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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MARIANO CRUZ,

Defendant and Appellant.

B296316

(Los Angeles County  
Super. Ct. No. TA146389)

APPEAL from a judgment of the Superior Court of Los Angeles County, Connie R. Quinones, Judge. Reversed in part and affirmed in part.

Michael C. Sampson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

## **INTRODUCTION**

Following a jury trial, defendant Jose Mariano Cruz was convicted of felony assault with a deadly weapon on Owen C.,<sup>1</sup> as well as simple assault and simple battery on defendant's girlfriend, Amanda C. On appeal, defendant asserts that his simple assault conviction must be reversed because it is based on the same set of facts as the simple battery conviction, and he cannot be convicted of both a greater and lesser offense based on the same facts. The Attorney General concedes that the simple assault conviction must be reversed. We agree with the parties, and reverse the conviction for simple assault. In all other respects, the judgment is affirmed.

## **FACTUAL AND PROCEDURAL BACKGROUND**

The Los Angeles County District Attorney (the People) filed an information charging defendant with felony assault with a deadly weapon on Owen C. (Pen. Code, § 245, subd. (a)(1),<sup>2</sup> count 1); felony assault by means of force likely to produce great bodily injury on Amanda C. (§ 245, subd. (a)(4), count 2); and misdemeanor battery on Amanda C., a person in a dating relationship (§ 243, subd. (e)(1), count 3). The information further alleged that defendant had two prior strike convictions (§§ 667, subd. (d), 1170.12, subd. (b)), two prior serious felony convictions (§ 667, subd. (a)(1)), and two prior prison terms (§ 667.5, subd. (b)). Defendant pled not guilty and the case proceeded to a jury trial.

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<sup>1</sup> We refer to the victims by first names to protect their privacy. (See Cal. Rules of Court, rule 8.90(b)(4).)

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

**A. Prosecution case**

At trial, Amanda testified that defendant was her ex-boyfriend and father of her unborn child. She testified that on June 23, 2018, she was living in a tent in a homeless encampment on the corner of Redondo Beach Boulevard and Vermont Avenue. Defendant did not live with her, but visited her often. Amanda testified that in the evening of June 23, she and defendant got into a “loud discussion” because they were arguing; Amanda pushed defendant, and defendant held Amanda’s hands down. Amanda testified that defendant did not hit her and was not violent with her. A man who lived in a neighboring tent, Owen, came over and “tried to get in between us.” Amanda testified that things “happened really fast,” and Owen and other neighbors started chasing defendant, while Owen was holding “some long thing.” Amanda said she could not tell what the thing was because she did not have her glasses on at the time. The police arrived, and Amanda testified that she “probably fibbed” to the police.<sup>3</sup>

Owen testified<sup>4</sup> that on June 23, 2018, he was in his tent with a friend when he heard a scream. He looked outside and saw defendant grab Amanda by her hair and drag her; Amanda was yelling, “Someone help me. He’s gonna kill me.” Owen told defendant to let her go, and defendant let go of Amanda and started walking toward Owen. Owen did not see anything in defendant’s hands, but defendant stabbed him “with a skinny

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<sup>3</sup> During redirect examination, after a break in the proceedings, Amanda did not return to the courtroom and was not located again. The partial redirect was stricken, and the jury was instructed to disregard it.

<sup>4</sup> Owen did not appear at trial, and after a showing of due diligence, his preliminary testimony was read to the jury.

Phillips screwdriver three times” in the left shoulder. Owen and others chased defendant away; during the chase, defendant fell down, Owen hit him with a stick, then defendant then got up and ran. After the incident, Owen talked to police officers and identified defendant as the man who stabbed him. Owen was transported to the hospital, where his wounds were cleaned, and he was given antibiotics.

Gardena Police Department officer Ryan Davidson testified that he responded to a call regarding an incident at the intersection of Redondo Beach Boulevard and Vermont Avenue on June 23, 2018. He testified that defendant was detained nearby, and when Davidson went to that location, he saw a firefighter pull a yellow screwdriver out of defendant’s pocket. The jury was shown still photographs recorded by Davidson’s body camera, which showed defendant and the screwdriver. Gardena police determined that the location of the crime was in the jurisdiction of the Los Angeles Police Department (LAPD), and investigation was therefore turned over to LAPD.

