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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL WILLIAMS, Defendant and Appellant.	F038787 (Super. Ct. No. SC082362A) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert P. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, John G. McLean and David A. Lowe, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Dibiaso, Acting P.J., Vartabedian, J,. and Buckley, J.

A jury convicted appellant Michael Williams of possession of a weapon or sharp instrument by a prisoner (Pen. Code, § 4502;[1] count 1) and assault by a prisoner with a deadly weapon or by means of force likely to produce great bodily injury (§ 4501; count 2), and found true an allegation that in committing the count 2 offense appellant personally used a deadly or dangerous weapon, viz. a shank (§ 12022, subd. (b)(1)). The general verdict form signed by the jury foreperson did not specify the legal theory upon which the count 2 conviction was based. In a separate proceeding, the court found true an allegation that appellant had suffered a "strike" conviction.[2] The court imposed a 12-year prison term.

On appeal, appellant contends (1) the court erroneously instructed the jury that the offense charged in count 2 could be committed by means of force having the *potential* to produce great bodily injury, and (2) the court, in instructing the jury with CALJIC No. 17.41.1, violated appellant's constitutional right to a jury trial. We will affirm.

FACTS

Prosecution Case

On August 20, 2000,[3] at approximately 12:20 p.m., Correctional Officer Jose Oceguera was working as "gun-coverage officer" at the California Correctional Institute at Tehachapi (CCI Tehachapi) when, from his position in a tower overlooking one of the prison exercise yards, he saw appellant and two other inmates, Steven Boyce and James Prescott, enter the yard, greet each other and begin walking around the yard.[4]

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[1] All statutory references are to the Penal Code.

[2] We use the term "strike conviction" to describe a prior felony conviction that subjects a defendant to the increased punishment specified in the "three strikes" law (§§ 667, subds. (b)-(i); 1170.12).

[3] Further references to August 20 are to August 20, 2000.

[4] Except as otherwise indicated, the factual statement is taken from Officer Oceguera's testimony.

After making several circuits of the yard, the men stopped in the southeast corner, at which point the officer saw appellant and Prescott "strike Boyce in the upper torso/head area." Boyce began running in the direction of the officer, who told him to "stop, get down[,]" but "[t]hey didn't respond to my orders." Appellant, who was "running behind" Boyce, tripped Boyce, who fell to the ground. The officer again "told them to stop" and "get down[,]" but appellant "got on top of Boyce and started striking him with his right hand." Appellant hit Boyce five or six times and then "got up." At that point, Officer Oceguera could see a "weapon in [appellant's] hand."

After getting up, appellant "made an attempt to go towards Boyce again." Officer Oceguera, who was armed with a weapon that shoots blocks of wood, fired this weapon at a spot three to six feet in front of appellant. At that point, Prescott got down on the ground but appellant, who still had the "weapon" in his hand, "walked over to the drain area" where he "tr[ied] to push [the weapon] down the drain." After doing so, appellant "went and laid down."

After the yard had been cleared of inmates, Officer Oceguera recovered from the drain in the yard, a "shank[,]" i.e., a "inmate-made weapon[,]" which was "sharpened to a point." There was blood on the shank.

Nikki Moore testified to the following. Moore is a "medical technical assistant" employed by the Department of Corrections. She was on duty at CCI Tehachapi on August 20 when, at approximately 12:30 p.m., she assisted a physician in treating Steven Boyce. Boyce required a total of 15 to 20 stitches. He had suffered injuries to his head, upper back and right arm.

The prosecution introduced into evidence three video tapes which purported to depict the attack on Boyce.

Defense Case

James Prescott testified that on August 20 he "attacked" Steven Boyce "with a weapon[,]" in the exercise yard at CCI Tehachapi, and then "tossed the weapon . . . towards the drain in the yard."

