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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. CHAYYA KIM, Defendant and Appellant.	2d Crim. No. B235148 (Super. Ct. No. 2011007631) (Ventura County)

Chayya Kim appeals the judgment entered after a jury convicted him of assault with a deadly weapon and force likely to cause great bodily injury (Pen. Code,[1] § 245, subd. (a)(1)). The trial court sentenced him to four years in state prison. Appellant contends (1) the court erred in denying his request to instruct the jury on simple assault; (2) the court abused its discretion in admitting evidence of his prior conviction for purposes of impeachment; and (3) the former statutory limitation on presentence custody credits for inmates convicted of serious felonies violates equal protection. We affirm.

[1] All further undesignated statutory references are to the Penal Code.

STATEMENT OF FACTS

On the night of January 21, 2001, Mark Jones was working as the head of security at the Borderline Bar and Grill (Borderline) in Thousand Oaks. Approximately 350 people came to Borderline that night to watch several hip-hop acts perform. At approximately 1:45 a.m., Jones and other security employees began telling people that it was closing time. No one wanted to leave, however, and "things started getting a little bit crazy." Jones approached two men who were blocking the stairwell to the front door and told them it was time to leave. After receiving no response, Jones tapped one of the men, later identified as appellant, on the shoulder. Jones, who was wearing a red shirt with the word "security" on it, identified himself to appellant as security and stated that the bar was closing. When Jones reiterated that it was time to leave, appellant turned around, flung his arm at Jones, and said, "if you don't take your hands off me, I'm fucking gonna kill you."

The man with appellant told Jones that he would get appellant to leave, and Jones replied that they had two minutes to exit the premises. When appellant reached the front counter, he picked up a beer bottle that was sitting on it and threw it into the crowd of people below. As Jones headed up the stairs towards appellant, he saw him pick up a glass from the front counter. Jones grabbed appellant's arm and tried to take the glass from him. Jones also attempted to place appellant in a headlock and move him away from the crowd. After Jones was unable to retrieve the glass, he tried to pin appellant up against the wall. Appellant again told Jones, "if [you] don't let [me] go, [I'll] fucking kill [you.]"

Appellant continued yelling at Jones to let him go. When Jones did not do so, appellant hit him over the head with the glass, causing it to shatter. Jones collapsed to the ground and grabbed the top of his head as appellant started punching and kicking him. Jones also saw appellant swinging another object toward his head as he continued to punch and kick him.

Borderline employees Matthew Tilley and Jeff Rock both saw appellant hit Jones over the head with the glass.[2] Tilley identified the type of glass appellant used as "extremely thick" and noted that he had "seen people drop these on the floor, and they're not breaking." Rock, who was working as a security employee that night, intervened after he observed the attack and placed appellant in a chokehold. When appellant's companion placed his hand on Rock, Rock released the chokehold and appellant ran away. Jones was transported to the hospital for injuries to his head, which required stapling and stitches.

Appellant testified in his defense. He was one of the acts who performed at Borderline on the night of the incident. He performed sometime around midnight and his set lasted approximately 15 minutes. He consumed one beer prior to his performance and one mixed cocktail afterward. As he was walking around and socializing, he heard a lot of commotion near the front entrance and went to assist a fellow performer who was trying to get the crowd to calm down. It seemed as if a fight was about to break out, so he decided to get his pregnant sister-in-law away from the crowd. As he was doing so, someone threw a glass that hit his sister-in-law in the back. Appellant pushed her aside, ran over to see who had thrown the glass, and reached for a beer bottle. He tried to throw the bottle at the crowd, but it slipped out of his hand. He then picked up a glass and was about to throw it when Jones grabbed him and placed him in a headlock, which caused the glass to slip out of his hand. Appellant grabbed Jones by the arm, then heard the sound of shattering glass as Jones loosened his grasp. Appellant turned around and punched Jones three or four times before Rock pulled him away. It was at that point that appellant realized he was in an altercation with security. Other people surrounded Jones and began kicking and punching him.

