), and sentenced to 19 years in prison due in part to his extensive criminal history. In this appeal, defendant argues that his two assault convictions are duplicative, that the trial court erred in denying his request to relieve his second retained attorney prior to the bifurcated trial on his prior convictions, and that the trial court erred in sentencing. We vacate defendant's conviction for assault by means of force likely to cause great bodily injury and strike one of the prior prison term enhancements, but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As defendant was driving down the Interstate 10 freeway with his girlfriend in the passenger seat, he punched her in the head several times, opened the passenger side door, and shoved her out of the moving car. She was momentarily tangled in the seat belt and dragged alongside the car before she broke free, slammed against the right rear tire, and tumbled to a stop on the side of the road. Defendant kept driving. While she was at the hospital being treated for "major road rash," she recounted what happened. At trial, she recanted her prior statements and testified that she threw herself out of the car.

The People charged defendant with (1) inflicting corporal injury on a cohabitant (§ 273.5, subd. (a)), and (2) assault with a deadly weapon (namely, a car) (§ 245, subd. (a)(1)). The People further alleged that defendant's 1991 conviction for robbery constituted a "serious felony" (§ 667, subd. (a)) as well as a "strike" within the meaning of the Three Strikes Law (§ 667, subds. (b)-(j); § 1170.12, subds. (a)-(d)), and that defendant had seven prior prison terms (§ 667.5, subd. (b)).

Defendant proceeded to trial, and the jury acquitted him of the corporal injury charge and was unable to reach a verdict on the assault with a deadly weapon charge.

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

The People elected to retry defendant on the assault charge. After the close of evidence at the retrial, the trial court granted the People's request to add a charge of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). The jury convicted defendant of both counts. Defendant waived his right to a jury and his right to a continuous trial. Eight months after the jury's verdict, the court held the trial regarding defendant's prior convictions.

After denying defendant's motion for a new trial, the trial court imposed a prison sentence of 19 years. The court imposed the upper term of four years on the assault with a deadly weapon charge, doubled it to eight years due to defendant's prior robbery "strike," added a consecutive term of five years because the robbery was also a "serious" felony, and added six consecutive one-year terms for each of six other prior prison terms. The court stayed the sentence on defendant's conviction of assault by means of force likely to produce great bodily injury charge under section 654, and stayed the prior prison term enhancement correlating with his prior robbery conviction (because it was the same conviction that constituted his prior "serious" felony).

Defendant timely appealed.

DISCUSSION

I. Assault Convictions

Defendant argues that he cannot stand convicted of both assault with a deadly weapon and assault by means of force likely to produce great bodily injury when the assaults both arise out of the same act of shoving his girlfriend out of a moving car. Relatedly, he contends that the trial court erred in not instructing the jury, using CALCRIM No. 3516, that it must select between the two assault crimes. Whether a defendant can be convicted of these two types of assault is a question of statutory interpretation; whether the trial court properly instructed the jury is also a question of law. Both are reviewed de novo. (*People v. Villegas* (2012) 205 Cal.App.4th 642, 646; *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1418 (*Dowdell*).)

Although a defendant can generally be convicted of two separate offenses for the

same act (§ 954; cf. *People v. Ortega* (1998) 19 Cal.4th 686, 692 [defendant cannot stand convicted of an offense and its lesser-included offense] (*Ortega*); *People v. Jaramillo* (1976) 16 Cal.3d 752, 758-759 [defendant cannot stand convicted of theft and receiving stolen property for the same item if it is one continuous transaction], superseded on other grounds by § 496, subd. (a) (*Jaramillo*)), a defendant cannot be convicted more than once for committing a single offense—no matter how many statutorily distinct ways he committed that offense. (See *People v. Craig* (1941) 17 Cal.2d 453, 458; *People v. Coyle* (2009) 178 Cal.App.4th 209, 218; *People v. Muhammad* (2007) 157 Cal.App.4th 484, 494 (*Muhammad*); *People v. Ryan* (2006) 138 Cal.App.4th 360, 370-371 (*Ryan*); accord, *People v. Tenney* (1958) 162 Cal.App.2d 458, 461 ["When a single act relates to but one victim, and violates but one statute, it cannot be transformed into multiple offenses by separately charging violations of different parts of the statute."].) As the People concede on appeal, it is well settled that "the offense of assault by means of force likely to produce great bodily injury is not an offense separate from . . . the offense of assault with a deadly weapon." (*People v. McGee* (1993) 15 Cal.App.4th 107, 110, 114; *In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5; see also *People v. Martinez* (2005) 125 Cal.App.4th 1035, 1043 [noting how section 245, subdivision (a)(1) "describes two different ways of committing a prohibited assault"].) Indeed, until 2012, both offenses were in the same subdivision (that is, section 245, subdivision (a)(1)), and the Legislature separated them only to address a sentencing issue, not to create separate offenses. (Hearings before Sen. Public Safety Com. on Assem. Bill No. 1026 (June 14, 2011).)

