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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. PABLO BARANDO FUENTES, Defendant and Appellant.	B289620 (Los Angeles County Super. Ct. No. BA458770)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Reversed and remanded.

Joseph T. Reisz, 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, Steve Mercer, Acting Supervising Deputy Attorney General, and John Yang, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Pablo Barando Fuentes of one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), one count of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)) and one count of misdemeanor vandalism (Pen. Code, § 594, subd. (a).) The jury also found true as to count two that Fuentes personally used a deadly or dangerous weapon, a detached cordless drill battery, within the meaning of Penal Code section 12022, subdivision (b)(1).

On appeal, Fuentes contends he could not be convicted of both assault with a deadly weapon and assault by means of force likely to produce great bodily injury as they are different statements of the same offense. Fuentes also argues the deadly weapon enhancement must be struck because it is an element of the offense of assault by means of force likely to produce great bodily injury. We agree, and reverse and remand for resentencing.

FACTUAL AND PROCEDURAL SUMMARY

On June 16, 2017 Noe Avila and his friend, Marco de la Cruz, were driving near 10th Street and San Pedro looking for cardboard boxes that they could recycle for money. While Avila and de la Cruz were loading cardboard into the truck, Avila saw Fuentes watching them. Fuentes did not say anything, and Avila drove off to pick up his father.

When Avila stopped at a red light one or two blocks away, a gray car approached Avila's vehicle on the driver's side. The man inside the gray car said to Avila: "We saw everything you did. Be careful next time" or "I saw what you were doing. Next time

you're not going to tell." After the light turned green, Avila drove another block before stopping again at a red light. At that time, the same gray car, as well as a black truck driven by Fuentes, blocked Avila from the front. Without exiting his truck, Fuentes told Avila that he had seen what Avila did, and that Avila should be careful. Fuentes also told Avila that it would be easy for him to unload the cardboard from Avila's truck and put it in his own truck.

Fuentes then proceeded to throw an open can or bottle of beer at Avila who was seated in his truck. The beer went into Avila's eyes and, as he was wiping the beer away, Fuentes got out of his truck, grabbed a detachable cordless drill battery and struck Avila in the face, hand, legs and arms with the drill battery. In all, Fuentes struck Avila 10 to 15 times. Avila sustained bruises to his arm, legs and hand, and a cut to his left wrist.

After striking Avila multiple times, the man in the gray car, who had been standing on the passenger side of Avila's truck, pulled Fuentes back. However, as he was being pulled back, Fuentes struck and damaged the front windshield of Avila's truck with the cordless drill battery.

Avila's mother, who had been on the phone with Avila since he picked up the cardboard, heard the events and went to confront Fuentes. Avila arrived shortly thereafter. Fuentes denied attacking Avila and told them to call the police. When the police arrived, Avila told them that Fuentes attacked him. The police arrested Fuentes.

Fuentes was charged with one count of assault with a deadly weapon (Pen. Code, §245, subd. (a)(1)),[1] a second count of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)) with an enhancement for the personal use of a deadly or dangerous weapon (§ 12022, subd. (b)(1)), and a third count of misdemeanor vandalism (§ 594, subd. (a).) The jury found Fuentes guilty on all counts, and found the special allegation to be true. As to count one, the imposition of the sentence was suspended and the trial court placed Fuentes on three years of formal probation on the condition that he serve 365 days in county jail, with credit for 42 days, complete sixty-eight days of Caltrans, and pay a $400 restitution fine, a $40 court operations assessment, and a $30 criminal conviction assessment. As to count two, the trial court declined to impose a sentence pursuant to section 654.[2] As to count three, the trial court suspended imposition of sentence and placed Fuentes on 24 months of formal probation.

DISCUSSION

A. *Applicable Law and Standard of Review*

Fuentes contends that because his conviction for assault with a deadly weapon and assault by means of force likely to produce great bodily injury are different statements of the same

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

[2] The trial court incorrectly declined to impose a sentence on count two, rather than imposing and staying the sentence. The court did, however, impose a $40 court operations assessment and a $30 criminal conviction assessment. Because we are reversing the judgment, we need not address these sentencing errors.

offense, he cannot be convicted of both under section 954. Section 954 states: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court." In other words, "the same act can support multiple charges and multiple convictions." (*People v. Gonzalez* (2014) 60 Cal.4th 533, 537; accord, *People v. Kopp* (2019) 38 Cal.App.5th 47, 62 [same].)

