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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LARRY ROBERT PAGE, Defendant and Appellant.	E035010 (Super.Ct.No. FSB040393) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. Affirmed as modified.

Maria Morrison, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Janelle Boustany,

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III and IV.

Supervising Deputy Attorney General, Marilyn L. George and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Larry Robert Page or his accomplice took money from the victim's pockets; either before or afterwards, the accomplice held a sharp pencil up to the victim's neck and warned him not to come back with the police. As a result, defendant was found guilty of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)) and assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). He was given a suspended sentence of three years in prison, then placed on probation for five years, on conditions including a year in jail.

Defendant contends, among other things, there was insufficient evidence that the pencil was a deadly weapon or, alternatively, because there *was* substantial evidence that the pencil was *not* a deadly weapon, the trial court erred by failing to instruct on simple assault as a lesser included offense. In the published portion of this opinion, we will hold that the pencil was a deadly weapon as a matter of law, even though the accomplice did not actually wield it with deadly force and even though she used it solely in connection with a threat to harm the victim in the future.

In the unpublished portion of this opinion, we accept the People's concession that the sentence violated Penal Code section 654. Otherwise, we find no error. Hence, we will modify the sentence and affirm the judgment as modified.

I

FACTUAL BACKGROUND

A. *Testimony of the Victim*.

On July 21, 2003, around 3:30 a.m., victim Craig Lucas was on Davidson Street in San Bernardino, walking home from his job at a Taco Bell. As he walked past one house, he noticed about eight people standing outside.

Two of these people -- a young man and a young woman -- came up to Lucas from behind. The woman asked, in a "hostile" manner, what he was looking at. She then "came up and started emptying out [his] pockets." Lucas did not resist because he was afraid and he "didn't want to get hurt . . . ." She took his wallet, which contained about $32. She also took a case he was holding, containing a compact disc (CD) player and some CD's. She took his glasses off and stomped on them.

Next, the young man patted Lucas down, took things from his pockets, and asked "if [he] had anything else on [him]." The young man "[s]eemed" drunk or high. At trial, Lucas identified the young man as defendant.

"[A]fter they took everything," the woman held "a sharp[,] pointy object" up to the side of Lucas's neck, touching him, and told him not to involve the police. She said that if he did, she knew where he lived. Defendant laughed. The two then walked off together. When Lucas got home, he called the police.

B. *Testimony of Defendant's Accomplice*.

Kendra Reader admitted being defendant's accomplice. She had pleaded guilty, pursuant to a plea bargain that required her to testify truthfully. No promises had been made to her concerning her sentence.

On July 21, 2003, at 3:30 a.m., Reader was "hanging out" with some people she had just met, including defendant, at a house on Davidson Street. She noticed Lucas, seeming to loiter near her car. After he walked by the house, she went up to him and asked what he was doing. Defendant followed her.

Lucas was holding a CD player and a pencil. Reader grabbed the CD player and threw it on the ground. At some point, she took his glasses and broke them. She "thought he was going to come after [her]," so she grabbed his pencil, held it to his neck, and "told him not to come back with his friends or the cops." Lucas, evidently concluding he was being robbed, told them where they could find his wallet and $20 in loose cash. Defendant took both items. Reader denied going through Lucas's pockets.

As defendant and Reader walked away, Reader picked up the CD player. They went to a gas station and bought gas. They tried to pay with Lucas's credit card, but "[i]t didn't work," so they paid with cash from Lucas's wallet instead.

C. *Testimony of the Police*.

Around 5:00 a.m., Officers Chris Johnson and Scott Mathews went to the house on Davidson Street to investigate a trespassing report. They discovered defendant and Reader "running down the side of the house and trying to hide." Defendant and Reader matched the description given in an earlier robbery report, so the officers arrested them.

In an in-field showup, Lucas "positively identified" both defendant and Reader. Identification cards belonging to Lucas were found on defendant's person. Lucas's CD player was found in Reader's car.

When the police interviewed Lucas, he told them defendant "did not do anything except laugh[.]"

Officer Johnson transported defendant to the police station, arriving around 7:00 a.m. Defendant was incoherent and "in and out of consciousness."

II

THE EVIDENCE THAT AN ASSAULT WAS COMMITTED WITH A DEADLY WEAPON

Defendant contends there was insufficient evidence that the assault was committed with a deadly weapon. Alternatively, he contends there was substantial evidence that it was not committed with a deadly weapon, and therefore the trial court erred by failing to instruct on the lesser included offense of simple assault.

