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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CRYSTAL MARIE DAVIS, Defendant and Appellant.	B240613 (Los Angeles County Super. Ct. No. BA387488)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. Modified and affirmed with directions.

Cindy Brines, 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, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Crystal Davis appeals from the judgment entered following a jury trial in which she was convicted of attempting to burn property, assault with a deadly weapon, and assault by means of force likely to produce great bodily injury, with an enhancement for use of a deadly or dangerous weapon. Defendant contends that the trial court should have stricken the weapon enhancement because the use of a deadly or dangerous weapon was the means by which she committed the assault by means of force likely to produce great bodily injury. We agree and strike the enhancement. We also correct the amount of the restitution and parole revocation fines imposed.

BACKGROUND

About 1:00 p.m. on August 6, 2011, defendant went to the home of her uncle, Louis Abraham. Defendant and Abraham argued. Defendant grabbed a barbecue fork and a potato peeler and made stabbing motions toward Abraham. The argument continued outside with defendant, still holding the fork and peeler. When Abraham's girlfriend, Shawnte Burghardt, came out of the house, defendant dropped the fork and peeler and grabbed a mop from the garage. Abraham picked up a wooden two-by-four. Defendant hit Abraham in the head with the wooden mop handle, which caused a bleeding laceration and left a knot on his forehead. Abraham swung the two-by-four and struck the mop with it. The mop broke into three pieces.

Defendant took a bottle of lighter fluid from the garage and squirted it onto Abraham's van, which was parked in the driveway. She then took a second bottle of lighter fluid from the garage and squirted it onto the van and the grass in the yard leading toward Abraham's front porch. Defendant called out for a match or lighter, but no one provided one. She stated that if Abraham touched her car, she would "'get the homies to fuck you up.'" She then got back into her own car and left. Burghardt called 911 and Abraham got on the phone. A recording of that call was played at trial.

Defendant testified that she went to Abraham's house at his request to pick up a gift he had for her mother's birthday. Burghardt grew angry about the gift and began yelling and cursing at defendant, then struck defendant's shoulder. Defendant punched

toward Burghardt, but missed. Abraham began yelling and cursing at defendant, then slapped defendant in the face. Defendant picked up the mop and swung it at Abraham to keep him away from her. Abraham grabbed a long stick and swung it at defendant. The stick hit and broke the mop. A piece of the broken mop struck Abraham. Abraham struck defendant on the collarbone with the two-by-four. Defendant denied wielding a barbecue fork or a potato peeler, squirting lighter fluid on anything, and making any threats.

The jury convicted defendant of attempting to burn property, assault with a deadly weapon, and assault by means of force likely to produce great bodily injury. The jury also found that defendant personally used a deadly and dangerous weapon, a mop, in the commission of the assault by means of force likely to produce great bodily injury. The jury acquitted defendant of a criminal threats charge. Defendant admitted an allegation she had served a prior prison term within the scope of Penal Code section 667.5, subdivision (b)(1). (Undesignated statutory references are to the Penal Code.) The court sentenced defendant to prison for five years, consisting of three years for the assault by means of force likely to produce great bodily injury, plus one year for the weapon-use enhancement, plus a one-year subordinate term for the assault with a deadly weapon, plus a concurrent 16-month term for the attempt to burn. The court struck the prior prison term enhancement.

DISCUSSION

1. Weapon-use enhancement

Citing *People v. McGee* (1993) 15 Cal.App.4th 107 (*McGee*), defendant contends that the trial court erred by imposing, not striking, the one-year section 12022, subdivision (b) enhancement to her assault by means of force likely to produce great bodily injury conviction because the use of a deadly or dangerous weapon was the means by which she committed the assault. As we explain, we agree.

At the time of the charged offenses, section 245, subdivision (a)(1) provided, in pertinent part, "Any person who commits an assault upon the person of another with a

deadly weapon or instrument other than a firearm or by means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three or four years . . . ."

Section 12022, subdivision (b)(1) states, "Any 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.*" (Italics added.)

In *McGee, supra,* 15 Cal.App.4th 107, the defendant stabbed the victim with a knife and was charged with assault with a deadly weapon and by force likely to produce great bodily injury, with a section 12022, subdivision (b) enhancement. McGee asked the court to strike the enhancement because use of a deadly weapon was an element of the offense with which he was charged. At the prosecutor's request, the trial court implicitly amended the information and instructed the jury on assault by means of force likely to produce great bodily injury. (*Id.* at pp. 109–113.) The jury convicted McGee and found the enhancement true, and the trial court imposed the enhancement. (*Id.* at pp. 109–110.)

The appellate court in *McGee, supra,* 15 Cal.App.4th at page 114 noted that although section 245, subdivision (a)(1) "can be violated without necessarily using a deadly weapon," the "section 'defines only one offense, to wit, "assault upon the person of another with a deadly weapon or instrument [other than a firearm] or by any means of force likely to produce great bodily injury . . . ." The offense of assault by means of force likely to produce great bodily injury is not an offense separate from . . . the offense of assault with a deadly weapon.' ([*In re*] *Mosley* [(1970)] 1 Cal.3d [913,] 919, fn. 5.) Consequently, in determining whether use of a deadly weapon other than a firearm is an element of a section 245, subdivision (a)(1) conviction, the question is not simply whether, in the abstract, the section can be violated without using such a weapon. Rather,

the conduct of the accused, i.e., the means by which he or she violated the statute, must be considered." (*McGee*, at pp. 114–115.)