But what is the remedy for these duplicative convictions? Defendant argues that he is entitled to have *both* convictions vacated, even though he does not dispute that the jury was properly instructed as to the elements of each or that substantial evidence supports each. That is simply not the law. (*People v. Ceja* (2010) 49 Cal.4th 1, 5-8 [appellate court vacated one of the two convictions] (*Ceja*); *Jaramillo*, *supra*, 16 Cal.3d at p. 760, fn. 11 [appellate court gave the People the option of retrying both or accepting vacation of one of the counts]; cf. *People v. Prado* (1977) 67 Cal.App.3d 267, 273-274

[retrial of both is required when the two offenses are "mutually exclusive" because findings necessary for one preclude conviction of the other].) And there is good reason to reject defendant's proffered remedy—namely, retrial on both charges "would result in an expenditure of court resources and the possibility of an acquittal through loss of evidence or other causes of a reliably convicted defendant for no reason." (*United States v. Gaddis* (1976) 424 U.S. 544, 552-553 (conc. opn. of White, J.).)

The cases do not speak with one voice as to which of two duplicative convictions must be vacated. Some look to which conviction appears to "more completely cover[]" the defendant's acts in that case, and vacate the less factually apt conviction. (*Ryan*, *supra*, 138 Cal.App.4th at p. 371.) Others look to which offense is the greater offense, and vacate the lesser. (*People v. Black* (1990) 222 Cal.App.3d 523, 525 ["for the sake of judicial economy reviewing courts . . . have reversed the conviction of a lesser offense and let the conviction of the greater offense stand"] (*Black*); *People v. Medina* (2007) 41 Cal.4th 685, 701-702 [vacating lesser offense]; cf. *Ceja*, *supra*, 49 Cal.4th at pp. 5-8 [vacating greater offense of felony receipt of stolen property and letting stand the misdemeanor offense of theft due to the common law rule that the antecedent theft precludes the subsequent conviction for receipt].) Still others look—and defer—to whichever conviction the trial court used as the principal offense in sentencing. (*Muhammad*, *supra*, 157 Cal.App.4th at p. 494.) Defendant suggests that, if we do not reverse both convictions, we should affirm whichever offense the jury would have selected if given the choice, but no case supports this rule and the rule itself provides no criteria for assessing what the jury would have done; we accordingly reject that rule.

We need not select among the remaining tests because, in this case, they all point to the same conclusion—namely, that we let stand the conviction for assault with a deadly weapon and vacate the conviction for assault by means likely to produce great bodily injury. Because the victim's more significant injuries in this case stem from defendant's use of his car rather than defendant's antecedent acts in punching and shoving her, the instrumentality of defendant's assault—and the means through which it

was likely to produce bodily injury—was the car. Consequently, the crime of assault with a deadly weapon—as charged, the car—better "covers" the defendant's crime. Also, assault with a deadly weapon is the greater of the two offenses. Although both types of assault have the same sentencing range, assault with a deadly weapon is by statute *always* a "serious" felony (and hence always a "strike" under the Three Strikes Law) (§§ 1192.7, subd. (c)(31), 667, subd. (d)(1), 1170.12, subd. (b)(1)), while assault by means likely to produce great bodily injury is only a "serious" felony (and hence only a "strike") if it factually involves the use of a deadly weapon or the personal infliction of great bodily injury (§§ 1192.7, subds. (c)(8), (c)(23), 667, subd. (d)(1), 1170.12, subd. (b)(1); *People v. Banuelos* (2005) 130 Cal.App.4th 601, 605). Assault with a deadly weapon is thus more often going to be the greater offense. Lastly, the trial court in this case used the assault with a deadly weapon count as the principal term in sentencing.