A. *The Sufficiency of the Evidence that the Pencil Was a Deadly Weapon*.

"As used in [Penal Code]section 245, subdivision (a)(1), 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.' [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining

whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029, quoting *In re Jose R*. (1982) 137 Cal.App.3d 269, 275-276.)

"'When it appears, however, that an instrumentality . . . is capable of being used in a "dangerous or deadly" manner, and it may be fairly inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon should the circumstances require, . . . its character as a "dangerous or deadly weapon" may be thus established, at least for the purposes of that occasion.' [Citation.]" (*People v. Graham* (1969) 71 Cal.2d 303, 328, quoting *People v. Raleigh* (1932) 128 Cal.App. 105, 108-109.)

For example, in *People v. Simons* (1996) 42 Cal.App.4th 1100, the defendant held several police officers at bay by brandishing a screwdriver. He yelled, "Shoot me" and "[C]ome on, kill me, go ahead . . . ." (*Id*. at p. 1106.) Whenever they approached, "'he would bring the screwdriver forward toward [them].'" (*Ibid*.) He was convicted of exhibiting a deadly weapon to resist arrest. On appeal, he argued that a screwdriver can never be a deadly weapon. (*Id.*, at pp. 1105-1106.) The court not only rejected this contention, but also held that, on these facts, the screwdriver was a deadly weapon as a matter of law: "The evidence clearly demonstrated that the screwdriver was capable of being used as a deadly weapon and that defendant intended to use it as such if the circumstances required." (*Id*. at p. 1107.)

In *People v. Smith* (1963) 223 Cal.App.2d 431, the defendant was convicted of first degree robbery, which, at the time, required him to be armed with a deadly or dangerous weapon. (*Id*. at p. 432.) The court held there was sufficient evidence of such arming: "The victim testified that defendant stuck a knife on his neck, that he did not see it, but felt the point. There was no objection to the answer that the object was a knife, that it was a conclusion, if conclusion it really was. The knife could be found to be a deadly weapon, without regard to its size, from the manner of its use. [Citations.]" (*Ibid*.)

Finally, in *People v. Klimek* (1959) 172 Cal.App.2d 36, the two defendants accosted the victim. One of them "poked something in his side and said: 'Don't move, Buddy, or I will kill you.'" (*Id*. at p. 39.) They took his money and his watch. (*Ibid*.) When they were arrested, just minutes later, one of them was found to have an ice pick. (*Id*. at p. 40.) They were convicted of first degree robbery, based on being armed with a deadly or dangerous weapon. (*Id*. at pp. 40-41.) The court found sufficient evidence that the ice pick was a deadly weapon: "Its intended use and appellant's ability to use it as a deadly weapon are clearly shown by the statement of appellant: 'Don't move, Buddy, or I will kill you.'" (*Id*. at p. 42; see also *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [three-pronged fork used to commit rape constituted deadly weapon]; *People v. Garcia* (1969) 275 Cal.App.2d 517, 521 [bow and arrow constituted deadly weapon, even if merely held in firing position].)

Certainly the pencil here was capable of being used as a deadly weapon, particularly if thrust into the neck, as Reader was in position to do. Defendant essentially

argues, however, that there was insufficient evidence that she did use it as a deadly weapon. As he notes, she merely touched Lucas's neck with it; she did not exert any force, much less in any way that could have produced great bodily injury or death. Each of the cases we have cited, however, involved some hard, sharp, pointy thing that was used only to threaten, and not actually used to stab. It necessarily follows that an instrument can be a deadly weapon even if it is not actually used with deadly force.

Defendant would distinguish these cases on the ground that none of them dealt with the aggravated assault statute. Absent a peculiar statutory definition, however, "no sound reason appears to define a 'deadly weapon' for purposes of section 245 differently than it is defined in other contexts under other statutes." (*People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 540; see also *People v. Brookins* (1989) 215 Cal.App.3d 1297, 1305-1307.) Cases discussing the definition of a deadly weapon routinely rely on other cases dealing with different statutes. (E.g., *People v. Aguilar*, *supra*, 16 Cal.4th at p. 1029 [dealing with Pen. Code, § 245], citing *People v. Graham*, *supra*, 71 Cal.2d at p. 327 [dealing with former Pen. Code, § 211a].)

