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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP ROGER WOLCOTT HERRELL, Defendant and Appellant.	C050610 (Super. Ct. No. CM023003)

A jury found defendant Phillip Roger Wolcott Herrell guilty of assault with a firearm, possession of a firearm by a felon, and misdemeanor battery. The trial court sustained two prior felony convictions and sentenced defendant to six years in prison.

On appeal, defendant contends the trial court erred in denying his requested pinpoint instruction and failing to give an instruction for brandishing a weapon as a lesser included offense of assault with a deadly weapon. He also argues his upper term sentence violates *Blakely v. Washington* (2004) 542

U.S. 296 [159 L.Ed.2d 403] (*Blakely*). We reject these contentions and affirm.

BACKGROUND

On the evening of April 19, 2005, Stephen Murray, Murray's wife Leigha Bellino, Blake Pollage, and Robert Nevers were at Murray's house. The men were drinking beer in the garage when Robert Strawn and his girlfriend Lisa Lee drove up in Strawn's pickup. Strawn had bought a Suzuki Samurai from Murray for $400 and a used axle. The axle was defective, so Strawn went to Murray's residence to discuss taking the axle back and "work out a deal" to clear his debt.

Murray went from the garage to Strawn's truck in the driveway, where Strawn showed him a shotgun he had inherited from his grandfather. Strawn put the gun away and the two started talking about Strawn's debt. Defendant then came up and interjected himself into the conversation. Defendant said to Strawn: "[Y]ou need to pay Steve. You are not going to screw him. You are going to pay him." Defendant's voice was raised and he accused Strawn of taking advantage of Murray's trust.

Strawn told defendant this had nothing to do with him. The witnesses' accounts vary as to the timing of what followed. According to Murray, Bellino, and Nevers, the argument escalated and defendant started to push Strawn, who pushed defendant back. At some point during the argument, defendant yelled to Strawn "I am going to kick your ass." Lee then yelled at defendant and slapped him on the cheek. Defendant struck Lee in the mouth, opening up a cut on her lip.

Murray pulled defendant and Strawn apart, while Bellino took Lee into the house and cleaned her up. Bellino escorted Lee back to Strawn's truck and yelled at everyone to leave. Defendant went back to his car, reached into the passenger door, and pulled out a pistol. Defendant loaded a round into the pistol and "said that he was going to take care of business." Defendant said, "I will kill you" as he pointed the pistol about 8 to 10 inches from Strawn's head. Murray told a police officer he had heard defendant say, "I am not afraid to shoot you, and I will."

Strawn backed up and said he would call the police. After about 10-15 seconds, someone knocked the gun out of defendant's hand. Defendant then went to Strawn's truck, where he reached in and "tossed" Strawn around. Strawn opened the door, and defendant tumbled back over a large rock in Murray's driveway. Nevers drove defendant home, and Strawn left with Lee.

According to Lee and Strawn, defendant first pulled the gun from his car and pointed it at Strawn's head. Strawn moved toward his truck after the gun was knocked from defendant's hand. Defendant then pushed Strawn down, waited for Strawn to get up, and pushed him down again. Lee intervened, accidentally slapping defendant as she tried to stop Strawn from falling. Defendant then hit Lee. Lee and Strawn left after Bellino got a bag of ice for Lee's lip.

DISCUSSION

I

The Pinpoint Instruction Was Properly Refused

Defendant claims the trial court improperly denied his requested pinpoint instruction. Defendant asked the trial court to give the following instruction pinpointing his theory of the case: "A defendant may not be convicted of Assault if his intent in acting was not to apply physical force against the victim, but was only an attempt to frighten or distract. If after consideration of all of the evidence you have a reasonable doubt that the defendant intended to apply physical force against the victim you must find the defendant not guilty." The trial court denied the request, finding the instruction was not supported by the evidence.

"'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.]'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

The defense has a right to a pinpoint instruction, that is, an instruction on a particular defense theory, provided that it appears the defendant is relying on the defense, or there is substantial evidence supporting such defense and the defense is not inconsistent with the defendant's theory of the case.

(*People v. Wright* (1988) 45 Cal.3d 1126, 1137-1138; see *People v. Earp* (1999) 20 Cal.4th 826, 886.)

"But a trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation]." (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) "It is of course virtually axiomatic that a court may give only such instructions as are correct statements of the law. [Citation.] Accordingly, a court may refuse an instruction that is incorrect. [Citation.]" (*People v. Gordon* (1990) 50 Cal.3d 1223, 1275, overruled on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

Penal Code section 245, subdivision (a)(2) penalizes "[a]ny person who commits an assault upon the person of another with a firearm." "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.)

The Supreme Court of California has addressed the mental state required for assault three times in the past 30 years. In *People v. Rocha* (1971) 3 Cal.3d 893, the court held an intent to injure is not required, concluding "that the criminal intent which is required for assault with a deadly weapon . . . is the general intent to wilfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another." (*Id*. at p. 899, fn. omitted.)

In *People v. Colantuono* (1994) 7 Cal.4th 206, the Supreme Court attempted again to eliminate the confusion on the issue of

the mental state for assault. The court distinguished assault from an attempt and concluded, "it is clear that the question of intent for assault is determined by the character of the defendant's willful conduct considered in conjunction with its direct and probable consequences. If one commits an act that by its nature will likely result in physical force on another, the particular intention of committing a battery is thereby subsumed." (*Id*. at p. 217.)

