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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

AKILI HERNDON,

Defendant and Appellant.

B291978

Los Angeles County  
Super. Ct. No. BA463976,  
BA439721

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed as modified.

William L. Heyman, 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, Senior Assistant Attorney General, Margaret E. Maxwell and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Appellant and defendant Akili Herndon was convicted of two counts of misdemeanor assault (Pen. Code,<sup>1</sup> § 240). In a separate case, Herndon was found in violation of probation. Upon his request, we ordered the assault case (BA463976) and the probation violation case (BA439721) consolidated into this one appeal. Herndon now argues one of his two assault convictions should be stricken because they were both based on the same criminal act. We disagree. We order the abstract of judgment for the probation violation case modified to reflect the sentence orally imposed by the trial court. In all other respects, we affirm.

## PROCEDURAL BACKGROUND

An amended information charged Herndon with assault by means of force likely to cause great bodily injury (§ 245, subd. (a)(4); count one) and assault with a deadly weapon or instrument other than a firearm (§ 245, subd. (a)(1); count two). The information further alleged Herndon personally inflicted great bodily injury during the commission of both counts (§ 12022.7, subd. (a)) and sustained three prison prior term convictions (§ 667.5, subd. (b)).

A jury acquitted Herndon of the charged crimes but convicted him of two counts of misdemeanor assault (§ 240), a lesser included offense of both counts. The trial court executed a suspended five-year sentence previously imposed in a trailing probation violation case (BA439721), sentenced Herndon to a consecutive jail term of six months on count one, and stayed the

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

six-month jail term imposed on count two. Herndon timely appealed.<sup>2</sup>

## **FACTUAL BACKGROUND**

### **A. Prosecution Case**

In December 2017, Lucio Tovar worked at Montez Pallet, a business located at 14th and Central Avenue in Los Angeles. On the morning of December 29, Tovar walked to a market across the street to buy a soda. He saw Herndon and a woman near the market. Herndon was yelling and hitting the woman with a 24-inch metal bicycle tire rim. Tovar walked by, and Herndon followed him. Tovar turned his head and saw Herndon behind him holding the tire rim. Herndon and the woman were arguing, but Tovar did not understand what they were saying because he did not speak English. Tovar was about to enter the market when he felt a blow to the back of his head and lost consciousness. He did not see what was used to hit him.

Eric Hernandez, Tovar's co-worker, witnessed the assault from across the street. Hernandez saw Herndon, whom he recognized as a local homeless person, holding a bicycle tire rim and arguing with a woman. When Tovar crossed the street to go to the market, Herndon turned from the woman and followed Tovar. Herndon raised the tire rim in his right hand and struck Tovar on the back of the head with it. Tovar fell down on the ground, unconscious. He landed on his stomach with his head turned to the side. Hernandez ran toward Tovar and saw Herndon drop the tire rim and hit Tovar again, this time with a

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<sup>2</sup> On December 11, 2018, we ordered the assault case consolidated on appeal with Herndon's probation violation case.

closed fist to Tovar's right eye. Herndon picked up the tire rim and walked away to where the woman was.

Tovar regained consciousness about a minute and a half after the attack. He had a bump and laceration on the back of his head, and the right side of his face was swollen. He felt pain to the left rear side of his head and to his right eye, elbow, and ribs. Paramedics arrived and transported him to County USC Medical Center.

About 40 minutes after the assault, Hernandez saw Herndon riding a bicycle in the area and called the police. When officers arrived, Hernandez identified Herndon as Tovar's assailant, and the police took him into custody.

The blow to Tovar's head caused a one-half inch laceration in addition to a bump about one-half-to-one-inch in height and one-and-one-half-to two-inches in diameter. At the hospital, his head wound was closed with stitches or staples, and he received treatment for his elbow.

Tovar was released from the hospital that night. He was dizzy and remained in pain after receiving treatment. At a follow-up appointment, the doctor told him to stay home from work for a week. At the time of trial, Tovar continued to experience pain where Herndon had struck him on the head.

## **B. Defense Case**

Herndon testified on his own behalf as follows. He and his wife were homeless. They lived in an encampment on 14th and Essex Streets. They both used crystal meth. Herndon was a bicycle mechanic.

Herndon left the encampment a few days before the assault on Tovar. Herndon returned, and on December 29, 2017, he and his wife had an argument about an ongoing issue. She had told Herndon some of the men from the pallet yard had raped her.<sup>3</sup> Herndon was upset and unsure whether his wife was telling him the truth. While Herndon's wife had an asthma attack, Herndon saw Tovar come out of the pallet yard and laugh at him. Herndon believed Tovar was taunting him.

Herndon approached Tovar and said, "You raped my wife." Herndon stood face-to-face with Tovar and hit him on the right cheek with his left hand. Herndon did not have the tire rim in his hand, and he never hit Tovar with it. Tovar fell backward and landed on his back. The tire rim was lying on the ground near Herndon's wife. Herndon picked it up and said to his wife, "You see what you made me do?" Herndon left the tire rim at his encampment, which was across the street from where he had assaulted Tovar. He borrowed a bicycle from a friend.

