Filed 7/27/18 P. v. Ollie CA2/4

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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. HARRY LEE OLLIE, Defendant and Appellant.	B281466 (Los Angeles County Super. Ct. No. BA450246)

APPEAL from judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed.

Patricia S. Lai, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Harry Lee Ollie appeals from a 35-year-to-life prison sentence following his conviction for assault with a deadly weapon. He contends his conviction should be reduced to simple assault, as there was insufficient evidence to support the jury's finding that he used a deadly weapon. He further contends the trial judge committed reversible error when the judge instructed the jury that it could consider the lesser offense of simple assault only after it determined he was not guilty of the greater offense of assault with a deadly weapon. For the reasons stated below, we conclude that substantial evidence supported the jury's verdict and that any instructional error was harmless. Accordingly, we affirm.

PROCEDURAL HISTORY

A jury convicted appellant of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).)[1] In a bifurcated proceeding, the trial court found true allegations that appellant had suffered two prior strikes within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), two prior serious felony convictions (§ 667, subd. (a)(1)), and one prior conviction resulting in a prison term (§ 667.5, subd. (b)).

The trial court denied appellant's motion to strike the prior strikes under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. It sentenced appellant to a total term of 35 years to life in state prison, consisting of 25 years to life for the assault with a

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

deadly weapon conviction, plus a five-year term for each of the two prior serious felony convictions.

Appellant timely appealed.

STATEMENT OF THE FACTS

A. *The Prosecution Case*

Los Angeles County Sheriff's Deputy Jacklyn Artiga testified that on August 29, 2016, she was on duty at the men's central jail. She was conducting a security check when she observed two men -- later identified as appellant and Dion Anthony -- who appeared to be wrestling. Artiga called for backup, and with the assistance of other deputies, separated and handcuffed the two men. Artiga noticed that Anthony was bleeding from his forehead, but appellant had no visible injuries. Artiga opined, based on her experience, that Anthony's wound was consistent with stabbing injuries. A search was conducted for the weapon used in the assault, but no weapon was ever recovered.

John Galindo, a registered nurse at the jail, testified he was on duty at the time of the incident. When Anthony was brought into the clinic for treatment, Galindo noticed a forehead wound that had stopped bleeding. Galindo determined that the wound was recent, had "defined" and "clean" edges, and was superficial. Based on his experience, the wound was inflicted by a sharp object; a punch would not leave such a wound. Galindo also observed multiple superficial lacerations on Anthony's scalp and upper back. The lacerations were consistent with wounds caused by a sharp object, such as a knife.

Los Angeles County Sheriff's Detective Jason Ekins testified he investigated the assault of Anthony. When Ekins

interviewed Anthony on September 9, 2016, he noticed a long healing laceration above Anthony's right eye and other scab wounds throughout his face. Ekins testified that inmates often fashioned weapons from "pieces of metal from within their cell[s]. They will take apart the sinks, the toilets, pieces of the bed framing, and they'll sharpen them." Ekins acknowledged that the weapon used to assault Anthony was never recovered. However, he testified that inmates can dispose of an impromptu weapon by "flushing it down a toilet, by ingesting it, secreting it within their bodies, destroying it, cutting it into pieces, grounding it down to where it doesn't look like a weapon anymore, [as well as] giving it to another inmate to hide for them." After reviewing a video-recording of the incident, Ekins opined that it appeared that after assaulting Anthony, appellant's arms and hands were "very close to the bars of other cells."

A video of the entire incident was played for the jury. The video showed appellant approaching Anthony from behind and making stabbing motions.

B. *The Defense Case*

Appellant did not testify or present an affirmative defense.