DISCUSSION

Assault Instruction

Subject to an exception not applicable here, section 4501 provides, in relevant part, that a state prison inmate "who commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, shall be guilty of a felony . . . ." With regard to the charge of violating this statute, the court, utilizing a modified version of CALJIC No. 7.36, instructed the jury, in relevant part, as follows: "In order to prove this crime, each of the following elements must be proved: [¶] 1. A person was assaulted; [¶] 2. The assault was committed with a deadly weapon or instrument or by means of force likely *or having the potential* to produce great bodily injury; and [¶] 3. The person who committed the assault was confined in a state prison . . . ." (Emphasis added.)[5]

Appellant argues as follows: section 4501 can be violated in only two ways, viz., by an assault committed (1) with a deadly weapon or (2) by means of force likely to produce great bodily injury, but the court erroneously told the jury the offense could be committed in a third way, viz., by means of force *having the potential* to produce great bodily injury. Reversal is required, appellant contends, "[b]ecause in light of the jury's general verdict form it is impossible to determine whether the jury found appellant guilty on one of the two legally correct theories or upon the legally incorrect theory . . . ."

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[5] The court modified CALJIC No. 7.36 by adding the language italicized in the portion of the instruction quoted above.

"In deciding whether an instruction is erroneous, we ascertain at the threshold what the relevant law provides. We next determine what meaning the charge conveys in this regard. Here the question is, how would a reasonable juror understand the instruction. [Citation.] In addressing this question, we consider the specific language under challenge and, if necessary, the charge in its entirety. [Citation.] Finally, we determine whether the instruction, so understood, states the applicable law correctly." (*People v. Warren* (1988) 45 Cal.3d 471, 487.)

As appellant contends, and the People do not dispute, the relevant law provides that an assault by a prisoner can be committed (1) with a deadly weapon or (2) by means of force likely to produce great bodily injury. (§ 4501.) However, as appellant contends and as we explain below, the court erroneously told the jury the offense could be committed in a third way, viz., by an assault committed by means of force *having the potential* to produce great bodily injury.

As reflected in their dictionary definitions, the terms "likely" and "potential" have quite different meanings. The term "likely" means "*probable*" and "reasonably to be expected . . . ." (Webster's New World Dict. (2d college ed. 1982) p. 819, emphasis added.) On the other hand, the term "potential" means "that can, but has not yet, come into being; *possible* . . . ." (*Id*. at p. 1114, emphasis added.) The term "express[es] possibility, capability, or the like . . . ." (*Ibid*.) In our view, the challenged instruction would have conveyed to a reasonable juror that the section 4501 could be violated in three ways: (1) assault with a deadly weapon; (2) assault committed by means of force such that great bodily injury is likely, i.e., probable; and (3) assault committed by means of force such that there exists the potential for great bodily injury, i.e., such injury is merely possible, rather than probable. As indicated above, this is an incorrect statement of the law.

We turn now to the question of whether the court's instructional error was prejudicial. We first determine the correct standard of review. As our Supreme Court

explained in *People v. Guiton* (1993) 4 Cal.4th 1116, where, as here, a jury is instructed with valid and invalid theories to support a verdict and the jury issues a general verdict in which it does not announce the particular theory on which it rested its decision, the instructional error may be classified as "legal" or "factual." (*Id*. at p. 1129.) Factual error occurs in those cases in which "the jury has merely been 'left with the option of relying upon a *factually* inadequate theory,' or, also phrased slightly differently, cases in which there was an 'insufficiency of proof.' " (*Id*. at p. 1128.) Legal error occurs when the jury is instructed on " 'a particular theory of conviction [which] . . . is contrary to law[] . . . .' " (*Ibid*.) As demonstrated above, here the jury was instructed on a theory that is contrary to law, viz., that appellant could be found guilty of violating section 4501 if he committed an assault by means of force having the "potential" to produce great bodily harm. Therefore, the instructional error in this case was "legal" under the terms adopted by the *Guiton* court.

In such cases, *Guiton* stated, " ' "the general rule has been to reverse the conviction because the appellate court is 'unable to determine which of the prosecution's theories served as the basis for the jury's verdict." ' [Citation.] But even this rule has not been universal. One way of finding this kind of error harmless has long been recognized. Sometimes it is possible to determine from other portions of the verdict that the jury *necessarily* found the defendant guilty on a proper theory." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130, emphasis added.) The court recognized that "[t]here may be additional ways by which a court can determine that error in [the "legal" error] situation is harmless[,]" but stated, "[w]e leave the question to future cases." (*Id*. at p. 1131.)