In light of our conclusion that defendant cannot twice be convicted for the same assault, defendant is correct that the trial court erred in not instructing the jury that it must choose between the two alternative assault charges and convict defendant of only one. (CALCRIM No. 3516 ["These are alternative charges. If you find the defendant guilty of one of these charges, you must find (him/her) not guilty of the other. You cannot find the defendant guilty of both."]; *Black*, *supra*, 222 Cal.App.3d at p. 525.) However, once an appellate court has vacated one of the two convictions (as we have here), the instructional error becomes harmless. (*Ibid.*)

For these reasons, the abstract of judgment should be modified to vacate count 3 (assault by means likely to produce great bodily injury), and to vacate the two assessments levied on that conviction (namely, the court operations assessment of $40 and the court facility assessment of $30).

II. Discharge of Retained Counsel

Defendant contends that the trial court erred in denying his request to discharge his retained counsel, thereby violating his constitutional right to counsel and entitling him to a new trial on his prior convictions, a new hearing for his posttrial motions, and a new

sentencing hearing. We review a trial court's denial of a motion to relieve counsel for an abuse of discretion (*Dowdell, supra*, 227 Cal.App.4th at p. 1411), and review any factual findings of the court regarding defendant's intent—like any other factual findings—for substantial evidence (*People v. Weatherton* (2014) 59 Cal.4th 589, 598).

The retrial of defendant's case occurred in April 2013. At that time, defendant was represented by retained counsel Patricia O'Brien (O'Brien), after defendant had discharged the alternate public defender. After the jury returned its verdicts during the retrial, defendant waived his rights to a jury trial and to a continuous trial with respect to the second half of the bifurcated trial on his prior convictions. In August 2013, defendant requested—and was granted permission—to discharge O'Brien and retain new counsel, Jay Vogel (Vogel). In September, October and November, Vogel did not make timely appearances or did not appear at all for a number of court hearings.

On November 26, 2013, defendant waived his right to counsel for the hearing and moved to have Vogel discharged. Defendant asked the trial court for three weeks so he could finalize which of three unnamed lawyers he would retain. The court agreed to continue the matter for nearly three weeks, and informed defendant that if his new counsel was not present, defendant would have to chose between representing himself or having the alternate public defender reappointed; defendant said this arrangement was "okay."

On December 9, 2013, defendant renewed his request that Vogel be discharged, but defendant did not—as he had promised—have his new retained counsel present. Defendant then indicated he preferred to represent himself, but wanted a continuance of the remaining proceedings. The trial court attempted to advise defendant regarding the dangers and disadvantages of self-representation—as is required before a court may accept a defendant's waiver of the right to counsel under *Faretta v. California* (1975) 422 U.S. 806 (*People v. Burgener* (2009) 46 Cal.4th 231, 241)—but defendant repeatedly interrupted and talked over the court, interjecting "Fuck you" no fewer than seven times. When the court, unable to provide the proper advisements, denied defendant's request to

proceed pro se, defendant told the court, "Fuck everything about you, son of a bitch." The court had defendant removed from the courtroom, and made a finding that defendant's behavior was "purposeful" and "an attempt to delay the proceedings in this case."

Nearly three weeks later, on December 27, 2013, defendant again asked to discharge Vogel and again did not have his unidentified new counsel present. Defendant then walked out of the courtroom and into his holding cell, voluntarily absenting himself from the proceedings. The court denied defendant's motion to discharge Vogel due to the absence of any substitute counsel and due to the fact that defendant's acts prevented the court from providing the advisements that are required before a court may authorize self-representation. The court found that defendant was employing the "delaying tactic that he has been involved in since he was convicted in this case." The court then proceeded to hear the trial on the prior convictions and defendant's new trial motion, and to impose sentence; Vogel represented defendant in those proceedings.[2]

A criminal defendant has a constitutional "right to counsel of choice" (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 146 (*Gonzalez-Lopez*); U.S. Const., amend. VI; Cal. Const., art. I, § 15), and this right encompasses a defendant's "interest in discharging a retained attorney" for good reason or no reason at all. (*People v. Lara* (2001) 86 Cal.App.4th 139, 152 (*Lara*); *People v. Ortiz* (1990) 51 Cal.3d 975, 983 (*Ortiz*).) This right is "not absolute" (*Ortiz*, at p. 983), but "the state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources--and [the individual's] desire can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." (*People v. Crovedi* (1966) 65 Cal.2d 199, 208 (*Crovedi*); *Ortiz*, at p. 983.) "'A court

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[2] Defendant does not assert in these proceedings that Vogel was ineffective.

faced with a request to substitute retained counsel must balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution. [Citation.]'" (*People v. Munoz* (2006) 138 Cal.App.4th 860, 870; *Lara*, at p. 153.) When engaging in this balancing, a court may consider whether the defendant's "actions imply a disposition to abuse the patience of the court through dilatory efforts to seek counsel." (*Crovedi*, at p. 208.)