Admittedly, in each of the cases we have discussed, the defendant threatened to stab the victim immediately, at the time of the assault; he did not do so only because the victim complied or escaped. Here, then, it could be argued that Reader merely threatened to stab (or otherwise harm) the victim in the future, if he involved the police. Inferably, she did not intend to use the pencil in a deadly manner at that time.

This argument, however, does not go to whether there was sufficient evidence of a deadly weapon; rather, it goes to whether there was sufficient evidence of an assault. An

assault is statutorily defined as "'an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another, or in other words, it is an attempt to commit a battery. [Citations.] Accordingly the intent for an assault with a deadly weapon is the intent to attempt to commit a battery, a battery being "any willful and unlawful use of force or violence upon the person of another." [Citation.] . . .' [Citations.]" (*People v. Colantuono* (1994) 7 Cal.4th 206, 214, quoting *People v. Rocha* (1971) 3 Cal.3d 893, 899.)

Ordinarily, "[a]n assault occurs whenever '"[t]he next movement would, at least to all appearance, complete the battery."' [Citation.]" (*People v. Williams* (2001) 26 Cal.4th 779, 786, italics omitted, quoting Perkins & Boyce, Criminal Law (3d ed. 1982) p. 164.) But there can also be an assault when the battery is only threatened. (*People v. McCoy* (1944) 25 Cal.2d 177, 192-193.) "'Where a party puts in a condition which must be at once performed, and which condition he has no right to impose, and his intent is immediately to enforce performance by violence, and he places himself in a position to do so, and proceeds as far as it is then necessary for him to go in order to carry out his intention, then it is as much an assault as if he actually struck, or shot, at the other party, and missed him.'" (*Id*. at p. 193, italics omitted, quoting *People v. McMakin* (1857) 8 Cal. 547, 548-549.) A conditional *future* threat will not suffice. (See *ibid*.)

Here, Reader used the pencil as a deadly weapon. Certainly she was not threatening to write a note with it! She was not threatening that, if the victim involved the police, she would break his pencil; she was threatening to stab him with it. She viewed it, at that moment, as an instrument of great bodily injury or death. If instead she

had pointed a loaded gun at the victim, it would still have been a deadly weapon, even if she threatened to harm him with it only in the future. Thus, there was ample evidence that the pencil was a deadly weapon. Indeed, on these facts, it was a deadly weapon as a matter of law.

The closer question is whether there was sufficient evidence that what Reader did with the deadly weapon constituted an assault. We hasten to add that defendant does not contend there was insufficient evidence of an assault; thus, he has waived this contention. We address it only as an alternative ground to waiver.

As we suggested above, if Reader used the pencil exclusively to make a conditional future threat, there was no assault.[1] The victim did testify that Reader did not threaten him with the pencil until after his property had already been taken. Our review, however, is governed by the deferential substantial evidence rule. Unlike Lucas, Reader

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[1] Subject to one caveat: Even though the statutory definition of battery requires "force or violence" (Pen. Code, § 242), this has the special legal meaning of a harmful or offensive touching. (*People v. Pinholster* (1992) 1 Cal.4th 865, 961.) """It has long been established, both in tort and criminal law, that 'the least touching' may constitute battery. . . ." [Citation.] . . .' [Citation.]" (*People v. Colantuono*, *supra*, 7 Cal.4th at p. 214, fn. 4, quoting *People v. Rocha*, *supra*, 3 Cal.3d at p. 899, fn. 12, quoting 1 Witkin, Cal. Crimes (1963) § 255, pp. 243-244.) It could therefore be argued that the "least touching" with the pencil constituted an assault, even aside from Reader's accompanying threats.

We need not decide, however, whether, under that theory, the pencil could or would constitute a deadly weapon. The jury was instructed that an assault requires "an act which, by its nature, would probably and directly result in the application of physical force upon another person . . . ." (CALJIC No. 9.00 (7th ed. 2003).) We do not believe a reasonable juror would have understood that this included the "least touching." Thus, to decide whether Reader's acts would probably and directly result in the application of physical force to Lucas's person, the jury had to consider whether she was threatening to harm him presently, or only in the future.

testified that "while [she] was threatening him," defendant "went through his pockets." The jury could reasonably find that Reader continued to hold the pencil to the victim's neck as a present conditional threat, so defendant could accomplish the robbery.

We therefore conclude that there was substantial evidence of an assault with a deadly weapon.