DISCUSSION

A. *Substantial Evidence Supported Appellant's Conviction for Assault with a Deadly Weapon.*

Appellant contends that the evidence supported a conviction only for simple assault, and was insufficient to support his conviction for assault with a deadly weapon. When a defendant challenges the sufficiency of the evidence, "the reviewing court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses

substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

Section 245, subdivision (a)(1), punishes assaults committed "with a deadly weapon or instrument other than a firearm." "One may commit an assault without making actual physical contact with the person of the victim; because the statute focuses on use of a deadly weapon or instrument . . . whether the victim in fact suffers any harm is immaterial." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028, italics omitted.) "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.' [Citation.]" (*Id.* at pp. 1028-1029.) "Great bodily injury" means "significant or substantial injury." (*People v. Brown* (2012) 210 Cal.App.4th 1, 7 (*Brown*).) "Because [section 245] speaks to the capability of inflicting significant injury, neither physical contact nor actual injury is required to support a conviction. [Citation.] However, if injuries do result, the nature of such injuries and their location are relevant facts for consideration in determining whether an object was used in a manner capable of producing and likely to produce great bodily injury." (*Ibid.*)

Here, the evidence showed that appellant approached the victim from behind and made "stabbing" motions aimed at the victim's upper back and head. (See *Brown*, *supra*, 210 Cal.App.4th at p. 8 [BB gun used as a deadly weapon where it was fired at victim's face from close range].) The victim sustained wounds to his scalp, forehead and upper back. (See

People v. Washington (2012) 210 Cal.App.4th 1042, 1047 ["some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of 'great bodily injury'"].) Deputy Artiga testified she observed that the victim was bleeding from a long wound on his forehead, and opined that the wound was similar to other stabbing wounds she had seen. Nurse Galindo testified that based on his experience working at the jail's clinic, the victim's wounds were consistent with those caused by a sharp object, such as a knife. (See *People v. Urrutia* (1943) 58 Cal.App.2d 468, 470 (*Urrutia*) [finding that appellant used deadly weapon supported by expert testimony from examining physician that he had observed "'two bad lacerations on [victim's] body, apparently made with some sharp instrument'"; that "'from the appearance of the wound a sharp instrument of some sort was used to make the cut'"; and that "it was possible a knife was used"].) On this record, a jury could reasonably find that appellant committed the assault with a deadly weapon. (See *Id.* at p. 471 ["The nature of the wound together with the direct testimony was sufficient to prove that the assault was committed with a deadly weapon, even if there had been no direct testimony that a knife was seen in the hand of the defendant"].)

Appellant's reliance on *In re Brandon T.* (2011) 191 Cal.App.4th 1491, is misplaced. There, the juvenile used a butter knife with a rounded end and tried to cut the victim's cheek and throat, but could not penetrate the victim's skin and left only "'welts.'" There was no evidence that the knife drew blood or that the juvenile aimed at the victim's eye. (*Id.* at pp. 1496-1497 & fn. 5.) The appellate court concluded that the butter knife was not used in such a manner that it would have resulted in great bodily

injury. (*Id*. at p. 1497.) In contrast, here, the victim was bleeding from multiple wounds caused by the assault. In sum, there was sufficient evidence to support the jury's verdict.

B. *Any Instructional Error was Harmless.*

Appellant contends the trial court prejudicially erred in instructing the jury that it could consider the lesser offense of simple assault only after it acquitted appellant of the greater offense of assault with a deadly weapon.

1. *Relevant Background*

The judge instructed the jury before the parties gave their closing arguments. After instructing the jury on the elements of assault with a deadly weapon, the judge also instructed: "If you are not convinced that the defendant is guilty of assault with a deadly weapon, you shall consider whether he is guilty or not guilty of the lesser charge of simple assault." The court then instructed on the elements of simple assault before extemporaneously stating: "Now, ladies and gentleman, I just spoke about the lesser crime. Now, you only consider the lesser crime if you unanimously find the defendant not guilty of the greater crime. If you find him guilty of the greater crime, it stops there. You do not consider the lesser. If you cannot make a decision with respect to the greater crime -- that's assault with a deadly weapon -- you don't consider the lesser it stops there. Do you understand that? You only move on to it if you unanimously find him not guilty of the greater, then you move on to consider the lesser. All right."

Defense counsel did not object to the trial court's impromptu statements. In closing argument, defense counsel conceded that an assault had occurred, but argued that the evidence was insufficient to find that a deadly weapon was used.

