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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CLARENCE ALONZO, Defendant and Appellant.	2d Crim. No. B206638 (Super. Ct. No. TA092487) (Los Angeles County)

Clarence Alonzo appeals the judgment entered after a jury convicted him on two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),[1] two counts of assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)), attempted carjacking (§§ 664/215, subd. (a)), and vandalism causing less than $400 in damage (§ 594, subd. (a)). In a bifurcated proceeding, the trial court found true the allegations that Alonzo had suffered two prior serious or violent felony convictions (§§ 667, subds. (a)(1) & (b)-(i), 1170.12, subds. (a)-(d)). He was sentenced to a total term of 21 years in state prison. He contends two of his assault convictions must be vacated as duplicative and that one of the remaining convictions must be stricken because

[1] All further statutory references are to the Penal Code unless stated otherwise.

it conflicts with Vehicle Code section 23110, a specific statute that applies to the criminal conduct in question. We agree with Alonzo that he cannot be convicted on separate assault counts under section 245, subdivision (a)(1), based on a single incident. Accordingly, we shall order two of the counts stricken. Otherwise, we affirm.

STATEMENT OF FACTS

On the morning of August 24, 2007, Ronald Kennedy was sitting at a car wash in Gardena when Alonzo approached him holding a 40-ounce beer bottle and demanded a cigarette. After Kennedy responded that he did not have a cigarette, Alonzo walked away mumbling profanities and appeared to talk to himself. Alonzo returned to where Kennedy was sitting and again demanded a cigarette, and Kennedy reiterated that he did not have one. Alonzo walked away again, then returned to where Kennedy was sitting and stood next to him. As Alonzo began to walk away again, Kennedy started to get up and move to another seat. Alonzo turned around and threw the beer bottle at Kennedy, hitting him in the face. The bottle shattered and caused gashes under Kennedy's eye and nose and an abrasion on the right side of his face. The owner of the car wash came out and told Alonzo to leave and never return. Alonzo walked away cursing under his breath, then picked up some bricks and threw them at cars that were travelling along Redondo Beach Boulevard. He walked onto the street "ranting and raving" and was almost hit by a car, then crossed the street and entered a restaurant.

Alonzo left the restaurant a few minutes later. Genevieve Villa, who was driving to work, was stopped at a traffic light in the right hand lane at the intersection of Avalon and Redondo Beach Boulevards when she saw Alonzo standing on the right side of the street holding rocks in both hands. Alonzo yelled at Villa to "get out of the road," then walked to the driver's side of her van and pulled on her door handle three or four times. After discovering the door was locked, Alonzo backed up and threw one of the rocks he was holding at Villa's window, then backed up and threw another rock that hit the driver's door. Villa drove away when the traffic light turned green. When she arrived at work, she discovered that the driver's side window to her van was scratched and that the driver's door was dented.

Los Angeles County Sheriff's Deputy Steven Medina arrived to find Alonzo walking in the middle of Avalon Boulevard. When Deputy Medina attempted to speak with Alonzo, he started yelling and cussing and threw his arms up and down. After the deputy took photographs of Kennedy's injuries, spoke to Villa, and observed the damages to Villa's vehicle, he placed Alonzo in handcuffs and advised him of his *Miranda*[2] rights. Alonzo agreed to speak with the deputy. Alonzo said he threw the bottle at Kennedy because he did not give him a cigarette. He also said he wanted to steal Villa's van because his own vehicle was at home, and that he threw rocks at her after he realized her doors were locked.

Alonzo testified on his own behalf. He was in the area on the morning of the incident looking for a job. He did not have a 40-ounce beer bottle and did not drink alcohol or take any drugs that morning. When he arrived at the car wash, he saw Kennedy sitting in a chair drinking a beer. He requested a cigarette from a young lady standing on the sidewalk, and she gave him one. He denied asking Kennedy for a cigarette. Kennedy walked up to Alonzo and asked him why he was disrespecting him. Kennedy also told Alonzo not to bother the young woman he had asked for a cigarette because she was doing something for Kennedy. When Alonzo said he was just asking her for a cigarette, Kennedy swung at him but missed. Alonzo grabbed Kennedy, and the two of them struggled. Kennedy pushed Alonzo off the curb, which caused him to fall and hit his head on the concrete. Alonzo was holding Kennedy's shirt and pulled him down with him. Kennedy got on top of Alonzo and tried to punch him in the face.

At some point, Kennedy got up and retrieved a chrome pistol from the trunk of a car. When Kennedy started walking back toward him, he ran to a car that was stopped at a red light and banged on the passenger window. Alonzo told the female driver he needed help because someone pulled a gun on him. The driver looked frightened and sped away when the light turned green, running over Alonzo's foot in the process. He picked up a small rock and threw it at the car in order to get the driver's

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

attention. When the police arrived, Alonzo told them what had happened. He asked the police to investigate the man with the gun, but they never did so. He denied telling the officers that he wanted to rob Villa's car, and also denied throwing a bottle at Kennedy.

