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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDER GILBERT VALDEZ, Defendant and Appellant.	B276007 (Los Angeles County Super. Ct. No. BA441184)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed.

Marta I. Stanton, 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, Margaret E. Maxwell and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Alexander Valdez of assault by means of force likely to produce great bodily injury. (See Pen. Code, § 245, subd. (a)(4).)[1] The trial court sentenced Valdez to the middle base term of three years in state prison. Valdez recognizes that the evidence shows the use of force in the commission of the offense, but argues it is insufficient to show that he used force likely to produce great bodily injury. In the alternative, Valdez contends the trial court abused its discretion in denying his motion pursuant to section 17, subdivision (b),[2] to reduce the aggravated assault count to a misdemeanor charge. We affirm the judgment.

FACTS

Background

In November 2015, Nathalia Ferreire (the victim) and Valdez both lived in a house owned by Ratana Bradford. Ferreire rented a room from Bradford. Valdez lived in a separate room, but Bradford did not charge him rent. There was a light fixture on the front porch of the house. Ferreire wanted the porch light to be kept on at night for safety. Valdez wanted the light off. Ferreire and Valdez discussed the porch light matter on one or two occasions. At some point, Valdez removed the light bulb.

The Assault

On the afternoon of November 2, 2015, Ferreire got on a chair on the porch and started trying to replace the light bulb. She was wearing two to three inch high heels at the time. As Ferreire was standing on the chair, Valdez approached and asked her if Bradford gave her permission to replace the light

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1 All further section references are to the Penal Code.

2 Hereafter § 17(b).

bulb.[3] Ferreire responded by asking Valdez if he had asked Bradford for permission to remove the light bulb. At this point, events escalated.

Valdez stated that Bradford told him he could remove the light bulb and then "slapped" Ferreire in the face "very hard." After slapping Ferriere, Valdez punched her approximately three times in the forehead, Ferreire fell to the ground, and the chair broke. Ferreire's vision went "black," and she was "a little dizzy," but did not lose consciousness. She "dragged" herself to a brick wall on the front of the porch to sit. After Ferreire sat on the wall, Valdez approached her and grabbed her hair with one hand, and punched her with a closed fist "everywhere," including in the head and ribcage area. The force of the punches caused Ferreire to fall backwards into rose bushes that were adjacent to the brick wall. When Valdez tried to grab her again, Ferreire ran toward a person on the street and asked to borrow his phone, but the person refused. Ferreire then continued on and found a girl who lent her phone to Ferreire. Ferreire called 911 more than once.[4]

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[3] At trial, Ferreire testified that she is five feet, two inches tall and weighs 96 pounds. A police officer who responded to the property and who testified at trial described Valdez as appearing to weigh between 230 and 250 pounds, and taller than five feet, eleven inches.

[4] Two of Ferreire's 911 calls were played for the jury. In the first call, Ferreire stated that her "roommate just slapped [her] face," her arms were bloody, and she hurt her head. She declined an ambulance, and said that her assailant was still at the house and was throwing things in the street. In the second call, Ferreire asked when the police would arrive, and said, "I'm really scared. He's outside all the time trying to get me."

Los Angeles Police Department Officer Justin Howarth and his partner responded to the house. When the officers arrived at the scene, Valdez came outside to observe, and Ferreire identified Valdez as the person who hit her. When Officer Howarth tried to speak to him, Valdez "hollered" that the police would need a search warrant, and that he did not have to talk to the police. Valdez then went back into the house. Officer Howarth and his partner requested a backup unit and a supervisor. Approximately four to six hours later, "dozens" of officers forced their way into the house, and apprehended Valdez. Officer Howarth arrested Valdez based on Ferreire's statements and the officer's observation of her injuries.[5]

The Criminal Case

In December 2015, the People filed an information charging Valdez with assault by means of force likely to produce great bodily injury (count 1; § 245, subd. (a)(4)) and battery with serious bodily injury (count 2; § 243, subd. (d)). In February 2016, the trial court granted Valdez's pre-trial motion pursuant to section 995 to dismiss the battery count based on the preliminary hearing transcript.

In March 2016, the remaining aggravated assault count was tried to a jury. The prosecution presented evidence establishing the facts summarized above. Valdez did not present

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[5] Shortly after the police arrived, paramedics responded to the house. Ferreire had a "big bump" on her face, a cut to her left eye, scratches on both arms, and scratches on her left hand and wrist. The paramedics treated Ferreire with an icepack. She declined transportation to the hospital. The injuries were photographed by a police officer and the photos were shown to the jury at trial. Ferreire suffered from headaches after the incident that were still present at the time of the trial.

any defense evidence. After the parties rested, Valdez made oral motions to dismiss (§ 1118.5) and, pursuant to section 17(b), to reduce the charged aggravated assault count "to a misdemeanor." The trial court denied both motions. The court instructed the jury on the charged offense of assault by means of force likely to produce great bodily injury, and the lesser offense of simple assault. Valdez's counsel argued that Ferreire "exaggerated" the incident, and urged that the important element of the case was for jurors "to consider . . . how hard he actually hit her." The case was submitted and the jury returned a verdict finding Valdez guilty of aggravated assault as charged in count 1.

After receiving and reviewing a diagnostic report, the trial court sentenced Valdez to a three-year mid-term prison sentence. The court imposed usual fines, assessments and fees. The court awarded 496 days of custody credits as follows: 248 actual days served, plus 248 local conduct credits.

Valdez filed a timely notice of appeal.

DISCUSSION

I. Substantial Evidence Supports the Aggravated Assault Verdict

Valdez argues the evidence is insufficient to sustain the jury's finding that he used force likely to produce great bodily injury. We disagree.

