Filed 3/28/02

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO ARMANDO PAREDES, Defendant and Appellant.	B149927 (Super. Ct. No. PA037874)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed in part and reversed in part.

Linda Casey Mackey, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Turchin, Supervising Attorney General, and Alene M. Games, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Robert Armando Paredes appeals from a judgment entered after a jury convicted him of sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)) and found true an allegation that he suffered a prior serious felony conviction on August 15, 1988 in case number A170060. (Pen. Code §§ 667, subds (b)-(i), 1170.12.[1]) We reverse in part.

STATEMENT OF FACTS

On November 14, 2000, Los Angeles Police Officers arrested defendant for selling cocaine during an undercover narcotics operation.[2]

CONTENTIONS

I

Defendant contends the trial court erroneously concluded that his prior conviction for violating section 245, subdivision (a)(1), qualified as a serious felony conviction under section 1192.7, subdivision (c)(31), as amended by Proposition 21.

---

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

[2] The details of defendant's current offense are irrelevant to the issues presented on appeal. We therefore need not, and do not, discuss them further.

II

Defendant also contends the trial court committed reversible error when it urged the jurors to inform on one another in violation of his Sixth Amendment rights.

DISCUSSION

I

Defendant contends the trial court erroneously concluded that his prior conviction for violating section 245, subdivision (a)(1), qualified as a serious felony conviction under section 1192.7, subdivision (c)(31), as amended by Proposition 21. We agree.

Defendant's 1988 conviction for violating section 245, subdivision (a)(1), served as the basis for the prior "strike" allegation in this case. On August 15, 1988, in case number A710060, defendant entered a plea of guilty to a violation of section 245, subdivision (a)(1). That statute is violated when a person "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." (§ 245, subd. (a)(1); italics added.) Thus, section 245, subdivision (a)(1), proscribes two forms of conduct—assault upon the person of another with a deadly weapon other than a firearm and assault upon the person of another by means of force likely to produce great bodily injury. (*People v. McGee* (1993) 15 Cal.App.4th 107, 110.)

In this case, the record is devoid of any evidence establishing which of the two forms of conduct prohibited by section 245, subdivision (a)(1), defendant actually committed. The reporter's transcript memorializing defendant's guilty plea merely reflects that before defendant entered his plea, the prosecutor apprised him that he had been charged "with one count of violation of California Penal Code Section 245(a)(1), assault likely to cause great bodily injury and/or with a deadly weapon." The prosecutor further expounded that "the nature of this charge is that you assaulted some individual,

either with a deadly weapon or by means likely to create bodily injury." Following his conviction, the trial court placed defendant on probation for three years.

The determination of whether defendant's prior conviction qualifies as a "strike" for purposes of the Three Strikes Law "must be based on the definition of serious felonies in Penal Code section 1192.7, subdivision (c) in effect on March 8, 2000." (*People v. James* (2001) 91 Cal.App.4th 1147, 1150.) Proposition 21, an initiative measure adopted by the voters at the March 7, 2000 primary election, became effective on March 8, 2000. (*People v. James*, *supra*, 91 Cal.App.4th at p. 1149.) In part, "Proposition 21 amended section 1192.7, subdivision (c), by adding 14 felonies to the statutory 'serious felony' list. [Citation.]" (*People v. Winters* (2001) 93 Cal.App.4th 273, 276.) As the result of Proposition 21, section 1192.7, subdivision (c), added as a "'serious felony' . . . [¶] . . . (31) assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245 . . ." Section 1192.7, subdivision (c)(31) glaringly and unambiguously omits any reference to an assault by means of force likely to produce great bodily injury.

The People urge this court to apply the rule of statutory construction enunciated in section 7.5 and to hold that any violation of section 245 qualifies as prior strike. Two appellate courts already have rejected this argument. (See, e.g., *People v. Winters*, *supra*, 93 Cal.App.4th pp. 277-280; *Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 620-624.)

