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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 ONE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DIRISEY BEALS,<br><br>Defendant and Appellant. | B236382<br><br>(Los Angeles County<br>Super. Ct. No. TA118393) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary E. Daigh, Judge. Affirmed in part and reversed in part with directions.

Sarvenaz Bahar, 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, Kenneth C. Byrne, Supervising Deputy Attorney General, and Shira B. Seigle, Deputy Attorney General, for Plaintiff and Respondent.

Defendant appeals her convictions for two counts of assault (former Pen. Code, § 245, subd. (a)(1)) and one count of petty theft (Pen. Code, § 484).[1] She contends (1) her conviction on one of the assault counts must be reversed because section 245 defines only one offense, and cannot serve as the basis for separate convictions based on the same conduct, and (2) the court erred in imposing a one-year enhancement on one of the assault counts under section 12022, subdivision (b) because the use of a deadly weapon was an element of the assault. We conclude in this case that the two assault counts arose from the same offense, conviction on both counts therefore was improper under section 654; accordingly, we strike defendant's conviction on count 3. Further, we remand for resentencing to permit the court to impose or stay the section 667.5, subdivision (b) prior prison term enhancements.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant was charged in an information filed July 1, 2011 with one count of robbery (§ 211), and two counts of assault (former § 245, subd. (a)(1)). The two assault counts were premised upon defendant's use of a box cutter to attack the victim. Count 2 charged the offense as "assault . . . with a deadly weapon . . . to wit, Box Cutter." Count 3 charged the offense as "assault . . . by means likely to produce great bodily injury," with the further allegation that defendant "personally used a deadly and dangerous weapon(s), to wit, Box Cutter."

The information further alleged that on count 1 and count 3, defendant used a deadly weapon (§ 12022, subd. (b)(1)), causing both counts 1 and 3 to be serious felonies within the meaning of section 1192.7, subdivision (c)(23); alleged with respect to all counts that defendant inflicted great bodily injury (§ 12022.7, subd. (a)), causing all counts to be serious felonies within the meaning of section 1192.7, subdivision (c)(8);

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[1] All statutory references herein are to the Penal Code. Section 245, subdivision (a) was amended after the commission of the offenses herein, as more fully discussed below.

and alleged that defendant had served two prior prison terms and suffered four prior convictions (§§ 667.5, subd. (b), 1203, subd. (e)(4)).

***1. Prosecution Case***

Byung Doo Lee ran a Valero gas station on Compton Boulevard in the City of Compton. The gas station also had a food market.

On June 2, 2011, at around 11:20 p.m., defendant entered the store. Lee was attending the cash register. The cash register is located behind a glassed-in area and is entered through a separate door. Lee observed defendant in a security mirror grab four or five candy bars with yellow wrappers, which cost a dollar each, and shove them in her pocket. Defendant went to another place in the store and picked up a piece of candy with a stick on it. Defendant walked towards the cash register and paid a quarter for the piece of candy with a stick and started towards the exit door.

Lee told defendant to stop and that she needed to pay more. Defendant stopped and said, "these are mine," and Lee responded that defendant was lying and he had seen everything in the mirror. Lee and defendant engaged in a verbal argument and defendant attacked Lee, hitting him with her fist on the side of his face. Lee told defendant to leave.

By this time, three of the candy bars had fallen out of defendant's pocket. Defendant refused to leave the store and "kept coming" at Lee, swinging at him and hitting him numerous times. Defendant pulled out a box cutter and began slashing at Lee. Defendant cut Lee on his chest and abdomen. While defendant kept attacking Lee with the box cutter, he pushed her out of the store with his feet. Lee went back into the store and retrieved his gun. Defendant was leaning on a wall. Lee told defendant to put down the box cutter, but defendant refused. Lee called the sheriff.

The police arrived. Deputy Hiroshi Yokoyama was on patrol and heard someone yell, "Hey, hey, hey." Yokoyama made visual contact with the person yelling, and pulled into the driveway of Lee's gas station. He saw Lee stepping out of the store, bleeding from the abdomen area. Lee pointed to defendant and said, "she did it." Yokoyama handcuffed defendant.

Jin Ho Song, a friend of Lee, was at Lee's store inside the cash register area at the time of the attack. Song saw Lee and defendant arguing inside the front door of the store. Lee motioned to defendant to leave the store. Song did not see a weapon on defendant, and did not see Lee retrieve a gun. After Song went outside, he saw defendant leaning against the wall outside and saw she had a box cutter and Lee had a gun.

The video cameras in the store did not work.

Defendant was not injured. Deputies did not find any candy on her person. Deputy Reginald Hoffman responded to the scene. Deputies recovered a box cutter on the ground near the front door.

Lee was bleeding profusely, required stitches and bonding on his cuts, and has scars from the attack.

