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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LEWIS READER, Defendant and Appellant.	B230715 (Los Angeles County Super. Ct. No. SA073552)

Appeal from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed as modified.

David L. Annicchiarico, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Lewis Reader appeals from a judgment of conviction after a jury trial. The jury found defendant guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] in count 1. Defendant was found not guilty of battery with serious bodily injury (§ 243, subd. (d)) in count 2, but he was convicted of the lesser included offense of misdemeanor battery (§ 242).[2] The jury found not true the allegation in count 1 that defendant personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)).[3]

The trial court sentenced defendant to state prison for the upper term of four years on count 1, with execution of the sentence suspended, and placed defendant on probation for 60 months. The court also imposed various terms and conditions of probation. On count 2, the court stayed the sentence pursuant to section 654 and placed defendant on five years of summary probation.

On appeal, defendant contends that the evidence is insufficient to support the conviction of assault with a deadly weapon, the conviction of simple assault in count 2 violates his due process rights, and several probation conditions imposed by the trial court are vague and overbroad in violation of his due process rights. We agree that, if the jury found defendant guilty of misdemeanor assault in count 2, the finding must be vacated. In addition, two probation conditions involving contact with drug users or sellers must be modified to include a knowledge requirement. In all other respects, we affirm the judgment.

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

[2] The record is ambiguous whether the jury also found defendant guilty of misdemeanor assault in count 2.

[3] The information jointly charged codefendants Jefferson Hull and Crispin Barrymore (Barrymore) in counts 1 and 2. Barrymore was additionally charged with possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a).) Barrymore ultimately pled guilty to the charges. Defendant and Hull were tried together. Hull and Barrymore are not parties to this appeal.

FACTS

A. *Prosecution*

Sometime in the summer of 2009, Barrymore met Jeffrey Barthold (Barthold) on the Venice Beach boardwalk. Barthold is a drummer. The two men went to Barthold's apartment and played music together. Barthold was not doing well financially, and Barrymore offered to let Barthold live in his garage, which had been converted into a music studio. Barthold was supposed to clean Barrymore's property.

In the following months, Barthold had some disagreements with Barrymore and Barrymore's girlfriend,[4] who began sleeping over at the main house. Barrymore asked Barthold to move out at least three times. Barrymore eventually filed an unlawful detainer action, and Barthold was given a three-day notice to quit, but Barthold still did not move out.

On February 6, 2010, at about 1:00 a.m., Barthold was playing his drums in the studio when he heard a knock on the door. Defendant was at the door and said he was an electrician and that Barrymore had asked him to come by to do electrical work. Even though it was late at night, Barthold did not find it to be unusual because the studio had serious electrical problems, and Barrymore lived an eccentric lifestyle. Barthold told defendant that he had to check with Barrymore before he could let defendant do any work.

Barthold went to the main house to look for Barrymore. He found Barrymore standing outside the front door talking to a man wearing a Halloween mask. Barrymore confirmed that he had asked defendant to do electrical work. Barthold returned to the studio, told defendant that he could proceed with the work, and then went back to playing his drums.

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[4] The girlfriend's father is defendant.

Sometime later, the lights in the studio went off. Barthold then heard a loud bang on the door like someone was trying to break it down, but a door chain stopped the door from opening. Barthold heard two or three men yelling, "You're leaving tonight," "You've stayed too long," and telling him to get out. He saw defendant, codefendant Jefferson Hull (Hull), a third man—later identified as James Scott (Scott)—and a pit bull outside the door. The men were trying to use a lead pipe, baseball bat, and/or ax handle to pry the door open. Thinking he might escape if the men came crashing inside, Barthold stepped away from the door to let the men in.

Defendant fell in first and Barthold knocked him out of the way. Hull, who came through the door second, "poked" Barthold on the side with a stick or "something blunt." Scott then hit him in the head with a stick or pipe, knocking him backwards. Barthold felt blood running down his head. Barthold saw that each of the men "had something" in his hands, and one of the objects was "definitely a long lead pipe."