DISCUSSION

I.

Section 954

Alonzo was charged in count 1 with assault with a deadly weapon upon Ronald Kennedy on August 24, 2007, in violation of section 245, subdivision (a)(1). Count 3 charges him with assault by means likely to produce great bodily injury to Kennedy on the same date, also in violation of section 245, subdivision (a)(1). In other words, Alonzo was charged and convicted of two violations of section 245, subdivision (a)(1), based on the same act employing the same means against the same victim. In the same vein, Alonzo is charged in count 4 with committing assault with a deadly weapon against Genevieve Villa under section 245, subdivision (a)(1), while count 5 charges him with assault by means likely to produce great bodily injury to Villa under section 245, subdivision (a)(1). Alonzo contends that the convictions under counts 2 and 5 must be stricken because they are duplicative of counts 1 and 4, respectively. We agree.

Section 245, subdivision (a)(1) provides: "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 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." The Supreme Court has recognized that this statute "defines only one offense, to wit, 'assault upon the person of another with a deadly weapon or instrument 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-and certainly not an offense lesser than and included within-the offense of assault with a deadly weapon." (*In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5.) In light of this conclusion, it is apparent that two of the assault counts of which Alonzo was

convicted are duplicative of the two others and must therefore be stricken.

The People urge us to reject the foregoing statement in *Mosley* as dictum. We decline the invitation. As the People acknowledge, the Supreme Court subsequently followed *Mosley* on this very point. (See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1036.) In doing so, the Court further expanded on the rationale for its holding: "The standard instructions on aggravated assault reflect th[e] fundamental identity of the concepts of assault with a deadly weapon and assault by means of force likely to produce great bodily injury. (See *In re Mosley* [*supra*,] 1 Cal.3d 913, 919, fn. 5 . . . ['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.'].) Those instructions, as relevant here and as read to the jury in this case, provide as follows: 'Every person who commits an assault upon the person of another with a deadly weapon or instrument or by means of force likely to produce great bodily injury is guilty of a violation of section 245, subdivision (a)(1) of the Penal Code, a crime. [¶] In order to prove such crime, each of the following elements must be proved: One, a person was assaulted, and two, the assault was committed by the use of a deadly weapon or instrument or by means of force likely to produce great bodily injury. *A deadly weapon is any object, instrument, or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury*.' (See CALJIC No. 9.02, italics added.) Thus, the instructions, like the prosecutor's argument, called on the jury to find defendant's conduct had the capability and probability of inflicting great bodily injury under either a 'deadly weapon' theory or a 'force likely' theory. The jury's analytical process was the same in either event. [Fn. omitted.]" (*Aguilar*, *supra*, at pp. 1036-1037.)

Notwithstanding these plain, unequivocal holdings that section 245, subdivision (a)(1), identifies a single offense, the People contend that the state's high court recently held otherwise in *People v. Delgado* (2008) 43 Cal.4th 1059. We disagree. In *Delgado*, the court merely recognized that the crime of aggravated assault under section 245, subdivision (a)(1), can be committed in two different ways, only one of which (assault with a deadly weapon) qualifies as a serious felony under the three strikes

law. (*Id.* at pp. 1065, 1069.) This holding does nothing to undermine the court's prior pronouncements that subdivision (a)(1) of section 245 defines only the single offense of aggravated assault. Indeed, the court went on to effectively acknowledge that a single count of conviction under section 245, subdivision (a)(1), may be based on "one, the other, or both, of the statutory forms of offense . . . ." (*Id.* at p. 1070, fn. 4.)[3]

The People's citation to section 954 is also unavailing. That statute merely states that a defendant may suffer multiple convictions for *different offenses* that arise from the same act or course of conduct. (*Ibid.*; *People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227.) Because section 245, subdivision (a)(1), defines a single offense, Alonzo could be convicted of only one such count with respect to each of the two acts of assault. (*People v. Ryan* (2006) 138 Cal.App.4th 360, 370-371.) Accordingly, two of the four counts of which he was convicted must be vacated.

II.

Vehicle Code Section 23110

Alonzo argues that his assault conviction on count 4, which is based on the act of throwing rocks at Villa's car, must be stricken because it conflicts with a specific statute, Vehicle Code section 23110, subdivision (b). He bases this claim on the so-called *Williamson* rule, which provides: "'It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment.'" (*In re Williamson* (1954) 43 Cal.2d 651, 654.) "When the *Williamson* rule applies, the special statute precludes prosecution under the general statute. [Citation.]" (*People v. Chardon* (1999) 77 Cal.App.4th 205, 213.) The rule is designed to ascertain and carry out legislative intent, and applies when either (1) "each element of the 'general' statute corresponds to an element on the face of

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[3] If the prosecution wanted the jury to find that Alonzo committed both assaults with a deadly weapon *and* by means likely to produce great bodily injury, the proper procedure would have been to charge or amend counts 1 and 4 to allege violations of the statute by both methods. (*People v. McGee* (1993) 15 Cal.App.4th 107, 114-115, 117.)

the 'specific' statute," or (2) "a violation of the 'special' statute will necessarily or commonly result in a violation of the 'general' statute." (*People v. Jenkins* (1980) 28 Cal.3d 494, 502.)