B. *Failure to Instruct on Simple Assault as a Lesser Included Offense*.

"'[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present.' [Citation.] Conversely, even on request, a trial judge has no duty to instruct on any lesser offense *unless* there is substantial evidence to support such instruction. [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008, quoting *People v. Lewis* (2001) 25 Cal.4th 610, 645.) The question, then, is whether there was substantial evidence that defendant committed assault but not assault with a deadly weapon.

Once again, defendant argues that Reader did not use the pencil in a deadly manner. As we held in part II.A, *ante*, however, this raised a factual issue, at best, only with respect to whether Reader committed an assault, not with respect to whether the pencil was a deadly weapon. On the facts of this case, the pencil was a deadly weapon as a matter of law. The jury could have found defendant guilty of assault with a deadly weapon, or not guilty at all; but it could not reasonably have found him guilty of simple assault. It follows that the trial court was not required to instruct on simple assault.

III

VOLUNTARY INTOXICATION

Defendant contends the trial court erred by excluding evidence of voluntary intoxication and by refusing his request for jury instructions on voluntary intoxication.

A. *Additional Factual and Procedural Background*.

While cross-examining Officer Johnson, defense counsel asked, "What's your training and experience in regards to identifying those individuals who are under the influence of a controlled substance?" The prosecutor objected on relevance grounds, and the trial court sustained the objection.

Later, in a sidebar, defense counsel offered to prove that, in Officer Johnson's opinion, defendant was under the influence of methamphetamine. The trial court adhered to its ruling, explaining that Lucas and Reader had not provided sufficient evidence that defendant was intoxicated and that "the officer's observations were three and a half to four hours after this incident . . . ."

Meanwhile, Officer Johnson testified that, when transported, defendant was incoherent. Defense counsel asked, "[D]id you form an opinion as to why he was incoherent?" The prosecutor objected on relevance grounds, and the trial court sustained the objection.

Defense counsel requested instructions on voluntary intoxication. (CALJIC Nos. 4.20, 4.21, 4.21.1, 4.21.2, 4.22.) The prosecutor objected, and the trial court refused to give them.

B. *Analysis*.

Voluntary intoxication is relevant to whether a defendant actually formed a required specific intent. (Pen. Code, § 22, subd. (b); *People v. Horton* (1995) 11 Cal.4th 1068, 1119.) Here, specific intent was a required element of the robbery count. (*People v. Butler* (1967) 65 Cal.2d 569, 572-573.) Moreover, as defendant was tried for both robbery and assault with a deadly weapon on an aiding and abetting theory, voluntary intoxication would be relevant to disprove both the specific intent and knowledge elements of aiding and abetting. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1131.)

"A defendant is entitled to [a voluntary intoxication] instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 677, quoting *People v. Horton*, *supra*, 11 Cal.4th at p. 1119.)

"Evidence that a defendant has ingested a drug at some point in time does not equate to usage at the time of the [crime]. [Citation.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 197.) In *Garceau* itself, the evidence showed that the defendant made "prodigious use of cocaine." (*Ibid*.) There was testimony that he became paranoid and "hyper" when using it and that he was, in fact, paranoid and "hyper" around the time of the crimes. (*Ibid*.) Nevertheless, the Supreme Court held the defendant was not entitled to voluntary intoxication instructions: "There was no evidence introduced at trial that defendant had ingested cocaine at or shortly before the time of the killings. . . . [D]efendant often went several days without consuming cocaine, thereby refuting

defendant's argument that his cocaine usage had been so habitual as to warrant an inference he had ingested cocaine at a time relevant to the . . . killings. [¶] . . . The paranoia exhibited by defendant concerning 'snitches[]' . . . did not establish that defendant then was ingesting cocaine; the record suggests that defendant was obsessed with 'snitches,' without regard to whether he was suffering the effects of cocaine intoxication. That defendant may have been 'hyper' . . . similarly does not establish that he had ingested cocaine shortly before the killings (which could have occurred several hours earlier)." (*Id*. at pp. 197-198.)

Similarly, in *People v. Horton*, *supra*, 11 Cal.4th 1068, the evidence showed that the defendant "had freebased cocaine on the day prior to the commission of the crimes . . . ." (*Id*. at p. 1119.) Once again, the Supreme Court held the defendant was not entitled to voluntary intoxication instructions because, on the one hand, there was no evidence that he was intoxicated at the time of the crimes, and, on the other hand, there was evidence that he actually had the necessary specific intent: "[T]he circumstantial evidence indicated that the crimes were carried out in accordance with a predesigned plan, and . . . the statements made by defendant following the murder and robbery helped support a finding that defendant was fully aware of his actions and intended their fatal consequences." (*Ibid*.)