Barthold managed to escape. He saw Barrymore "watching the whole thing happening" from inside the main house. Barthold ran out to the street and flagged down a police car. A police officer saw Barthold "covered in blood." Barthold was treated by paramedics at the scene for wounds or lacerations on his head. He told the police that he believed Barrymore had hired the men to get him off the property.

During the subsequent investigation, the police found "a bunch of sticks, poles, [and] a lot of things that could have been used in the incident" just outside the front door of the studio. Inside the studio was a seven-foot lead pipe.

Barthold suffered from vision problems and headaches as a result of the assault.

Barrymore[5] testified that he knew defendant, Hull and Scott, and he had complained to defendant about Barthold squatting on his property. Additionally, at his girlfriend's request, Barrymore had allowed Robert Simpers (Simpers) to move into his

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[5] Barrymore was required to testify for the prosecution under the terms of his plea agreement, which also included participation in a year-long, live-in substance abuse program.

house to "mak[e] it uncomfortable for Jeff Barthold to live there." Barrymore had Simpers serve Barthold with the three-day notice to quit.

On the night of the incident, defendant came to Barrymore's house to fix the electrical problems, although Barrymore had not requested that the work be done that evening. Shortly after defendant's arrival, Hull and Scott came to Barrymore's house with a pit bull. Simpers asked Barrymore what he should do. Barrymore knew that defendant was unhappy with Simpers and would be upset if he knew that Simpers was staying with Barrymore, so Barrymore told Simpers to go to his room.

Barrymore discussed with defendant the electrical work. During the conversation, Barrymore got the impression that the men were there to evict Barthold. Barrymore told defendant not to forcibly remove Barthold that night and to wait at least until the next morning.

Sometime later, Scott told Barrymore that "they would be taking care of business" and "how many people [they were] going to have to beat up." Scott asked whether Simpers was in the back house with Barthold. Barrymore said that Simpers was in his bedroom. Defendant and Hull were present while Barrymore and Scott "were discussing where Rob Simpers was and how many people would he have to deal with."

At some point, defendant told Barrymore that he was going to shut off the electricity to both the studio and the main house. After the electricity was shut off, Barrymore saw the three men head toward the backyard. The power went off and Barrymore heard "thuds" and "bangs" "like there was some sort of altercation going on." Barrymore sat in the dark while this happened "because [he] didn't want to have anything to do with what was going on."

Defendant, Scott and Hull returned to the house, but Scott left shortly thereafter. Barrymore, defendant and Hull went upstairs. Defendant ordered Barrymore not to warn Simpers about what had happened. About 40 minutes later, the police knocked on the door, and Simpers answered. The police called for Barrymore, and he came downstairs and went with them.

Barrymore denied that he had any agreement to compensate the men for removing Barthold, although he believed the men expected something in return, possibly drugs.

B. *Defense*

Defendant testified in his own defense. According to defendant, Barrymore told him at the end of December that he was having electrical problems. Barrymore gave him a hundred dollars cash and a check for $185 and asked him to come over and fix the problems. Defendant went to the bathroom when he arrived at Barrymore's house and could not find Barrymore when he came out. He walked back to the studio and saw Barthold. Defendant introduced himself as an electrician and asked Barthold where Barrymore was. Barthold went to find Barrymore and defendant looked at the electrical panel.

At some point, Hull agreed to help defendant replace outlet covers that he had removed while investigating the electrical problem. The power went out as they were putting things back in place. Defendant heard people "thumping around, [and] people tripping." Defendant heard Barrymore say something had happened and he was going outside to talk to the police. Defendant stayed inside because there was methamphetamine paraphernalia all over the bedroom where he was sitting, and he did not want to be blamed for it. Twenty minutes later, the police arrested defendant.

DISCUSSION

A. *Sufficiency of the Evidence of Assault with a Deadly Weapon*

"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.) Viewed in the light most favorable to the prosecution, substantial evidence supports the conviction for assault with a deadly weapon.