When appellant was interviewed by the police following his arrest, he denied being involved in any altercation at Borderline on the night in question. In his

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[2] Portions of the incident were captured on Borderline's surveillance video, and those recordings were played for the jury. Although the recordings show appellant pick up the glass, they do not show him using it to assault Jones.

testimony at trial, he claimed he had denied any knowledge of the incident because he was scared and wanted an attorney. When appellant was interviewed, however, he was fully advised of his rights yet never requested an attorney.[3] During his testimony, appellant also admitted he has a prior felony conviction for having a concealed firearm in his vehicle, in violation of former section 12025, subdivision (a)(1), now section 25400, subdivision (a)(1).

DISCUSSION

I.

Failure to Instruct on Simple Assault

Appellant contends the court erred in denying his request to instruct the jury on simple assault as a lesser included offense of the charged crime of assault with a deadly weapon and force likely to create great bodily injury. We conclude that the instruction was properly refused.

"A trial court must instruct on a lesser included offense if substantial evidence exists indicating that the defendant is guilty only of the lesser offense. [Citation.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) "An offense is necessarily included in a greater offense when, for present purposes, under the statutory definition of the offenses the greater offense cannot be committed without necessarily committing the lesser. [Citations.]" (*People v. Basuta* (2001) 94 Cal.App.4th 370, 392.) A lesser included instruction need not be given, however, "[w]hen there is no evidence the offense committed was less than that charged . . . ." (*People v. Booker* (2011) 51 Cal.4th 141, 181.) In other words, instructions on a lesser included offense must be given only when there is "evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser. [Citations.]" (*People v. Blair* (2005) 36 Cal.4th 686, 745.) On appeal, we apply a de novo standard of review and independently determine whether an instruction on the lesser included offense was properly refused. (*Manriquez, supra*, at p. 584.)

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[3] A recording of appellant's police interview was played for the jury.

Simple assault is defined as "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 aggravated assault, which for present purposes includes both assault with a deadly weapon and assault with force likely to produce great bodily injury. (§ 245; *People v. McDaniel* (2008) 159 Cal.App.4th 736, 747.)

An object that is not deadly per se, such as a drinking glass, nevertheless qualifies as a deadly weapon for purposes of section 245 when it is "used in such a manner as to be capable of producing and likely to produce[] death or great bodily injury." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) Appellant was charged with and found guilty of violating section 245 on the theory that he hit Jones over the head with a bar glass. He does not dispute that the evidence is sufficient to support the jury's verdict. (See, e.g., *People v. McWilliams* (1948) 87 Cal.App.2d 550, 551, disapproved on other grounds in *In re Wright* (1967) 65 Cal.2d 650, 654-655, fn. 3 [defendant convicted of assault with a deadly weapon for "throwing a heavy water glass which struck the [victim] in the face"].) He claims, however, that he was entitled to an instruction on the lesser included offense of simple assault because the testimony offered to prove the charge "was contradictory and confusing." According to appellant, the jury "could have found that, given the conflicting testimony and the chaos surrounding the altercation, doubt remained as to whether appellant was the person who hit Jones with the glass." He further contends that the evidence of his threat to kill Jones, considered in conjunction with the other evidence, "could have led the jury to conclude that [he] was guilty of simple assault." In his reply brief, he reiterates that "substantial evidence was introduced which established that appellant engaged in a physical struggle with Jones while verbally threatening him and thereby committed at least the lesser included offense of simple assault."

We are not persuaded. Appellant was charged with committing aggravated assault based solely on the allegation that he had hit Jones over the head with a bar glass. As the court correctly concluded, giving the simple assault instruction would "be confusing to the jury" in this context. The court explained: "Although assault is a lesser-

included offense, or can be a lesser-included offense, I don't find that it is under the circumstances of this case given the defendant's testimony that he did not, even with general criminal intent, strike the security guard with the glass. And since the People are not pursuing a further action, I'm not going to give simple assault. [¶] Now, if that changes by way of argument and you'd like me to reconsider if [the prosecutor] opens the door or the defense opens the door, and you want to readdress the issue of whether or not the jury should be instructed on the lesser, I will consider that. But assuming that everyone argues that what we're talking about is a hit on the head with the glass object, causing Mr. Jones to fall to the ground, that's the extent of the criminal act that has been charged against the defendant. [¶] With that understanding, coupled with the defendant's testimony, I deny the request for a lesser included of simple assault."