LAPD officer Mario Silva testified that he responded to a call at the location of the incident. Silva spoke with Amanda, who said that she and her boyfriend, defendant, had gotten into an argument, during which he had “grabbed her by the hair and he started hitting her” around her face area. Amanda also told Silva that she saw defendant stab Owen. The screwdriver recovered from defendant was admitted as an exhibit.

## **B. Defense case**

The defense called witness Markquis Harris, who testified that he was in the encampment area on June 23, 2018. Harris testified that as he arrived he witnessed a “struggle” in progress, in which a man named Lamont hit defendant with a machete,

and Owen and others chased defendant. Harris also testified that he saw Owen stab himself in the arm a few minutes after the struggle ended.

Defendant testified that on the evening of June 23, he went to the encampment and took Amanda to dinner. He testified that Amanda was his girlfriend, and they were expecting a child. Defendant said that after they ate, Amanda stayed at the restaurant, and defendant returned to the encampment. There, Lamont's pit bulls bit him and defendant threatened to call the police. Defendant then went inside his tent and called Tiffany, an ex-girlfriend who was also pregnant with defendant's child, and asked her to pick him up. Amanda returned and heard defendant talking to Tiffany, and they began to argue. Amanda took defendant's phone and threatened to break it on the ground, and defendant "held her hands by the wrist . . . so she could not slam the phone on the ground." Amanda gave the phone back but started hitting defendant's chest, accusing him of cheating, and calling him names. Then, "[a]ll the guys from payback gangster crip interfered because they were trying to get at her to sleep with her." The men attacked defendant. Owen had a knife; as defendant put his hands up to protect his face, Owen "sliced my whole finger." Lamont had a machete and cut defendant's lower back. Defendant ran away; the men chased him and knocked him down, but defendant was able to get away and call 911. Defendant testified that he did not stab Owen, hit Amanda, or pull Amanda's hair.

In closing arguments, the prosecutor made clear that counts 2 and 3 were both based on the allegation that defendant pulled Amanda's hair and hit her. The jury was instructed on lesser included offenses for these two counts.

### **C. Verdict and sentence**

The jury found defendant guilty of count 1, assault with a deadly weapon on Owen. On count 2, the jury found defendant guilty of the lesser included offense of misdemeanor simple assault (§ 240). On count 3, the jury found defendant guilty of the lesser included offense of misdemeanor simple battery (§ 242). Defendant admitted his prior convictions, and the court dismissed one of defendant's strikes. The court sentenced defendant to a total of 18 years in prison, consisting of the high term of four years on count one, doubled to eight years due to the prior strike, plus two consecutive five-year enhancements for defendant's prior violent felony convictions. The court ordered the sentences on counts 2 and 3 to be stayed, but did not appear to impose any sentence on these counts. Appellant timely appealed.

### **DISCUSSION**

On appeal, defendant asserts that his simple assault conviction must be reversed because it is based on the same set of facts as the simple battery conviction, and defendant cannot be convicted of both a greater and lesser offense on the same facts. The Attorney General agrees, as do we.

“[I]t is generally permissible to convict a defendant of multiple charges arising from a single act or course of conduct. (*People v. Sanders* (2012) 55 Cal.4th 731, 736; see also § 954.) However, “[w]hen a defendant is found guilty of both a greater and a necessarily lesser included offense arising out of the same act or course of conduct, and the evidence supports the verdict on the greater offense, that conviction is controlling, and the conviction of the lesser offense must be reversed.” (*Sanders*, *supra*, 55 Cal.4th at p. 736.) Here, both convictions were based

on the same course of conduct—the incident in which defendant hit Amanda and pulled her hair. There was no suggestion at trial that these counts were directed to specific or separate actions.

“A defendant who commits a battery may not be convicted of both battery and assault, because ‘[a]n assault is a necessary element of battery, and it is impossible to commit battery without assaulting the victim.’” (*People v. Ortega* (1998) 19 Cal.4th 686, 692, overruled on other grounds by *People v. Reed* (2006) 38 Cal.4th 1224.) The two convictions were based on the same course of conduct, so the conviction for simple assault must be reversed. Because the trial court did not impose a sentence on that count, there is no related sentence to be vacated.

#### **DISPOSITION**

Defendant’s conviction on count 2 for simple assault is reversed. In all other respects, the judgment is affirmed.

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COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.