Section 7.5 provides that "[w]henever any offense is described in [the Penal C]ode, . . . as criminal conduct and as a violation of a specified code section or a particular provision of a code section, *in the case of any ambiguity or conflict in interpretation*, the code section or particular provision of the code section shall take precedence over the descriptive language. The descriptive language shall be deemed as being offered only for ease of reference unless it is otherwise clearly apparent from the context that the descriptive language is intended to narrow the application of the referenced code section or particular provision of the code section." (Italics added.)

In *People v. Winters*, *supra*, 93 Cal.App.4th 273, the People argued "that the interpretation of section 1192(c)(31) is governed by section 7.5 and that, so interpreted, section 1192.7(c)(31) includes any violation of section 245 as a 'serious felony.'" (At pp. 277-278.) The court rejected this argument, noting first that "[b]y its own terms, section 7.5 does not apply in interpreting section 1192.7(c)(31) because . . . there is no ambiguity or internal conflict in the language of the latter provision. Further, section 7.5 cannot be read to create a statutory ambiguity that does not otherwise exist; where a statute clearly and unambiguously circumscribes the application of a cited Penal Code provision, section 7.5 does not render the otherwise clear language uncertain. [Citation.]" (At p. 278.) The *Winters* court further stated that "[i]n the absence of any ambiguity on the face of the statute, we must presume that section 1192.7(c)(31) reflects the voters' intent and apply the statute in accordance with its plain meaning. [Citations.] The language of section 1192.7(c)(31) is clear that it includes as 'serious felonies' only those section 245(a)(1) assaults that involved a specified weapon or were made against a peace officer or a firefighter. That statute does not incorporate other types of section 245(a)(1) assaults, which thus do not qualify as 'serious felonies' unless they fall within the purview of some other provision of section 1192.7, subdivision (c)." (*Id*. at p. 280.)

Similarly, in *Williams v. Superior Court*, *supra*, 92 Cal.App.4th 612, the trial court rejected the argument "that because the descriptive language in section 1192.7, subdivision (c)(31) differs from section 245 (by omitting the crime at issue here), an ambiguity is created which, under section 7.5, requires that section 245, in its entirety, be incorporated by reference and control over the descriptive language of section 1192.7, subdivision (c)(31) referencing it." (At p. 622.) The court explained: "We read section 7.5 according to its plain meaning, and do not construe section 7.5 as applying to every instance in which a Penal Code section references another by both descriptive language and section number. In the absence of any ambiguity or conflict in interpretation between the descriptive language and the referenced code section, no necessity arises for determining whether the descriptive language or the statutory provisions controls, and by its own terms section 7.5 is inapplicable. When an ambiguity or conflict does arise,

section 7.5 controls resolution of the ambiguity or conflict, requiring that the provisions of the referenced section control, unless it is contextually clearly apparent that the descriptive language is intended to narrow application of the referenced code section, in which case the descriptive language controls." (At p. 622.)

Following an examination of section 1192.7, subdivision (c)(31), the *Williams* court concluded its "language is clear." The court further observed that "section 1192.7, subdivision (c)(40), enacted simultaneously with section 1192.7, subdivision (c)(31), declares '*any* violation of Section 12022.53' to be a serious felony. (Italics added.) Sections 12022.53 and 245 each list a variety of crimes. While section 1192.7, subdivision (c)(40) unambiguously defines any of the crimes contained in section 12022.53 as a serious felony, in contrast, subdivision (c)(31) eschews language including *any* violation of section 245 as a serious felony, and instead lists *some* of the listed crimes, thereby excluding others. From section 1192.7, subdivision (c)(40), it therefore can be inferred that the absence of similar language in section 1192.7, subdivision (c)(31), declaring any violation of section 245 to be a serious felony, demonstrates an intention not to incorporate section 245 in its entirety." (*Id*. at p. 623, italics in the original.)