The court's reasoning is sound. The only issue presented to the jury was whether appellant intended to hit Jones over the head with the glass.[4] If so, he was guilty of aggravated assault. Whether appellant may have committed a lesser assault on Jones at some point during the course of the altercation was irrelevant to the jury's determination. If, as appellant contends, the jury had reason to entertain a reasonable doubt as to whether he was the individual who hit Jones with the glass, any such doubt would have resulted in an acquittal. Although the prosecution could have brought additional charges against appellant based on what he did before and after he broke the glass over Jones's head, it elected not to do so. Because there was no theory presented to the jury upon which it could have found that appellant was guilty of only simple assault,

[4] At the beginning of his closing statement, the prosecutor made clear that appellant was being prosecuted solely on the theory that he had hit Jones over the head with a glass. Defense counsel's closing argument similarly made clear that "we're just talking about whether Mr. Jones was hit with the glass, and that caused his great bodily injury, and [appellant] did not do that." Counsel thereafter continued to emphasize that appellant could be found guilty of the charged crime only if the evidence showed beyond a reasonable doubt that he had hit Jones in the head with the glass.

instructions on that offense were neither necessary nor proper. (*People v. Booker, supra,* 51 Cal.4th at p. 181.)[5]

In any event, any error in failing to instruct on simple assault was harmless. Although appellant correctly notes the jury declined to find that he had personally inflicted great bodily injury on Jones within the meaning of section 12022.7, the jury may have simply concluded, as appellant himself suggests, that Jones's injuries were incurred at some other point during the ensuing melee.[6] In reviewing for prejudice, the issue is whether it is reasonably probable that the jury would have convicted appellant of only simple assault had it been instructed to that effect. (*People v. Breverman, supra,* 19 Cal.4th at p. 178 [in noncapital cases, error in failing to instruct on lesser included offenses is reviewed for prejudice under standard of review enunciated in *People v. Watson* (1956) 46 Cal.2d 818].) Given the specific and limited theory of appellant's guilt, and the persuasive evidence offered in support thereof, no reasonable jury would have so found.

II.

Impeachment Evidence

Appellant asserts that the court abused its discretion in admitting for impeachment purposes his prior conviction for having a concealed firearm in a vehicle. He claims the evidence should have been excluded under Evidence Code section 352

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[5] The cases appellant cites in support of his claim are all inapposite. (*People v. Breverman* (1998) 19 Cal.4th 142, 152-153 [jury could have found defendant guilty of voluntary manslaughter as a lesser included offense of first degree murder]; *People v. Saldana* (1984) 157 Cal.App.3d 443, 455-456 [conflicting circumstantial evidence could have supported finding that defendant was guilty of simple possession of heroin as a lesser included offense of possessing heroin for sale]; *People v. Baker* (1999) 74 Cal.App.4th 243, 251-252 [conflicting evidence whether defendant unlawfully entered residence with intent to commit simple assault instead of assault with a deadly weapon compelled lesser included instructions to that effect].) As we have explained, here there was no evidence from which the jury could have found appellant was guilty of simple assault but not guilty of aggravated assault.

[6] For the first time in his reply brief, appellant contends the jury could have found that "if appellant did hit Jones with the glass, he did not do so in a manner as to make the glass a deadly weapon." Assuming that appellant can raise this theory for the first time in his reply brief, suffice to say that no reasonable juror would have made such a finding.

because its probative value was substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice. We disagree.

Evidence Code sections 788 and 352 "provide discretion to the trial judge to exclude evidence of prior felony convictions when their probative value on credibility is outweighed by the risk of undue prejudice." (*People v. Muldrow* (1988) 202 Cal.App.3d 636, 644, citing *People v. Beagle* (1972) 6 Cal.3d 441, 453, superseded by statute on other grounds, as stated in *People v. Rogers* (1985) 173 Cal.App.3d 205, 208.) In ruling on the admissibility of evidence of prior felony convictions for purposes of impeachment, the trial court should consider: "(1) Whether the prior conviction reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of a prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions." (*Muldrow, supra,* at p. 644, citing *Beagle, supra,* at p. 453.) Such factors, however, need not be rigidly followed. (*Beagle, supra,* at p. 453.) We review the court's ruling in this regard for an abuse of discretion. (*People v. Mendoza* (2007) 42 Cal.4th 686, 699.)