Most recently, in *People v. Williams* (2001) 26 Cal.4th 779, the Supreme Court traced the history of the assault statute to determine the required mental state and again noted that assault was a distinct crime from criminal attempt. (*Id*. at pp. 785-786.) The crime of assault focuses on the nature of the act, not on the perpetrator's specific intent. "An assault occurs whenever '"[t]he next movement would, *at least to all appearance*, complete the battery."' [Citation.]" (*Id*. at p. 786.) "Accordingly, we hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Id*. at p. 790.) In other words, to be guilty of assault, a defendant "must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*Id*. at p. 788.)

The jury was instructed with CALJIC No. 9.00 (assault), CALJIC No. 9.01 (assault requires the ability to commit injury), CALJIC No. 3.30 (general intent), and CALJIC No. 9.02 (assault with a firearm). The special instruction would have informed the jury that showing a weapon with an intent to frighten was not assault. This was an incorrect statement of the law and, therefore, was properly refused. (*People v. Gordon, supra*, 50 Cal.3d at p. 1275.)

Defendant relies on *People v. Marceaux* (1970) 3 Cal.App.3d 613, *People v. Garcia* (1984) 159 Cal.App.3d 781, and *People v. Burres* (1980) 101 Cal.App.3d 341 in support of his proposed instruction. Subsequent cases have cast grave doubt on the validity of the purported holdings of these cases.

Marceaux held that since assault required an intent to commit battery, "a conviction may not be grounded upon an intent only to frighten." (*People v. Marceaux*, *supra*, 3 Cal.App.3d at p. 618.) *Garcia* and *Burres* followed *Marceaux* in holding an intent to frighten is incompatible with assault. (*People v. Garcia*, *supra*, 159 Cal.App.3d at p. 789; *People v. Burres*, *supra*, 101 Cal.App.3d at p. 346.)

Rocha overruled *Marceaux* for the proposition that assault was not a general intent crime. (*People v. Rocha*, *supra*, 3 Cal.3d at p. 899, fn. 8.) In *Colantuono*, the Supreme Court ruled that assault is not a specific intent crime even though it is defined as an attempted battery. (*People v. Colantuono*, *supra*, 7 Cal.4th at pp. 215-216.)

Finally, in *Williams,* the Supreme Court reaffirmed "that assault does not require a specific intent to injure the victim," and that the defendant "need not be subjectively aware of the risk that a battery might occur." (*People v. Williams*, *supra*, 26 Cal.4th at p. 788, fn. omitted.) In the accompanying footnote, the court pointed out that "a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*Id*. at p. 788, fn. 3.)

In sum, assault focuses on the nature of the act, not the defendant's subjective intent. If the defendant willfully commits an act the direct and probable result of which is a battery, the defendant has demonstrated the general criminal intent required for an assault conviction, even if his intent was only to frighten and not to injure. (*People v. Williams*, *supra*, 26 Cal.4th at pp. 785-786.)

The trial court did not err by refusing to give an instruction which misstated the law.

II

The Court Did Not Err In Refusing A Lesser Instruction

Defendant claims the trial court erred in failing to instruct the jury on the offense of brandishing a deadly weapon as a lesser included offense of assault with a deadly weapon. We find no error.

We need not decide whether brandishing a weapon is a lesser included offense of assault with a deadly weapon because there was no evidence to support it.

Although a trial court is obliged to instruct, even without a request, on the general principles of law that relate to the issues presented by the evidence (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311), it is well established that duty arises in criminal cases as to lesser included offenses only "when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged [citations]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154). The court has no duty to instruct on lesser included offenses not supported by substantial evidence (*id*. at p. 162) and substantial evidence in this context is "'"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed" (*ibid*.).

The distinction between assault with a deadly weapon under Penal Code section 245 and mere brandishing of a deadly weapon under Penal Code section 417 is the crime of brandishing "does not require an intent to harm or the commission of an act likely to harm others." (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1094.) None of the testimony indicates defendant intended only to display the gun but did not intend to injure Strawn with it. Defendant loaded the gun, pointed it at Strawn's head, and

threatened to kill him. He did not release his hold on the weapon until others knocked away.

There were no defense witnesses or any other evidence supporting an inference that defendant committed the offense of brandishing rather than assault with a deadly weapon. Because the evidence fails to support an instruction on brandishing, there was no error in the court's refusal to give it.

III

The Upper Term Sentence Was Proper

Defendant claims that *Blakely*, *supra*, 542 U.S. 296 [159 L.Ed.2d 403], invalidates the statutory method used by California trial judges to impose an upper term, thereby invalidating his sentence.

The California Supreme Court rejected defendant's *Blakely* contention in *People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254-1256.[1] Pursuant to *Black*, we reject defendant's *Blakely* claim. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

There is another reason to affirm the upper term sentence. Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] that other than the fact of a prior conviction, any fact increasing the penalty for a crime beyond the statutory maximum must be tried to a jury and

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[1] Defendant states he is making the argument because the United States Supreme Court has not yet resolved this issue.

proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely*, *supra*, 542 U.S. at pp. 303-304 [159 L.Ed.2d at pp. 413-414].)

One of the reasons the trial court gave for imposing the upper term is defendant's prior criminal convictions. (Cal. Rules of Court, rule 4.421(b)(2).) As we have noted, the rule of *Apprendi* and *Blakely* does not apply to a prior conviction used to increase the penalty for a crime. Since one valid factor in aggravation is sufficient to expose defendant to the upper term (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433), defendant's sentence did not violate the rule of *Apprendi* and *Blakely*.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SCOTLAND, P.J.

MORRISON, J.