After the presentation of the prosecution's case, defendant moved to dismiss one of the assault counts pursuant to section 1118.1. The court noted that it was likely a "654 issue," noting that the information charged "the same act, but under different legal theories. . . . You can't be convicted of both. I think it's a sentencing issue. The jury could believe [it was] not deadly weapon but force to produce great bodily injury." The court denied the motion.

***2. Defense Case***

Barry Eugene Alexander had seen defendant on the street and knew her casually, but did not know her personally. Alexander had seen Lee before. On June 2, 2011, he saw Lee and defendant fighting at the Valero food market. Defendant was trying to get away from Lee, and was backing out of the store. Lee kicked defendant in the stomach. Defendant threw a candy bar at Lee and she fell into a standing ashtray. Lee knocked her off the ashtray. Lee's tennis shoe came off, and she tried to hit Lee with the shoe to get him off of her. Lee was hitting defendant about the head with both hands, and Lee kicked defendant two or three times. Both Lee and defendant appeared to be more frightened than angry. Lee asked Song to get him a gun.

Defendant testified that she went into the food market to buy some candy. She picked up a box of Lemon Head Chewies, which are 25 cents a box. She picked up two Mr. Goodbars. She put the Mr. Goodbars in her pocket because she intended to steal them. She dropped a Mr. Goodbar as she approached the cashier, but she still had the Lemon Head Chewies in her hand. Lee said, "don't you move." Lee took the other Mr. Goodbar out of her pocket and said, "get out of my store." Lee pushed her, and she pushed him back and said, "don't put your hand on me." Her back hit a candy display, and she backed out of the store. Lee kicked her in the stomach and on the side of the head. Defendant pulled out the box cutter when she realized Lee would not stop kicking her, and would not let her leave. After he called her a nigger, she swung at him with the box cutter.

When she sat down on the ashtray Lee stopped kicking her. Lee got a gun from somewhere and told her to get on the ground. Song did not come out from behind the cash register while she was in the store.

***3. Rebuttal***

Sheriff's Detective Lorena Gomez testified that she spoke to defendant the day after the incident. Defendant told her that the day before the altercation, she had gone to the store and had been overcharged for an item. The next day she went back to take the candy to make up for the difference. While defendant was grabbing one of the Mr. Goodbars, the whole box fell on the floor and caught Lee's attention. Lee asked her to leave, but defendant grabbed some Lemon Head Chewies to pay for. Lee took the candy bar from defendant's pocket, told her to leave, and pushed her towards the front door. Defendant pushed Lee back. Lee hit her and she hit him back, and then Lee started kicking her. Defendant did not tell Detective Gomez that Lee kicked her in the stomach or the chest.

***4. Verdict and Sentencing***

The jury found defendant guilty of the lesser included offense of petty theft (§ 484) on count 1, and found defendant guilty of both counts of assault. The jury found

true the great bodily injury allegations on counts 2 and 3, and the weapon use allegation on count 3. The court sentenced defendant on the base count, count 3 (assault with force likely to produce great bodily injury), to a total of eight years, consisting of the upper term of four years plus three years for the great bodily injury allegation (§ 12022.7, subd. (a)), plus one year for the weapons use allegation (§ 12022, subd. (b)(1)). The court sentenced defendant to a term of eight years on count 2 for assault with a deadly weapon, and stayed sentence on count 2 pursuant to section 654. On count 1 the court sentenced her to a six-month consecutive sentence, and stayed it pursuant to section 654.

## DISCUSSION

### I. Two Counts Of Assault And Section 12022 Enhancement

Defendant argues that although former section 245, subdivision (a)(1) provides two different ways to commit an assault, those two different methods do not constitute separate crimes; rather, because former section 245, subdivision (a)(1) describes only one offense, she asks that we strike one or the other of her two assault convictions (counts 2 or 3). Defendant also contends the trial court erred in imposing a section 12022, subdivision (b)(1) enhancement on her conviction for count 3 because it was element of the offense. Respondent concedes both points, and requests that we strike count 3. We agree with defendant that in this instance both count 2 and count 3 charged the same offense and were based on the same facts; we further agree the deadly weapon allegation on count 3 was improper. We therefore strike count 3 because count 2, as pleaded, correctly reflects the facts of this case.