While section 954 permits multiple charges and convictions in the same accusatory pleading, "a judicially created exception to this rule prohibits multiple convictions based on necessarily included offenses." (*People v. Aranda* (2019) 6 Cal.5th 1077, 1089; accord, *People v. Ortega* (1998) 19 Cal.4th 686, 693; *People v. White* (2017) 2 Cal.5th 349, 354 [same].) We review the propriety of multiple convictions under section 954 de novo. (*People v. Villegas* (2012) 205 Cal.App.4th 642, 646 ["The issue of whether multiple convictions are proper is also reviewed de novo, as it turns on the interpretation of section 954"]; see *People v. Frausto* (2009) 180 Cal.App.4th 890, 897 ["As we have observed, though, our consideration of the sufficiency of the evidence in this case also requires us to construe the applicable statute. For this

task, we apply a de novo standard of review and the usual rules of statutory interpretation"].)

Similarly, because whether an enhancement was erroneously imposed is a question of law, we review that issue de novo as well. (*People v. Warren* (2018) 24 Cal.App.5th 899, 908 ["As the questions at issue are questions of law rather than of the court's sentencing discretion, we review them under the de novo standard"]; accord, *People v. Tua* (2018) 18 Cal.App.5th 1136, 1140 ["An unauthorized sentence is subject to correction when it comes to the attention of the reviewing court. [Citation.] The issue raised presents a pure question of law, which we review de novo"]; see *People v. Munguia* (2016) 7 Cal.App.5th 103, 109 [reviewing occupied burglary enhancement de novo].)

B. *Assault with a Deadly Weapon and Assault by Means of Force Likely to Produce Great Bodily Injury Are Different Statements of the Same Offense*

In this case, counts one and count two describe the same offense of assault. (*People v. Vidana* (2016) 1 Cal.5th 632, 650 ["The most reasonable construction of the language in section 954 is that the statute authorizes multiple convictions for different or distinct offenses, but does not permit multiple convictions for a different statement of the same offense when it is based on the same act or course of conduct"]; accord, *People v. Shiga* (2019) 34 Cal.App.5th 466, 480-481 [same].)

In *People v. Vidana*, *supra*, defendant was charged with grand theft by larceny and grand theft by embezzlement after underreporting cash payments to her employer and retaining the difference. After examining the legislative history of both offenses, the Supreme Court concluded that "section 484 "'consolidate[d] the present crimes known as larceny,

embezzlement and obtaining property under false pretenses, into one crime, designated as theft.'" (*Id.* at pp. 640-641.) Thus, because larceny and embezzlement "are different ways of describing the [same] behavior" (*id.* at p. 649) section 954 precludes "multiple convictions for different statements of the same offense." (*Id.* at p. 651.)

Likewise, when a weapon that is not inherently dangerous[3] is used to commit an assault, "the determination of whether an aggravated assault is committed under section 245(a)(1)'s deadly weapon clause or force-likely clause is 'functionally identical.'" (*People v. Brunton* (2018) 23 Cal.App.5th 1097, 1104; accord, *People v. Aguilar* (1997) 16 Cal.4th 1023, 1035 ["Ultimately (except in those cases involving an inherently dangerous weapon), the jury's decision making process in an aggravated assault case under section 245, subdivision (a)(1), is functionally identical regardless of whether, in the particular case, the defendant employed a weapon alleged to be deadly as used or employed force likely to produce great bodily injury; in either instance, the decision turns on the nature of the force used"].)

In *People v. Brunton*, *supra*, the court considered whether the single act of choking a cellmate with a tightly rolled towel would support a conviction for both assault with a deadly weapon and assault by means of force likely to produce great bodily injury. (*Id.* at p. 1099.) In reviewing the legislative history, the court noted that "[i]n 2011 . . . , the two variants of aggravated assault under section 245, former subdivision (a)(1), were placed in separate paragraphs of subdivision (a)" (*Id.* at p. 1104). However, as the *Brunton* court explained, "the Legislature did

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[3] The People conceded at trial that the detached cordless drill battery used in the assault was not inherently dangerous.

not intend for its 2011 amendment of section 245 to create two offenses" (*id.* at p. 1107) as "the Legislature made clear it was making only 'technical, nonsubstantive changes' to section 245 (Stats. 2011, ch. 183, § 1) to provide clarity for purposes of recidivist enhancements – it was not 'creat[ing] any new felonies or expand[ing] the punishment for any existing felonies' (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1026 (2011-2012 Reg. Sess.) as introduced Feb. 18, 2011, p. 3)." (*Id.* at p. 1107.) Consequently, because both counts against Brunton were based on the same conduct of using a towel, a weapon that was not inherently dangerous, in a manner "likely to produce great bodily injury," the court concluded that "defendant may not be convicted of violating both subdivisions." (*Id.* at p. 1107.)

In this case, the People acknowledge, as did the trial court in sentencing Fuentes, that Fuentes was convicted of assault with a deadly weapon and assault by means of force likely to produce great bodily injury based on a single act of assaulting Avila with the detached cordless drill battery. Nevertheless, the People contend that *Brunton* was wrongly decided because it "looked at the particular manner in which the crime was committed based on the facts of that case rather than in the abstract." The People argue that we should instead rely on *In re Jonathan R.* (2016) 3 Cal.App.5th 963, 968 wherein the court concluded that section 245, subdivisions (a)(1) and (4), created separate offenses of assault as they are set forth in different subdivisions with different elements and ranges of punishment.