Defendant contends that while there was sufficient evidence that he participated in an assault, he was not the person who struck Barthold on the head with a blunt object. However, defendant's conviction is not dependent upon his having been the person who struck Barthold on the head. Assault is an unlawful attempt, coupled with the present ability, to commit a battery on another, i.e., to use force or violence upon another's person. (*People v. Rocha* (1971) 3 Cal.3d 893, 899.) The assault need not actually produce injury. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.)

Barthold testified that all three men who crashed into his home held objects, and his testimony was that all three men attacked him with objects used as weapons. When asked if only one of the individuals inflicted the strikes, Barthold responded, "Oh, no. No. They were, all three of them."

Los Angeles Police Detective Maricela Huerta indicated she disbelieved Barthold's speculation that the men used a long lead pipe against him. When Barthold went to the residence the day after the assault to collect his belongings, he noticed a pipe he had never seen before. When Detective Huerta later visited the crime scene, she found a lead pipe that she estimated to be probably just under seven feet long. She also testified

that she found "a bunch of sticks, poles, just a lot of things that could have been used . . . in the incident . . . ."

The evidence was sufficient to sustain defendant's conviction of assault with a deadly weapon, even without evidence that defendant struck a blow to Barthold's head.

B. *Conviction of Simple Battery*

Defendant contends that his conviction for simple assault must be reversed because it is a lesser included offense of both assault with a deadly weapon and battery. In making this argument, defendant states that the record contains a verdict for simple assault in count 2.[6]

Defendant is correct that simple assault is a lesser included offense of both assault with a deadly weapon and battery. Simple assault is a lesser included offense of both crimes because neither battery nor assault with a deadly weapon can be committed without the defendant necessarily also being guilty of simple assault. (*People v. Ortega* (1998) 19 Cal.4th 686, 692; *People v. Colantuono* (1994) 7 Cal.4th 206, 216-217 ["'An assault is a necessary element of battery, and it is impossible to commit battery without assaulting the victim.'"]; *In re Brandon T.* (2011) 191 Cal.App.4th 1491, 1498 [simple assault is lesser included offense of assault with deadly weapon].)

While the record is somewhat unclear if there was a finding of guilt on simple assault, both parties agree that any such finding should be stricken, and judgment of conviction and sentence on the simple assault in count 2 should be stricken.

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[6] As to count 2, the minute order for the sentencing hearing set forth both the statute on simple assault (§ 240) and the statute on simple battery (§ 242). It stated in part, "Sentence as to count 2 ([§] 240 . . .) is ordered stayed . . . . [¶] The following sentence is imposed pursuant to conviction in [§] 242 . . . lesser included offense: [¶] The defendant is placed on 5 years['] summary probation."

C. *Probation Conditions*

Defendant requests the modification or striking of four of his probation conditions as unconstitutionally vague and overbroad: (1) not owning, using or possessing "any dangerous or deadly weapons, including any firearms, knives or other weapons"; (2) not using or possessing "any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription"; (3) "stay[ing] away from places where users or sellers congregate"; and (4) not associating "with drug users or sellers unless attending a drug treatment program."

Initially, the People contend that defendant has forfeited his challenge to the probation conditions when defendant stated at the sentencing hearing that he understood and accepted the probation terms imposed on him. We disagree.

A "[d]efendant's ultimate acceptance of the conditions of probation does not preclude him from challenging them on appeal: '"[I]t is established that if a defendant accepts probation, he may seek relief from the restraint of an allegedly invalid condition of probation on appeal from the order granting probation."' (*People v. Penoli* (1996) 46 Cal.App.4th 298, 302, fn. 2 . . . .)" (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355, fn. 1; accord, *In re Sheena K.* (2007) 40 Cal.4th 875, 888-889.)