The court did not abuse its discretion in admitting appellant's prior conviction in accordance with Evidence Code section 352. Appellant's conviction for having a concealed firearm is a crime of moral turpitude. (*People v. Robinson* (2005) 37 Cal.4th 592, 624, 626.) The conviction occurred in 2008, less than three years prior to the charged crime. Moreover, the crime of which he was previously convicted bears no similarity to the instant offense. Finally, the prior conviction did not prevent appellant from testifying.

Although appellant argues that his prior conviction showed his predisposition for violence, the jury was instructed that the prior conviction could only be used for purposes of assessing appellant's credibility. We presume the jury followed this instruction. (*People v. Osband* (1996) 13 Cal.4th 622, 714.) As the People note, the prosecutor's closing argument reminded the jury of the limited purpose for which the prior conviction had been admitted. Because each of the *Beagle* factors weighs in favor

of the court's decision to admit the prior conviction, there was no abuse of discretion. Moreover, any error would also be harmless. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *People v. Castro* (1985) 38 Cal.3d 301, 319.)

III.

Presentence Custody Credits

Under the statutory scheme in effect when appellant was sentenced, inmates required to register as sex offenders, committed for a serious felony, or with a prior serious felony conviction were entitled to two days of presentence conduct credit for every four days in actual custody. (Former §§ 2933, subd. (e)(3), 4019, subds. (b), (c) & (f).) Appellant, who was committed for a serious felony, was accordingly awarded 81 days conduct credit for his 163 days in actual custody, for a total of 244 days presentence custody credit. If appellant had not been convicted of a serious felony, he would have been entitled to "one-for-one" conduct credits, i.e., one day of conduct credit for each day actually served. (Former § 2933, subd. (e)(1).)[7]

Appellant contends that the limitation on presentence custody credits for inmates such as him who are convicted of a serious felony amounts to a violation of his state and federal rights to equal protection. Although courts have consistently rejected the argument that the disparate application of presentence and postsentence conduct credit violates equal protection (e.g., *People v. DeVore* (1990) 218 Cal.App.3d 1316, 1319; *People v. Poole* (1985) 168 Cal.App.3d 516, 524-526; *People v. Ross* (1985) 165 Cal.App.3d 368, 377), appellant claims these cases are no longer useful because they were based on the fact that postsentence conduct credits must be earned, while presentence credits are automatic. According to appellant, postsentence conduct credits are now effectively "automatic" as well because they cannot be denied to prisoners who are willing to work but lack the opportunity to do so. He asserts that the issue is therefore

[7] After appellant was sentenced, the Legislature deleted the provision limiting custody credits for inmates required to register as sex offenders, committed for a serious felony, or with a prior serious felony conviction. (§§ 2933, 4019; Assem. Bill No. 17 (2011-2012 1st Ex. Sess.) ch. 12, § 1.) Appellant concedes that this change in the law does not apply to him because he was convicted of a crime committed before October 1, 2011. (§ 4019, subd. (h).)

governed by *People v. Sage* (1980) 26 Cal.3d 498, in which the Supreme Court concluded there was no rational basis for section 4019 to award presentence conduct credits to defendants ultimately convicted of misdemeanors, and yet deny them to defendants ultimately convicted of felonies. (*Id.* at pp. 507-508.)

We are not persuaded. Subdivision (c) of section 2933 plainly and unequivocally provides that postsentence conduct credits are "a privilege, not a right" and "must be earned." Moreover, the cases finding no equal protection violation in this context are based not only on the fact that postsentence conduct credits must be earned, but also because "the state's interest in rehabilitation and the difficulty in establishing prison-style work programs in county jails justify the disparate application of presentence and postsentence work credits." (*People v. DeVore, supra*, 218 Cal.App.3d at p. 1320, citing *People v. Waterman* (1986) 42 Cal.3d 565, 570; see also *People v. Buckhalter* (2001) 26 Cal.4th 20, 36 ["the pre and postsentence credit systems serve disparate goals and target persons who are not similarly situated"].) "The legislative justification for this differential treatment of prisoners cannot be summarily rejected here, as it was in *Sage*, because the factors do not apply to misdemeanants here." (*DeVore*, at p. 1320.) Because the denial of additional presentence custody credit for serious felons does not violate equal protection, appellant is only entitled to the credits he was actually awarded.

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Patricia M. Murphy, Judge

Superior Court County of Ventura

Linda L. Currey, under appointment by the Court of Appeal, for Defendant and Appellant.

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