We have previously considered the People's argument and concluded that *Brunton* was correctly decided. (*People v. Shiga*,

supra, 34 Cal.App.5th at p. 480, fn. 20;[4] see also *People v. Aguayo* (2019) 31 Cal.App.5th 758, 767 ["[A]s our court previously explained in *Brunton*, due to intervening California Supreme Court authority, we place less weight on the intervening amendment to section 245 than did the *Jonathan R.* court"].)

Accordingly, because Fuentes was convicted on two counts of the same offense based on a single act of using a weapon that was not inherently dangerous in a manner likely to produce great bodily injury, one of the convictions must be vacated. (*People v. Chatman* (2019) 33 Cal.App.5th 60, 66 ["Moreover, since the identical conduct supports both convictions for violating what should be the same statute, one of the convictions must be vacated"]; accord, *People v. Brunton*, *supra*, 23 Cal.App.5th at p. 1100 ["we agree that one of the duplicative convictions must be vacated. Accordingly, we remand with directions to the trial court to strike one of the duplicative convictions"].)

C. *The Deadly Weapon Enhancement Must be Stricken*

Fuentes contends the deadly weapon enhancement attached to count two (§ 245, subd. (a)(4)) is improper as it is an element of the offense. (§ 12022, subd. (b)(1) ["A person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense"].) Section 245, subdivision (a)(4) states: "Any person who commits an assault upon the person of another by

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[4] In *Shiga*, we also distinguished *People v. White* (2017) 2 Cal.5th 349 and *People v. Gonzalez* (2014) 60 Cal.4th 533, upon which the People rely.

any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison . . . ."

In *People v. McGee* (1993) 15 Cal.App.4th 107, defendant stabbed his victim with a knife. The jury convicted defendant of assault by means of force likely to produce great bodily injury, and found true the allegation that he used a deadly weapon in the commission of the crime. The court found the enhancement improper as "[t]he assault by means of force likely to produce great bodily injury was defendant's stabbing of the victim with a knife. Hence, his use of this deadly weapon was an element of the offense, within the meaning of section 12022, subdivision (b), even though the crime was pleaded as an assault by means of force likely to produce great bodily injury rather than as an assault with a deadly weapon other than a firearm." (*Id*. at p. 115.)

Similarly, the assault by means of force likely to produce great bodily injury was accomplished when Fuentes hit Avila with the detached cordless drill battery, the act that was the basis of the enhancement under section 12022, subdivision (b)(1). The People contend that we should consider the enhancement in the abstract and conclude that because assault by means of force likely to produce great bodily injury does not always require the use of a deadly weapon, it is not necessarily an element of the crime.

This argument is without merit. As explained in *McGee*: "We recognize that, in the abstract, use of a deadly weapon is not an element of assault by means of force likely to produce great bodily injury because the offense may be committed without using a deadly weapon. However, if this were the test applied to a violation of section 245, subdivision (a)(1), which encompasses

two forms of prohibited conduct (assault with a deadly weapon other than a firearm or assault by means of force likely to produce great bodily injury),[5] prosecutors could evade the exception to imposition of a deadly weapon use enhancement set forth in section 12022, subdivision (b)–and thereby increase the punishment to be imposed for an assault with a deadly weapon other than a firearm–simply by charging the crime as an assault by means of force likely to produce great bodily injury and alleging a deadly weapon use enhancement. This the prosecution cannot do because section 245, subdivision (a)(1) defines only one offense." (*McGee*, *supra*, 15 Cal.App.4th at p. 110; see *People v. Landry* (2016) 2 Cal.5th 52, 128-130 [adopting reasoning of *McGee*].)

Accordingly, the deadly weapon enhancement must be stricken. (*People v. McGee*, *supra*, 15 Cal.App.4th at p. 110 ["[W]e agree with defendant that the weapon use enhancement must be stricken because section 12022, subdivision (b) precludes the enhancement where, as in this case, use of a deadly weapon is an element of the offense of which the accused is convicted"]; accord, *People v. Brunton*, *supra*, 23 Cal.App.5th at p. 1108 [striking deadly weapon enhancement]; *People v. Landry*, *supra*, 2 Cal.5th at p. 130 [same].)

DISPOSITION

The judgment is reversed and the matter remanded to the trial court to strike either count one or count two, to strike the deadly weapon enhancement attached to count two, and to resentence Fuentes.

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[5] Two forms of assault previously included in subdivision (a)(1) are now listed separately in subdivisions (a)(1) and (a)(4).

ZELON, J.

We concur:

PERLUSS, P. J. FEUER, J.