Here, the victim's testimony that defendant "[s]eemed" drunk or high, standing alone, was insufficient to support voluntary intoxication instructions. It shed no light on whether defendant actually formed any necessary specific intent. Moreover, Lucas testified that defendant patted him down, removed items from his pockets and even asked

"if [he] had anything else on [him]." Thus, there was evidence that defendant did form the requisite necessary specific intent.

Adding in Officer Johnson's testimony that defendant was incoherent and lapsing in and out of consciousness does not change the result. Just like the evidence in *Garceau* that the defendant was "hyper," this evidence related to a time several hours after the crimes. Admittedly, evidence that a defendant was intoxicated at one point in time does indicate that he or she *became* intoxicated at some earlier time. To state the obvious, however, a defendant who is intoxicated will become less and less so over time (assuming he or she does not "top off" with additional intoxicants). Here, defendant became *more* intoxicated over time. At 3:30 a.m., when the crimes were committed, he seemed high, but he was fully functional. By 7:00 a.m., however, he had become incoherent and nearly unconscious. Thus, Officer Johnson's testimony did not support an inference that earlier, at the time of the crimes, defendant was already so intoxicated as to affect his specific intent.

Finally, for the same reason, the trial court did not err by excluding Officer Johnson's opinion. It related to defendant's condition at 7:00 a.m. (or, at the earliest, 5:00 a.m., when Officer Johnson arrived at the house on Davidson Street). "The trial court has broad discretion to determine the relevance of evidence [citation] . . . ." (*People v. Gurule* (2002) 28 Cal.4th 557, 614.) In light of the testimony Lucas and Reader had already given, the trial court could reasonably conclude that there was insufficient evidence to link Officer Johnson's opinion to defendant's intoxication at the time of the crimes.

Significantly, defendant never offered any expert testimony about the effects of methamphetamine intoxication on specific intent; we do not believe this is a matter of common knowledge. Arguably, Officer Johnson's testimony that defendant eventually became incoherent suggested that such intoxication could interfere with specific intent; when the trial court ruled, however, he had not yet given this testimony. Accordingly, even assuming Officer Johnson's opinion tended to show that defendant was *intoxicated* at the time of the crimes, it was not relevant to raise a reasonable doubt as to defendant's *specific intent*.

Thus, we conclude that the trial court properly excluded Officer Johnson's opinion that defendant was under the influence of methamphetamine. Moreover, even if that opinion had been admitted, there would have been insufficient evidence to support defendant's request for instructions on voluntary intoxication.

IV

PENAL CODE SECTION 654

Defendant contends the trial court violated Penal Code section 654 (section 654) by imposing separate, unstayed sentences for both robbery and assault with a deadly weapon. The People concede that this was error. We agree.

"The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'

[Citation.]" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952, quoting *Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

Regardless of whether Reader assaulted Lucas as part of the robbery (see *People v. Ridley* (1965) 63 Cal.2d 671, 678) or to dissuade him from reporting it after it was over (see *People v. Bauer* (1969) 1 Cal.3d 368, 372, 377; *In re King* (1968) 264 Cal.App.2d 347, 348-349; *People v. Niles* (1964) 227 Cal.App.2d 749, 753, 755), the assault was incidental to the robbery. This was not a case of "gratuitous violence against a helpless and unresisting victim . . . ." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 190.) The assault was not "ongoing" after the robbery (see *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1658), nor was it "committed in response to [an] unforeseen circumstance . . . ." (*People v. Vidaurri* (1980) 103 Cal.App.3d 450, 465-466.)

We must stay execution of the sentence for whichever offense provides for the shortest potential term of imprisonment. (§ 654.) The trial court imposed three-year midterms for both offenses; however, it did declare the robbery the principal term. Second degree robbery is punishable by imprisonment for two, three, or five years. (Pen. Code, § 213, subd. (a)(2).) Assault with a deadly weapon is punishable by imprisonment for two, three, or four years, or as a misdemeanor. (Pen. Code, § 245, subd. (a)(1).) We conclude that robbery is the greater offense, and assault with a deadly weapon is the lesser. Accordingly, we will stay execution of the sentence for assault with a deadly weapon.

V

DISPOSITION

The judgment is modified by staying execution of the three-year concurrent term for assault with a deadly weapon, said stay to become permanent upon defendant's service of the remainder of his sentence. The judgment as thus modified is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.