The version of section 245 in effect at the time defendant committed the crimes herein provided for two methods by which an assault could be committed: (1) with a deadly weapon other than a firearm, or (2) by means of force likely to produce great bodily injury.[2]

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[2]Former section 245 provided in relevant part as follows: "(a)(1) Any person who commits an 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 shall be

The difficulties presented by former section 245, subdivision (a)(1)'s reference to two different methods of committing an assault was highlighted in *People v. McGee* (1993) 15 Cal.App.4th 107 (*McGee*), where the defendant attacked the victim with a folding knife. (*Id.* at p. 111.) He was charged with violating section 245, subdivision (a)(1) in an information that alleged he assaulted the victim "'with a deadly weapon, to wit, [a] knife, *and* by means of force likely to produce great bodily injury.'" (*Id*. at p. 112.) However, in spite of the charging allegation, the prosecution asked the court to instruct the jury that the defendant was charged with a violation of section 245 based upon assaults by means likely to produce great bodily injury, and the jury convicted defendant of this offense, and also found true a section 12022, subdivision (b) enhancement that he used a deadly weapon in the commission of the offense. (*Id.* at p. 113.) The defendant argued that his sentence could not be enhanced by section 12022, subdivision (b) because deadly weapon use was an element of the offense, and the trial court impermissibly allowed the prosecutor to get around the exception set forth in

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punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment." (As amended by Stats. 2004, c. 494, § 1.) Effective January 1, 2012, the statute broke apart these two ways of committing an assault into separate subsections. Assault with a deadly weapon other than a firearm remains in section 245, subdivision (a)(1), while assault by means of force likely to produce great bodily injury is found in section 245, subdivision (a)(4). (Stats. 2011, c. 183, § 1.) The bill itself provides it was intended to "make technical, nonsubstantive changes to these provisions." (*Ibid.*) The legislative history indicates the amendment was designed to ameliorate confusion arising in assessing prior convictions because "[a] prosecutor will see 'PC § 245(a)(1)' on a defendant's rap sheet and not know if it was an assault with a deadly weapon or an assault likely to produce great bodily injury. This causes problems by clogging the court system with cases which could be settled at an early disposition hearing or prior to a preliminary hearing, but cannot, because the true nature of the [section] 245(a)(1) conviction is not known." (Assem. Com. on Pub. Safety, Rep. on Assem. Bill No. 1026 (2011-2012 Reg. Sess.) as introduced February 18, 2011, pp. 1–2.) Plainly, Assembly Bill No. 1026 was a response to *People v. Delgado* (2008) 43 Cal.4th 1059, where the court held that an abstract of judgment containing ambiguous references to both prongs of former section 245, subdivision (a)(1) could not constitute sufficient evidence that a prior conviction was for a serious felony.

section 12022, subdivision (b) by deleting the deadly weapon allegation in the charge that defendant violated section 245, subdivision (a)(1) and instead using great bodily injury as the basis of his assault. (*Ibid.*)

*McGee, supra,* 15 Cal.App.4th 107 observed that section 245, subdivision (a)(1) specified two forms of prohibited conduct: "The statute can be violated by assaulting a person with a deadly weapon other than a firearm *or* by means of force likely to produce great bodily injury," and thus could be violated without necessarily using a deadly weapon. (*Id.* at p. 114.) Further, section 245, subdivision (a) "'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.)]" (*Ibid.*) As defendant's use of the deadly weapon was the only means by which he violated former section 245, subdivision (a)(1), his use of a deadly weapon was an element of the offense, prohibiting the imposition of a deadly weapon enhancement. (*McGee*, at p. 115.)

*McGee* reasoned: "The prosecutor attempted to evade the statute's exception and to increase the punishment imposed on defendant simply by deleting the assault with a deadly weapon allegation and by calling the charged offense assault by means of force likely to produce great bodily injury. However, as we have explained, section 245, subdivision (a)(1) defines only one offense. '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.' (*Mosley, supra*, 1 Cal.3d at p. 919, fn. 5.) 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 pp. 116–117.)

What appears to have happened here is that the prosecution sought to allege two different versions of the offense. Section 954 provides, in relevant part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense . . . under separate counts. . . . 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. . . ." The statute "permits the charging of the same offense on alternative legal theories, so that a prosecutor in doubt need not decide at the outset what particular crime can be proved by evidence not yet presented. [Citation.]" (*People v. Ryan* (2006) 138 Cal.App.4th 360, 368.)

The California Supreme Court addressed this issue more than 70 years ago in *People v. Craig* (1941) 17 Cal.2d 453, where defendant was convicted of both forcible rape and statutory rape, based on a single act of sexual intercourse with a female under the age of 18. (*Id.* at pp. 454–455.) The court acknowledged that section 954 permits a statement of the "'same offense'" in separate counts, such that a defendant could be accused of (as opposed to convicted of) committing the same offense in two different ways. (*Id.* at p. 456.) However, the court held that "only one punishable offense of rape results from a single act of intercourse, though it may be chargeable in separate counts when accomplished under the varying circumstances specified in the subdivisions of section 261 of the Penal Code." (*Id*. at p. 458.) Relying on *Craig*, the Third District struck a conviction for rape of an unconscious woman (§ 261, subd. (a)(4)), where defendant also had been convicted of rape of an intoxicated woman (§ 261, subd. (a)(3))

based on the same act of sexual intercourse, concluding that "'only one punishable offense of rape results from a single act of intercourse. . . ." (*People v. Smith* (2010) 191 Cal.App.4th 199, 205, quoting *Craig*, at p. 458.)