A comparison of section 245, subdivision (a)(1), and Vehicle Code section 23110, subdivision (b), demonstrates that the *Williamson* rule does not apply to preclude Alonzo's conviction under the former statute. The elements of section 245, subdivision (a)(1), do not correspond to those of Vehicle Code section 23110, subdivision (b). The former statute (§ 245, subd. (a)(1)) proscribes the commission of "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," while the latter (Veh. Code, § 23110, subd. (b)) punishes "[a]ny person who with intent to do great bodily injury maliciously and willfully throws or projects any rock . . . at [a] vehicle or occupant thereof . . . ." Accordingly, a conviction under section Vehicle Code section 23110, subdivision (b), requires proof of the presence of a vehicle, while a conviction under section 245, subdivision (a)(1), does not. Subdivision (b) of Vehicle Code section 23110 also requires proof that the defendant acted with "intent to do great bodily injury." By contrast, subdivision (a)(1) of section 245 requires proof the defendant committed an act "likely to produce great bodily injury," yet requires no proof of an intent to commit such injury. In this regard, Vehicle Code section 23110, subdivision (b), is a specific intent crime, while section 245, subdivision (a)(1), is a crime of general intent. (See *People v. Atkins* (2001) 25 Cal.4th 76, 82.) Because a conviction under Vehicle Code section 23110, subdivision (b), requires specific intent and the presence of a vehicle, neither of which is an essential element of section 245, subdivision (a)(1), the former is not necessarily included in the latter.

In the same vein, a violation of Vehicle Code section 23110, subdivision (b), will not necessarily or commonly result in a violation of section 245, subdivision (a)(1). The former offense does not require the use of a deadly weapon, nor does the defendant need to have the present ability to inflict a violent injury. (*People v. Spence* (1970) 3 Cal.App.3d 599, disapproved on other grounds in *People v. Rocha* (1971) 3

Cal.3d 893, 899, fn.8), is instructive. In *Spence*, the defendant was convicted of one count of Vehicle Code section 23110, subdivision (b), and three counts of assault with a deadly weapon under section 245, subdivision (a)(1), based on the act of firing a gun at a vehicle with three occupants.[4] In affirming the convictions, the court stated: "It appears from the texts of these statutes that Vehicle Code section 23110 does not necessarily include assault with a deadly weapon, nor does the assault statute necessarily include all possible violations of section 23110. The Vehicle Code violation is limited to attacks aimed at vehicles or their occupants, but it does not require in its commission either the use of a deadly weapon or the present ability to commit a violent injury. The phrase 'capable of doing serious bodily harm' in the Vehicle Code section refers to a quality of the missile or the substance which is thrown or projected. The statute does not seem to require that the person throwing it have the present ability to inflict the injury, even though he is using a dangerous missile with intent to injure." (*Spence*, *supra*, at p. 603.)

Alonzo contends that *Spence* "is inapposite" because the Supreme Court subsequently disapproved of the proposition that "'[a] special statute does not supplant a general statute unless all of the requirements of the general statute are covered in the special statute.' [Citation.]" (*People v. Jenkins*, *supra*, 28 Cal.3d 494, 501-502, quoting *People v. Isaac* (1976) 56 Cal.App.3d 679, 683.) While the Court did conclude that "[i]t is not correct to *assume* that the [*Williamson*] rule is inapplicable whenever the general statute contains an element not found within the four corners of the 'special' law" (*Jenkins*, *supra*, at p. 502), the court also recognized that the crucial inquiry is whether "it appears from the entire context that a violation of the 'special' statute will necessarily or commonly result in a violation of the 'general' statute . . . ." (*Ibid.*) When the answer to this question is in the affirmative, "the *Williamson* rule may apply even though the elements of the general statute are not mirrored on the face of the special statute." (*Ibid.*)

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[4] The version of Vehicle Code section 23110, subdivision (b), in effect at the time included the discharge of a firearm at a vehicle. The statute was subsequently amended to omit discharge of a firearm from the offense. (See *In re Wasif M.* (2004) 119 Cal.App.4th 176, 183, fn. 4.)

Considered in context, it does not appear that a violation of Vehicle Code section 28110, subdivision (b), necessarily or commonly results in a violation of section 245, subdivision (a)(1). Accordingly, Alonzo fails to persuade us that the *Williamson* rule applies to bar his conviction under the latter statute.

DISPOSITION

We modify the judgment by vacating Alonzo's convictions and stayed terms on counts 2 and 5. We order the trial court to amend the abstract of judgment accordingly and forward the amended abstract to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

John T. Doyle, Judge

Superior Court County of Los Angeles

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