Given these standards, the trial court did not abuse its discretion in denying defendant's request to discharge Vogel. To begin, the trial court did not categorically deny defendant's request to discharge Vogel; instead, the court indicated a willingness to allow the substitution and, to that end, gave defendant nearly six weeks—nearly twice as much time as defendant requested—to bring to court the retained lawyer defendant said he wanted to substitute. The question thus becomes whether the trial court abused its discretion in not granting defendant a *further* continuance; in not allowing defendant to proceed pro se, the option defendant said he preferred to having Vogel continue representing him; and in not allowing defendant to discharge Vogel and to have no counsel at all moving forward.

The trial court did not abuse its discretion in denying a further continuance. "[A] defendant who desires to retain his own counsel is required to act with diligence and may not demand a continuance if he is unjustifiably dilatory . . ." (*People v. Blake* (1980) 105 Cal.App.3d 619, 623-624; *People v. Courts* (1985) 37 Cal.3d 784, 790-791 (*Courts*).) Any other rule would empower a defendant to "prostitute the recognized right to counsel into a convenient tactic for delay." (*People v. Lefer* (1968) 264 Cal.App.2d 48, 50.) In this case, defendant did not ask for the reappointment of appointed counsel (which can be accomplished rather quickly). (*Munoz*, *supra*, 138 Cal.App.4th at p. 868.) Rather, he sought to retain private counsel, but never named that counsel and took nearly twice as much time as he said he would need and still produced no attorney or a suggestion of when one might appear. Defendant asserts that the trial court should have asked him more questions about his efforts to secure new counsel and about how much

more time he would need, but defendant had already taken more time than he said he needed and defendant's immediate reaction to the trial court's further questions regarding how to proceed was to hurl imprecations and profanities. It is not an abuse of discretion to deny a continuance when "participation by a particular private attorney [is] still quite speculative at the time the motion for continuance was made." (*Courts,* at p. 791, fn. 3.) The trial court specifically found that the continuances it had granted defendant to obtain counsel had yielded no progress, and had been calculated to delay the proceedings; the record amply supports those findings.

The trial court also did not abuse its discretion in denying defendant's request to represent himself. Even apart from defendant's intentional efforts to prevent the court from providing him the necessary advisements by cussing out the trial court on one occasion and absenting himself on another, this very same disruptive conduct provides a sufficient basis for denying his request for self-representation. (*People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1515 ["A defendant's *in-court* misconduct can warrant the denial or revocation of a defendant's right to represent himself."].)

Nor did the trial court abuse its discretion in refusing to discharge Vogel and leave defendant without any counsel or a valid waiver of the right to counsel. Aside from the absence of authority to support a court order that would strand a criminal defendant without any representation whatsoever in the middle of a bifurcated proceeding, such an order would have effectively paralyzed any further proceedings as long as defendant continued not to hire counsel and not to listen to the court's advisements regarding self-representation. The right to counsel requires a balancing of the defendant's right to counsel against a court's interest in the orderly progression of cases; it does not compel an open-ended invitation to stall that progression indefinitely.

Defendant argues that the trial court was wrong to attribute the full eight months of delay between the jury's verdict and the trial on the prior convictions to defendant when, in fact, three months of the delay was due to Vogel's missed appearances. However, five months of the delay were *not* attributable to Vogel. More to the point, the

court's partial misattribution of the blame for the delay in no way undermines the analysis we set forth above.

In sum, the trial court acted within its discretion in denying defendant's requests to discharge Vogel.

III. Sentencing

Defendant lastly asserts that the trial court erred in *staying* the one-year enhancement for a prior prison term under section 667.5, subdivision (b), for the robbery conviction that also underlies the five-year "serious" felony enhancement under section 667, subdivision (a); defendant argues that this one-year enhancement should have been *stricken*, not stayed. He is correct, as the People concede on appeal. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Jones* (1993) 5 Cal.4th 1142, 1150-1153.) The abstract of judgment should be modified to strike the one-year enhancement corresponding to that conviction.

DISPOSITION

The judgment is modified to (1) vacate the conviction on count 3, (2) reduce the total court operations assessment under section 1465.8 to $40, and the total court facilities assessment under Government Code section 70373 to $30, and (3) strike the one-year prior prison term enhancement in case No. BA040049 that had been stayed. The clerk of the superior court is directed to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

HOFFSTADT

We concur:

_____, Acting P. J.

ASHMANN-GERST

_____, J.

CHAVEZ