We agree with the analysis employed by the courts in *Winters* and *Williams* and similarly conclude that section 7.5 is inapplicable. We further conclude that assault on the person of another by means of force likely to produce great bodily injury, a violation of section 245, subdivision (a)(1), is not a "serious" felony within the meaning of section 1192.7, subdivision (c)(31), and thus the Three Strikes Law.

The evidence before the trial court disclosed only that on August 15, 1998 in case number A710060 defendant pled guilty to a violation of section 245, subdivision (a)(1), and the trial court placed him on probation for three years. The record does not disclose which of the two forms of conduct prohibited by section 254, subdivision (a)(1), defendant committed. Inasmuch as one form (assault with a deadly weapon or instrument other than a firearm) qualifies as a "serious felony" under section 1192.7, subdivision (c)(31), and the other form (assault by means of force likely to produce great bodily

injury) does not, the trial court's finding that defendant's prior conviction was a serious felony must be reversed. The jury's true finding that defendant suffered a prior conviction for "assault with a deadly weapon" also must be set aside as it is unsupported by the evidence. In addition, defendant's sentence must be vacated. The matter must be remanded for a new trial on the prior serious felony conviction enhancement allegation at which the People will have another opportunity to establish, if they can, that defendant's 1988 conviction for violating section 245, subdivision (a)(1), qualifies as a serious felony conviction within the meaning of section 1192.7, subdivision (c)(31), and for resentencing.

II

Defendant also contends the trial court committed reversible error when it urged the jurors to inform on one another in violation of his Sixth Amendment rights. We disagree.

Over defendant's objection, the trial court instructed the jury with CALJIC No. 17.41.1 that "[t]he integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

Defendant asserts that CALJIC No. 17.41.1 should not have been given in this case. He claims that the instruction violates a criminal defendant's right to jury trial under the state and federal constitutions and the jurors' right to free speech and association. This assertion has no merit. As we explained in *People v. Elam* (2001) 91 Cal.App.4th 298 at pages 311 through 313, CALJIC No. 17.41.1 is unobjectionable.

In any event, we note that the propriety of CALJIC No. 17.41.1 currently is pending before the California Supreme Court in *People v. Engleman*, review granted April 26, 2000, S086462; *People v. Taylor*, review granted August 23, 2000, S088909;

People v. Morgan, review granted March 14, 2001, S094101; and *People v. Phillips*, review granted September 12, 2001, S099017. Even if CALJIC No. 17.41.1 is found to be unconstitutional, any potential error resulting from the giving of that instruction does not rise to the level of a structural defect requiring automatic reversal of the conviction. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1332-1335; see *Neder v. United States* (1999) 527 U.S. 1, 8-9; *Arizona v. Fulminante* (1991) 499 U.S. 279, 309.) Moreover, reversal would not be mandated under any other standard of review.

The jury retired to commence its deliberations on March 28, 2001 around 11:00 a.m. At 9:25 a.m. the next day, the jury's verdicts were read. Although the trial court did receive questions from the jury during it deliberations, none suggested there was disagreement or dissension amongst the jurors. The record contains no hint that the jury at anytime was deadlocked, that there were hold out jurors or that any juror wanted to disregard the law. Stated otherwise, defendant has failed to demonstrate that CALJIC No. 17.41.1 had any negative impact on the jury's deliberations. (See *People v. Brown* (2001) 91 Cal.App.4th 256, 270-271; *People v. Molina*, *supra*, 82 Cal.App.4th at pp. 1335-1336.) Thus, even if CALJIC No. 17.41.1 is held to be improper, error in giving the instruction was harmless under both federal and state standards. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The judgment of conviction is affirmed. The trial court's finding that defendant suffered a prior serious felony conviction is reversed. The jury's finding that defendant suffered a prior serious or violent felony conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12 is stricken, and the sentence is vacated. The matter is remanded to the trial court for a new trial on the prior serious felony enhancement allegation and for resentencing.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

VOGEL (MIRIAM A.), J.

MALLANO, J.