Herndon "knew, since [he] hit [Tovar], that most likely they would call the police," so he rode around the neighborhood on the bicycle. He returned to the scene of the assault and saw Tovar standing up and a crowd of people gathered around. He checked on his wife and then rode to East Los Angeles. He remained there for about an hour, and then returned to the crime scene.

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<sup>3</sup> Herndon's wife never reported the rape to the police, nor did Herndon take her for medical treatment. At first, Herndon did not believe she had been raped. He thought she had claimed she was raped to cover up that she was cheating on him. A few days before December 29, 2017, Herndon confronted Hernandez about the rape allegation, and Hernandez denied it.

## DISCUSSION

### 1. Herndon Was Properly Convicted of Two Counts of Assault

Herndon contends he was erroneously convicted of two counts for the same act under the same statute, and since he only committed one criminal act, one of those convictions should be stricken. He notes the jury acquitted him of assault with a deadly weapon and assault by means of force likely to produce great bodily injury, and instead convicted him of two counts of misdemeanor assault, a lesser included crime of both charged offenses. He claims this outcome necessarily means the jury must have disbelieved the prosecution evidence that he hit Tovar with a tire rim and then punched Tovar as he lay unconscious. He argues the jury must have instead believed his testimony that he punched Tovar once and never hit him with the tire rim. He thus argues because the jury must have believed he only hit Tovar once, one of his assault convictions must be stricken.

The Attorney General argues: “Contrary to appellant’s assertion that the jury’s verdicts pertain to a single act – punching Tovar in the face – the record demonstrates that here, multiple applications of physical force resulted in separate injuries.” The evidence supports that conclusion. Hernandez testified Herndon hit Tovar with the tire rim, causing Tovar to fall to the ground and lose consciousness. At this point, the first assault would have been completed. Herndon then put aside the tire rim and punched Tovar in the face with his fist, resulting in the completion of the second assault. These separate criminal acts supported multiple convictions. (See § 240 [“An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.”])

Herndon's argument that the jury must have rejected the prosecution evidence that two assaults occurred and instead believed his version of what happened is speculative and belied by the record. The information and jury instructions indicated Herndon was charged with two different counts based on two different acts. Moreover, the prosecution, during closing argument, told the jury count one was based on Herndon punching Tovar in the face and count two was based on Herndon hitting Tovar with the tire rim. Thus, with respect to count one, the verdict (not guilty of assault by means of force likely to produce great bodily injury [§ 245, subd. (a)(4)] but guilty of misdemeanor assault) indicates the jury concluded Herndon assaulted Tovar when he punched him as he lay unconscious but also concluded this assault was not accomplished by means of force likely to produce great bodily injury. With respect to count two, the verdict (not guilty of assault with a deadly weapon or instrument other than a firearm [§ 245, subd. (a)(1)] but guilty of misdemeanor assault) indicates the jury concluded Herndon assaulted Tovar when he hit him with the tire rim but also concluded the tire rim was not a dangerous or deadly weapon.

Perhaps most significantly, we know the jury understood the lesser misdemeanor assault charges were separate counts because the court clarified this in response to a jury question. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 905 [““It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court’s instructions.” [Citation.]”]; *Bollenbach v. United States* (1946) 326 U.S. 607, 612 [“Particularly in a criminal case, the judge’s last word is apt to be the decisive word.”].)

We reject Herndon's argument because it is based on the incorrect premises that the jury must have believed his version of events (that he committed one criminal act), rejected the prosecution's version (that he committed two criminal acts), and disregarded the trial court's clear response to its question.<sup>4</sup>

## **2. Abstract of Judgment**

As the Attorney General points out, the abstract of judgment states Herndon was sentenced to four years in county jail for the probation violation case even though the trial court stated at the sentencing hearing it was imposing a five-year sentence. It appears the trial court imposed an upper term of four years for violating Health and Safety Code section 11351.5 (possession of cocaine base for sale), and an additional one-year prior prison term enhancement (§ 667.5, subd. (b)), but the abstract of judgment incorrectly omitted the one-year enhancement. We are authorized to order correction of an abstract of judgment that does not accurately reflect the sentence imposed orally by the trial court. (*People v. Mitchell* (2001) 26 Cal.4th 131, 185.) We order the abstract corrected to include the one-year prior prison term enhancement.

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<sup>4</sup> Because we reject Herndon's argument the jury must have based the two assault convictions on the same act, and instead conclude the jury based the convictions on two separate acts, we need not address his argument that assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)) is necessarily included within the offense of assault with a deadly weapon or instrument other than a firearm (§ 245, subd. (a)(1)).



## **DISPOSITION**

The clerk of the superior court is directed to prepare an amended abstract of judgment consistent with this decision, then deliver copies of the corrected abstract to the Department of Corrections. In all other respects, the judgment is affirmed.

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CURREY, J.

WE CONCUR:

MANELLA, P. J.

WILLHITE, J.