1. Ban on Weapons and Drugs

The minute order from defendant's sentencing imposes the condition that he "not own, use or possess any dangerous or deadly weapons, including any firearms, knives or other weapons." The court orally imposed the following condition at sentencing: "You are not to own, use, threaten to use, possess, buy or sell any deadly or dangerous weapons, including but not limited to firearms[,] knives or other weapons."

The condition concerning drugs that is challenged states, "Do not use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription . . . ."[7]

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.'" (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) "A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.] A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Ibid*.) If a reviewing court concludes on the merits that a probation condition is unconstitutionally vague and/or overbroad in its literal wording, the reviewing court may modify the condition so as to render it constitutionally sound. (*Id*. at pp. 878, 892.)

Defendant argues that the weapons and drugs probation conditions are unconstitutionally vague and overbroad because they lack an express knowledge requirement. Defendant relies in part on *Sheena K.* In *Sheena K.*, the minor was convicted of misdemeanor battery and was adjudicated a ward of the juvenile court. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 878.) In its disposition, the juvenile court ordered that the defendant be placed on probation subject to various terms and conditions, "including that she 'not associate with anyone disapproved of by probation.'" (*Ibid*.) The Court of Appeal concluded that "the condition that [the] defendant not associate with anyone 'disapproved of by probation' was both vague and overbroad because the juvenile court did not require that in order to be in violation, [the] defendant must know which persons were disapproved of by the probation officer." (*Id*. at p. 890.) The Supreme

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[7] At the sentencing hearing, the trial court told defendant, "You are not to own, use, possess, buy or sell any narcotics, dangerous or restricted drugs or associated paraphernalia except with a valid prescription."

Court agreed with the rationale of the Court of Appeal. (*Id*. at pp. 891-892.) In the instant case, the probation conditions differ from the challenged conditions in *Sheena K.*

We find that the probation term is sufficiently clear concerning the drug condition. The term in the drug condition, "without a valid prescription" after the word "paraphernalia," provides sufficient notice as to what narcotics and controlled substances defendant may use and possess without violating probation. The weapons condition requires a more extensive analysis.

In support of his contention that the weapons probation condition is vague and overbroad, defendant relies on *People v. Freitas* (2009) 179 Cal.App.4th 747. In *Freitas*, the defendant was convicted of grand theft. (*Id*. at p. 749.) He was placed on probation with various terms, including that he "'[n]ot own, possess or have custody or control of any firearms or ammunition,'" or "'possess stolen property.'" (*Id*. at p. 750, fn. omitted.) He argued that the probation condition was overbroad, in that it did not contain a knowledge requirement, with the result that he could be found in violation of probation if he merely borrowed a car which, unknown to him, had a gun in the trunk. (*Id*. at p. 752.) The People responded that, under those circumstances, there would be no violation "because the language of the probation condition tracks the language of section 12021 (prohibiting felons from possessing guns), and section 12021 contains no express knowledge requirement, yet has been held to contain an implied general intent requirement which may be satisfied by proof of knowledge. [Citation.]" (*Ibid*., fn. omitted.)

The court concluded that "[a] requirement of knowledge should be read into the probation condition," in that "the law has no interest in punishing an innocent citizen who has no knowledge of the presence of a firearm or ammunition." (*People v. Freitas, supra*, 179 Cal.App.4th at p. 752.) The court therefore agreed with the defendant that it was appropriate to modify the probation condition to specify that he was not to knowingly possess firearms or ammunition. (*Ibid*.)