One of those "additional ways" was suggested in *People v. Swain* (1996) 12 Cal.4th 593. There, the court held that an instance of "legal" instructional error was prejudicial for two reasons: (1) there was nothing in the record to indicate the jury "necessarily found the defendants guilty . . . on a proper theory"; *and* (2) it could not be determined beyond a reasonable doubt that the erroneous instruction did not contribute

to the convictions in question. (*Id*. at p. 607.) In reaching the latter conclusion, the court applied "the harmless error test traditionally applied to misinstruction on the elements of an offense, namely, whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained' . . . ." (*Ibid*., citing *Chapman California* (1967) 386 U.S. 18, 24.) And in *People v. Smith* (1998) 62 Cal.App.4th 1233 the court applied the harmless-beyond-a-reasonable-doubt standard to a case of legal instruction error, as, it appears, did the court in *People v. Hargrove* (2002) 96 Cal.App.4th 279. In the latter case, the court, in affirming the defendant's first degree murder conviction, held that even assuming the court's instructions on three legal theories for the murder charge were legally inadequate, the testimony of a certain witness supporting a fourth, proper theory was "[s]o compelling[,]" even though the credibility of the witness was "challenged" at trial and nothing in the record indicated the jury necessarily convicted appellant on a proper theory, that the reviewing court "confidently . . . conclude[d] the verdict was actually based on the fourth of the prosecution's theories supporting the charge of murder . . . ." (*Id*. at p. 290.)

Based on the foregoing, we conclude that where, as here, a jury is instructed with valid and invalid theories to support a verdict and the jury issues a general verdict in which it does not announce the particular theory on which it rested its decision, reversal for instructional error of the "legal" sort is required if (1) it cannot be determined that the jury necessarily convicted the defendant on a proper theory *or* (2) if it otherwise can not be determined beyond a reasonable doubt that the erroneous instruction did not contribute to the conviction in question. Here, as we explain below, the court's instructional error was harmless under the second of these principals.

The jury found true the allegation that in committing the assault charged in count 2, appellant personally used a deadly weapon, viz., a shank. And although appellant's defense was that Prescott, and not he, assaulted Boyce with a shank, it is undisputed that someone assaulted Boyce with a deadly weapon and with force likely to cause great

bodily injury. The jury's finding that appellant personally used a shank demonstrates the jury concluded that person was appellant, and that therefore the jury found appellant guilty based on the two proper theories. On this record, we conclude beyond a reasonable doubt that the instructional error did not contribute to the verdict. (*People v. Harris* (1994) 9 Cal.4th 407, 426 [" 'To say that an error did not contribute to the verdict is, rather, to find that error unimportant *in relation to everything else the jury considered on the issue in question, as revealed in the record*' "].)

Appellant disagrees. He argues that "the jury's finding of personal use in Count Two does not demonstrate beyond a reasonable doubt that the jury relied on a legally correct theory." As appellant notes, personal use of a knife within the meaning of section 12022.5, subdivision (a) can occur in either of two ways: if a person (1) strikes another with a knife; or (2) "intentionally display[s] [the weapon] in a menacing manner . . . ." (*People v. Wims* (1995) 10 Cal.4th 293, 302, overruled on another ground in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; accord, *People v. Turner* (1983) 145 Cal.App.3d 658, 684-685, disapproved on another point in *People v. Majors* (1998) 18 Cal.4th 385, 411 ["A weapon/firearm is 'used' when the defendant means to display it in a menacing manner or intentionally to strike at a human being with it"].) Appellant argues, based on "Officer [Oceguera's] testimony that after the fight, he observed appellant standing over the victim holding a weapon in his hand[,]" that "the jury may have simply found that after the fight, appellant *displayed* a weapon . . . ." And because the jury may have found that display of a weapon constituted an assault committed with the "potential" of causing great bodily injury, appellant contends, "it is impossible to determine whether the jury found appellant guilty on one of the two legally correct theories or upon the legally incorrect theory[,]" and therefore reversal is required. There is no merit to this contention.