"To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., 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. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Defendant was convicted of violating section 245, subdivision (a)(4), which prohibits committing "an assault upon the person of another by any means of force likely to produce great bodily injury . . . ." Assault is defined in section 240: "[a]n assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

It is long-settled that use of hands or fists alone may support a guilty verdict for assault by means of force likely to produce great bodily injury. For example, in *People v. Armstrong* (1992) 8 Cal.App.4th 1060, the defendant grabbed a victim's face, held her jaw tightly, ripped her clothes, and got on top of her and "shoved his whole hand down her throat" so she would not be able to scream. (*Id.* at p. 1064.) The victim suffered bruises and scratches and a sore throat, but did not seek medical attention. (*Ibid.*) On appeal, Division Four of our court rejected the

defendant's arguments that these facts were insufficient to support the jury's guilty verdict under section 245, subdivision (a)(4). (*Id*. at pp. 1065-1066.) As Division Four correctly noted, the crime prohibited by section 245, subdivision (a)(4), is an assault by means of force "likely" to produce great bodily injury, and the evidence supported a finding that such force was used by the defendant.

We see no material difference between the assault in *Armstrong* and the assault committed by Valdez. This was not a case of a simple slap, or a slap followed by only one or two weak punches. Valdez knocked his victim off of a chair onto the ground, then proceeded to punch her multiple times in the head and torso, causing her to see "black" and suffer dizziness. Under any reasonable perspective, this was an assault by means of force "likely" to produce great bodily injury.

II. The 17(b) Motion Was Properly Denied

Valdez contends the trial court should have granted his pre-verdict motion pursuant to section 17(b) to reduce the charged aggravated assault to a misdemeanor charge. We disagree.

Section 17(b) grants a trial court broad discretion at sentencing to reduce a felony verdict on a charged "wobbler" offense to its misdemeanor relative. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 976-977; *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1457.) In deciding whether to grant such a reduction, the court may consider such factors as " 'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' " (*Alvarez, supra*, 14 Cal.4th at p. 978.) A court may also

be guided by general sentencing objectives, such as protecting society, punishing the defendant, deterring future crime, securing restitution, and achieving uniformity in sentencing. (*Ibid.*) A reviewing court may not disturb the trial court's ruling on a 17(b) motion unless the trial court's decision was "irrational or arbitrary." (*People v. Sy* (2014) 223 Cal.App.4th 44, 66.)

Here, the trial court did not act irrationally or arbitrarily in declining to reduce the charged aggravated assault to a misdemeanor given the court's accurate perspective of the violent nature of Valdez's assault. Ferreire was vulnerable in that she was 96 pounds and five feet, two inches tall, and was standing on a chair in high heels when the assault began, whereas Valdez unquestionably held the strength advantage, weighing around 250 pounds and standing roughly six feet tall. Further, after Valdez knocked Ferreire to the ground, he did not stop his violence. He followed her to the wall in front of the residence and knocked her again to the ground, punching her multiple times during the course of the attack. And, even though actual infliction of injury is not required for the crime of assault with means of force likely to produce great bodily injury, the trial court noted that Ferreire did suffer injuries in the attack, including ongoing headaches that continued through the time of trial. Given the totality of the circumstances, we cannot find that decision to deny the section 17(b) motion was irrational or arbitrary.

Valdez's reliance on *Alvarez* is not persuasive. In *Alvarez*, a court of appeal granted the prosecution's petition for a peremptory writ of mandate and directed a trial court to vacate its order, issued at the time of sentencing, reducing the defendant's felony drug offense conviction to a misdemeanor.

The Supreme Court reversed the court of appeal's judgment, finding the trial court had not abused its discretion in reducing the defendant's conviction to a misdemeanor. *Alvarez* is not helpful to Valdez. The major principle to take away from *Alvarez* is that a trial court has broad discretion in determining whether to reduce a felony to a misdemeanor. In Valdez's case, the reasonable exercise of that discretion cuts against finding error in the trial court's decision not to reduce his felony assault conviction to a misdemeanor.

We are not persuaded by Valdez's argument that the trial court abused its discretion in light of the facts that he had no prior felony conviction, was educated, was diagnosed with bipolar disorder in 2005, and because the trial evidence did not show that he assaulted Ferreire with force likely to cause great bodily injury. First, as we explained above, we find the evidence did show that Valdez committed an assault by means of force likely to produce great bodily injury. Second, at the time during trial when the court ruled on Valdez's section 17(b) motion, the court only had the evidence presented at trial. The facts about Valdez that he now cites on appeal were not presented until the time of his sentencing. The trial court cannot be held accountable for abusing its discretion in failing to consider matters that were not before the court at the time it ruled. Third, we note that Valdez did not renew his motion for section 17(b) relief at the time of sentencing, and, further, note that, had he renewed his motion at sentencing, the trial court had before it at that time a diagnostic study opining that Valdez posed a danger to the community in that he stated that he did not regret his unprovoked attack on Ferreire. Fourth, we perceive little relevance in Valdez's alleged graduate education attainments in the *Alvarez* analysis.

A person's educational background does not assuage the nature and circumstances of an offense, nor does it show in and of itself a defendant's appreciation of and attitude toward an offense, or his or her character traits as evidenced by his or her behavior and demeanor at trial. (*Alvarez, supra*, 14 Cal.4th at p. 978.) Valdez's mental illness does not tip the scales toward finding an abuse of discretion in declining to reduce his felony assault to a misdemeanor.

For all of the reasons discussed above, we cannot find irrationality, i.e., an abuse of discretion, and, will not disturb the trial court's ruling.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.