The People rely on the case of *People v. Kim* (2011) 193 Cal.App.4th 836 for the proposition that the weapons condition is not vague or overbroad. In *Kim*, the defendant

pleaded no contest to felony battery causing serious bodily injury. At sentencing, the trial court imposed various terms and conditions of probation including that the defendant "'not own, possess, have within your custody or control any firearm or ammunition for the rest of your life under Section[s] 12021 and 12316[, subdivision] (b)(1) . . . .'" (*Kim, supra,* at p. 840.) The defendant contended that the no firearms condition imposed by the trial court did "'not satisfy the due process concept of fair warning.'" (*Id*. at p. 843.) He contended that "'[t]he absence of a knowledge requirement subject[ed] him to unfair risk that his probation could be revoked for unknowingly transporting a gun or ammunition by driving a car in which a friend ha[d] ammunition in a bag or purse, unbeknownst to [him].'" (*Ibid*.) The Court of Appeal upheld the probation condition, holding that it contained an implicit knowledge requirement and that this requirement was appropriate. (*Id*. at pp. 840, 847.) In approving the probation condition, the court explicitly rejected *People v. Freitas*, *supra*, 179 Cal.App.4th 747. (*Kim*, *supra*, at pp. 846-847.)

The court agreed that "[p]robation conditions must be narrowly tailored to avoid infringing on a probationer's constitutional rights, but as the *Freitas* court correctly pointed out, a convicted felon has no constitutional right to bear arms. [Citation.] The Second Amendment should not be understood 'to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . .' [Citations.]" (*People v. Kim*, *supra*, 193 Cal.App.4th at p. 847.) Ruling that no constitutional right was at stake, the *Kim* court stated "that the conduct proscribed by sections 12021 and 12316 is coextensive with that prohibited by a probation condition specifically implementing those statutes. As the statutes include an implicit knowledge requirement, the probation condition need not be modified to add an explicit knowledge requirement." (*Kim*, *supra,* at p. 847.)

In the instant case, the probation condition prohibiting defendant from possessing dangerous or deadly weapons does not make explicit reference to any statutes, distinguishing it from that in *Kim*. Nevertheless, "because the language of the probation condition tracks the language of section 12021 (prohibiting felons from possessing guns), and section 12021 contains no express knowledge requirement, yet has been held to contain an implied general intent requirement which may be satisfied by proof of

knowledge," (*People v. Freitas*, *supra*, 179 Cal.App.4th at p. 752, fn. omitted), we agree with *Kim* that it is not necessary for an express knowledge requirement to be included in the probation condition; the requirement is implicit.

2. Contact with Drug Users or Sellers

The third and fourth probation conditions that defendant challenges concern contact with drug users and sellers. As stated in the minute order, the third condition provides, "stay away from places where users or sellers congregate," and the fourth condition provides, "Do not associate with drug users or sellers unless attending a drug treatment program."[8]

The conditions are unconstitutionally vague unless they include a knowledge requirement, i.e., that defendant stay away from places where he knows users congregate. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 891; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816.) Thus, "modification to impose an explicit knowledge requirement is necessary to render the condition[s] constitutional." (*In re Sheena K.*, *supra*, at p. 892; *In re Justin S.*, *supra*, at p. 816.)

The problem with the probation condition concerning staying away from places where users or sellers congregate is that it does not contain a requirement that defendant know or should know that the prohibited locations are where drug users or sellers congregate. To prevent being overbroad, the condition may be modified to state that defendant "stay away from places where defendant knows or should know that users or sellers congregate."

The probation condition concerning not associating with drug users or sellers is in the minute order. The oral pronouncement includes a knowledge requirement while the minute order condition does not. While the oral pronouncement of judgment is

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[8] At the sentencing hearing, the trial court told defendant, "And stay away from places where users, buyers or sellers get together. Do not associate with people known by you to be narcotic or drug users or sellers except in an authorized drug counseling program."

controlling, an accurate minute order is necessary "'to furnish a concise record'" of what occurred at the hearing if necessary for future reference. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 386.) The minute order thus must be corrected to reflect the knowledge requirement imposed by the trial court as to this probation condition. (*People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1415-1416.)

DISPOSITION

The conviction for the lesser included offense of simple assault in count 2 is vacated. The drug probation condition is modified as follows: "Do not use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription, and stay away from places where you know or should know that users or sellers congregate. Do not associate with people known by you to be drug users or sellers except in an authorized drug counseling program." As modified, the judgment is affirmed.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.