Counsel noted that no weapon was recovered and that the victim suffered only superficial injuries. Counsel concluded by saying that based on the evidence, "Yes, he [appellant] is guilty of assault, but you will find him not guilty of assault with a deadly weapon."

After closing arguments, the jury was provided with written instructions, including an instruction that if the jury was not convinced that appellant was guilty of assault with a deadly weapon, "you shall consider whether he is guilty or not guilty of the lesser charge of simple assault." The written instructions did not include the trial court's extemporaneous statements about considering the lesser offense. They further provided, "You are to be governed only by the instruction in its final wording."

2. *Analysis*

Under California law, a jury must acquit a defendant of the greater offense before returning a verdict on the lesser included offense, but it may consider and deliberate on greater and lesser included offenses in any order. (See *People v. Kurtzman* (1988) 46 Cal.3d 322, 330-331 (*Kurtzman*).) Under California's acquittal-first rule, a trial court errs if it instructs "the jury not to 'deliberate on' or 'consider' [the lesser included offense] until it ha[s] unanimously agreed on [the greater offense]." (*Id.* at p. 335.) Such instructional error is subject to harmless-error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *Kurtzman*, *supra*, 46 Cal.3d at p. 335; accord, *People v. Olivas* (2016) 248 Cal.App.4th 758, 775.)[2]

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[2] Respondent argues that in light of the written instructions, the jury understood the trial court's oral statements as governing how it was to return its verdict after deliberating on all charges.

Here, the instructional error was harmless. As an initial matter, we note that in discussing *Kurtzman* error, our Supreme Court has observed that "it will likely be a matter of pure conjecture whether the instruction had any effect, whom it affected, and what the effect was." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1077-1078, fn. 7, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823.) Here, the jury was provided with correct written instructions and told that it was to be governed only by the "final wording" of the written instructions. Those instructions did not preclude the jury from deliberating on the lesser included offense of simple assault at any time. They did not include the court's oral pronouncements, and stated that the jury "shall" consider the lesser included offense if not convinced that appellant was guilty of the greater offense. As the jury presumptively followed the written instructions, it was not constrained from considering the lesser offense. (See *People v. Wilson* (2008) 44 Cal.4th 758, 803 ["We of course presume 'that jurors understand and follow the court's instructions.' [Citation.] This presumption includes the written instructions. [Citation.] To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control."].)

Second, the whole record indicates that the jury considered both the greater and lesser included offenses. (See *Kurtzman*,

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However, the trial court's oral pronouncements are similar to the jury instruction found erroneous in *Kurtzman*. There, the court concluded that the trial court erred when it instructed the jury that "you must unanimously agree on the second degree murder offense before considering voluntary manslaughter." (*Kurtzman*, *supra*, 46 Cal.3d at p. 328, italics omitted.)

supra, 46 Cal.3d at p. 335 [no prejudicial error where despite erroneous acquittal-first instruction, the jury deliberated on both the greater and the lesser offenses].) The key issue at trial was whether appellant used a deadly weapon. In both their opening statements and their closing arguments, the prosecutor and defense counsel focused on evidence of the use of a deadly weapon. In closing argument, defense counsel argued that the evidence was insufficient to establish that appellant used a deadly weapon. As the only difference between the lesser offense of simple assault and the greater offense of assault with a deadly weapon assault was the use of a deadly weapon, the jury was asked to consider and determine whether appellant committed the lesser or the greater offense. As we concluded above, substantial evidence supported the jury's finding that appellant used a deadly weapon in his assault on the victim. In sum, it is not reasonably probable that a result more favorable to appellant would have been reached in the absence of the court's instructional error.[3]

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[3] On appeal, appellant contends the trial court should have given CALJIC No. 17.10, which instructs the jury that "you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdict." However, trial counsel never requested that CALJIC No. 17.10 be given. More important, any error in not giving CALJIC No. 17.10 is harmless for the reasons stated above.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

MICON, J.*

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