At the outset, we examine the factual premise of appellant's claim, viz., that the evidence showed that appellant was "standing over" Boyce, holding a knife. Officer

Oceguera's testimony on this point was that appellant, after striking Boyce repeatedly, and while Boyce was still on the ground, got up and "made an attempt to go towards Boyce again." He did not refer to appellant "standing over" Boyce. We have examined the video tapes introduced into evidence, and they depict the victim on the ground, and an assailant striking the victim repeatedly, backing away and then taking a half-step toward the prone victim in a manner the jury may well have interpreted as menacing, before turning away and moving to the other side of the exercise yard. The shank is at no time visible in the videos. However, we assume for the sake of the argument that the jury reasonably concluded from the foregoing evidence that the assailant, after the attack, intentionally displayed a weapon in a menacing manner, within the meaning of section 12022.5, subdivision (a).

The evidence makes clear, however, that the assailant who "displayed" the weapon in the manner described above was the same person who inflicted multiple stab wounds on the victim. The videos depict the following: there were only three men in the exercise yard; one of the men struck one of the others, the victim, no more than twice, at the outset of the attack; the other assailant (assailant No. 2) struck the victim numerous times on the upper body, including at least five forceful blows delivered while the victim was on the ground, after assailant No. 2 had chased and tripped him; and it was assailant No. 2 who immediately thereafter stepped toward the victim, before turning and going to the other side of the yard. Thus, the videos show, beyond any reasonable dispute, that the assailant who took a step toward the victim in a menacing manner, assailant No. 2, was the same person who delivered the vast majority of the blows to the victim, including the five blows to the victim's upper body while the victim was on the ground. And given the undisputed evidence of the victim's upper body lacerations, it is also beyond any reasonable dispute that that assailant No. 2 used a deadly weapon in delivering those blows and that he did so with force likely to cause great bodily injury.

On this record, if the jury found that appellant personally used a weapon based on a finding that he *displayed* a weapon, the jury made that finding based on the actions of assailant 2. And as demonstrated above, the evidence is just as clear that assailant 2 struck the victim with the knife. Therefore, if the jury found that appellant personally used a weapon by displaying it, it is highly likely the jury also found that appellant personally used a weapon by striking the victim with it. Accordingly, the record shows beyond a reasonable doubt that the jury convicted appellant on two valid bases and that therefore the misinstruction did not contribute to the verdict.

CALJIC No. 17.41.1

The court instructed the jury, in language virtually identical to CALJIC No. 17.41.1 as follows: "The integrity of a trial requires that jurors at all times during their deliberations to [*sic*] 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 this situation." Appellant contends the giving of this instruction "violate[d] the constitutional right to a jury trial by interfering with the jury's power of nullification and by improperly chilling freedom of expression during deliberations." (Fn. omitted.) He argues further that the giving of CALJIC No. 17.41.1 constituted "structural error" and is therefore reversible per se.

Even if we were to assume that the instruction should not have been given, reversal is not required in this case. Such an error is not reversible per se. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1335.) Rather, it is subject to harmless error analysis. (*Ibid*.) As the court in *Molina* explained, "[a]ll the instruction does is to require jurors to inform the court of juror misconduct. It does not ' "affect[] the framework within which the trial proceeds," ' nor does it 'necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'

[Citations.] We do not agree that the instruction is likely to be coercive. Absent misconduct by the jury, expressly identified in the instruction, the instruction is not likely to enter into jury deliberations at all. In the vast majority of cases, there is no jury misconduct. We do not see how an instruction that is not likely to come into play in most cases can constitute structural error requiring the reversal of every case in which it is given. We think that such a result would be, frankly, absurd." (*Ibid*.)

As to whether CALJIC No. 17.41.1 had any prejudicial impact on the deliberative process, we note the following: the jury deliberated for less than three and one-half hours; during that period the jury communicated with the court only once, asking whether it was necessary to make a finding on the personal use allegation if the jury found appellant guilty on counts 1 and 2; and there was no sign of deadlock or holdout jurors. Thus, there was no indication the instruction interfered with the jury's deliberations. Consequently, applying the standard of review announced in *Chapman v. California* (1967) 386 U.S. 18, we conclude the error, if any, was harmless beyond a reasonable doubt. (Cf. *People v. Molina*, *supra*, 82 Cal.App.4th at pp. 1335-1336.)

DISPOSITION

The judgment is affirmed.