However, in *McGee*, *supra*, 15 Cal.App.4th 107, the court recognized that an assault could be committed under section 245, subdivision (a)(1) without the use of a deadly weapon, but where a deadly weapon was used in the commission of the assault, the section 12022, subdivision (b)(1) allegation was superfluous; thus, in the case where the defendant committed the assault with a deadly weapon, the additional allegation of deadly weapon use was improper. (*Id.* at p. 110.) *McGee* noted that the court cannot look at the statute in the abstract, but must consider the means by which the defendant violated the statute. (*Id.* at p. 115.)

Here, we agree with defendant that there is no distinction between defendant's two convictions of assault with a box cutter. One was properly charged as committed with a deadly weapon, the box cutter. The other count sought to charge defendant under the second prong of the statute and enhance that with a deadly weapon allegation. (*McGee*, *supra*, 15 Cal.App.4th at p. 115.) Thus, not only were counts 2 and 3 statements of the same offense, they were moreover improper under section 954 because count 3 improperly added a deadly weapon allegation that was prohibited because use of a deadly weapon was an element of the offense. As a result, defendant suffered two convictions based on the same act against the same victim, one of which contained an improperly added deadly weapon use allegation. (*People v. Smith*, *supra*, 191 Cal.App.4th at p. 205.) As we conclude count 2 more accurately reflects defendant's conduct in this case, defendant's conviction on count 3 must be stricken.

**II. Correction Of Abstract To Reflect The Court's Oral Pronouncement Of Judgment**

Respondent points out that the jury found true the special allegations on counts 2 and 3 that defendant inflicted great bodily injury on Lee (§ 12022.7, subd. (a)); further, the jury found on count 3 that defendant used a deadly and dangerous weapon (§ 12022, subd.(b)(1)). On count 3, at the sentencing hearing, the trial court imposed a three-year

sentence enhancement for the great bodily injury allegation (§ 12022.7, subd. (a)), and a one-year sentence enhancement pursuant to section 12022, subdivision (b). As to count 2, the trial court imposed and stayed a three-year sentence for the great bodily injury allegation (§ 12022.7, subd. (a)).

However, the abstract of judgment and the clerk's minutes erroneously reflect that a one-year sentence enhancement pursuant to section 12022.7, subdivision (b)(1), rather than section 12022.7, subdivision (a), was imposed as to count 3 and imposed and stayed as to count 2. Therefore, respondent requests that the abstract of judgment be amended to reflect that the one-year sentence enhancement imposed as to count 3 was pursuant to section 12022, subdivision (b), and to delete the erroneous reference to a stayed enhancement pursuant to section 12022.7, subdivision (b)(1), as to count 2.

As we have stricken defendant's conviction for count 3, the trial court must prepare a new abstract of judgment. Such new abstract of judgment will reflect the proper imposition of the section 12022.7, subdivision (a) enhancement.

## III. Section 667.5 Enhancements

Respondent contends the trial court improperly stayed defendant's two prior prison term enhancements alleged pursuant to section 667.5, subdivision (b), and that the matter should be remanded to the trial court to permit it to either impose or strike the enhancements and properly state its reasons in the record.

Defendant contends there is only one prior prison term enhancement at issue because they merged into one allegation under section 667.5, subdivision (b); further, the trial court has the authority to strike the enhancement, which is effectively what the court did here, although it failed to satisfy the technical requirement that it state on the records its reasons for striking the enhancement.

### *A. Factual Background*

The information alleged two prior convictions for violations of Health and Safety Code section 11350, subdivision (a) on September 15, 2008, and that she served a prison term. After defendant admitted the prior allegations, the court ordered that the two one-

year priors be merged together to form one allegation under section 667.5, subdivision (b). The court stayed one section 667.5 subdivision (b) enhancement.

***B. Analysis***

Section 667.5 subdivisions (b), requires that, in order to qualify for the enhancement, the prior prison terms must have been served separately. (§ 667.5, subd. (b).) The trial court must either impose or strike a section 667.5, subdivision (b) allegation. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) Here, the trial court did neither, and instead stayed one allegation after ordering the two priors merged. Such an unauthorized sentence may be corrected on appeal. (*Ibid.*) However, because the trial court failed to specify its reasons in the record as required by section 1170, subdivision (b), we remand for the court to either impose or strike the section 667.5, subdivision (b) enhancement.

**DISPOSITION**

Defendant's conviction on counts 1 and 2 is affirmed, and her conviction on count 3 and the weapon use finding under Penal Code section 12022 subdivision (b)(1) are stricken. The matter is remanded for resentencing so that the trial court may either impose or strike the Penal Code section 667.5, subdivision (b) enhancement. The trial court is directed to prepare a new abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.