The court further explained, "If prosecutors were permitted to divide section 245, subdivision (a)(1) into two separate offenses regardless of the defendant's conduct, as did the prosecutor in this case, similarly situated defendants who assaulted their victims with deadly weapons other than firearms and were charged with violating section 245, subdivision (a)(1) could receive disparate punishment depending solely upon the language used in the pleadings. The one accused of assault with a deadly weapon would not be subject to the enhancement under section 12022, subdivision (b) while the one accused of assault by means of force likely to cause great bodily injury would be subject to the additional punishment. This is an absurd and unjust result which is inconsistent with the legislative intent in enacting sections 245, subdivision (a)(1) and 12022, subdivision (b)." (*McGee*, *supra*, 15 Cal.App.4th at p. 117.)

Examining McGee's conviction, the appellate court stated, "Here, defendant's use of a deadly weapon other than a firearm was the sole means by which he violated section 245, subdivision (a)(1). The 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." (*McGee*, *supra*, 15 Cal.App.4th at p. 115.) Accordingly, the court struck the section 12022, subdivision (b) enhancement as "an unauthorized sentence enhancement" that was subject to correction "'"whenever the mistake is appropriately brought to the attention of the trial court or the reviewing court."'" (*Id.* at p. 117.)

In this case, the prosecutor expressly based the assault by means of force likely to produce great bodily injury charge on defendant's striking Abraham on the head with a mop. In her closing argument, the prosecutor explained, "Count 3 is the charge that involves the mop, and what's alleged is assault with force likely to produce great bodily

injury." She argued, "I think that if you think about it, using a wooden mop handle, whacking it on someone's forehead is likely to produce great bodily injury." Here, as in *McGee*, defendant's use of the mop to strike Abraham's head was the sole means by which she violated section 245, subdivision (a)(1). Thus, her use of the mop as a dangerous 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. Accordingly, the section 12022, subdivision (b) enhancement must be stricken and defendant's sentence reduced by one year.

The Attorney General attempts to distinguish *McGee* by arguing, "[T]he use of a deadly weapon . . . was not inherent in the offense. On the contrary, a juror might have concluded that the mop used in the assault did not constitute a deadly weapon." As the *McGee* court expressly held, "[I]n determining whether use of a deadly weapon other than a firearm is an element of a section 245, subdivision (a)(1) conviction, the question is not simply whether, in the abstract, the section can be violated without using such a weapon. Rather, the conduct of the accused, i.e., the means by which he or she violated the statute, must be considered." (*McGee*, *supra*, 15 Cal.App.4th at p. 115.) Similarly, whether the jury might have found that the mop did not constitute a deadly weapon is irrelevant to the determination of whether the use of the mop as a weapon was an element of defendant's violation of section 245, subdivision (a)(1) and whether defendant's sentence for that violation could be enhanced. The questionable lethality of the mop was, no doubt, the reason the offense was charged in terms of an assault by means of force likely to produce great bodily injury. It was still an aggravated assault carrying the same sentencing range as if it were charged in terms of an assault with a deadly weapon. As discussed by the *McGee* court, it would be absurd and unjust to permit defendant to receive an enhanced sentence for using a mop to violate section 245, subdivision (a)(1) while prohibiting an enhanced sentence for another defendant who used a more

dangerous weapon—such as the knife used in *McGee*—to commit his or her violation of section 245, subdivision (a)(1).

The Attorney General also attempts to distinguish *McGee* by arguing that the prosecutor in this case did not attempt to evade the statute. The *McGee* decision was based upon statutory interpretation, not improper intent or conduct by the prosecutor therein. Accordingly, this argument has no merit.

2. Correction of restitution fine

At the sentencing hearing, the trial court calculated the sections 1202.4, subdivision (b) restitution fine and the section 1202.45 parole revocation fine as "$240 times the number of counts, three[,] times the number of years, for a total of $5,760" each. The court was using the formula specified in section 1202.4, subdivision (b)(2) to calculate the restitution fine. Section 1202.45 requires the parole revocation fine to be equal to the restitution fine.

Defendant contends, and the Attorney General aptly agrees, that the trial court made a mathematical error in applying the statutory formula. Given the five-year sentence and three counts, it should have multiplied $240 by 15 and imposed fines of $3,600. But, after striking the section 12022 weapon-use enhancement, defendant's sentence is four years, and, applying the statutory formula, the fines should be $2,880, as the parties agree.

DISPOSITION

The judgment is modified by (1) striking the Penal Code section 12022, subdivision (b)(1) enhancement and the one-year term imposed for it and (2) modifying the amounts of the Penal Code sections 1202.4, subdivision (b) and 1202.45 fines to $2,880 each. As modified, the judgment is affirmed. Upon remand, the trial court is directed to issue an amended abstract of judgment reflecting these changes and to forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.