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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN TRUONG, Defendant and Appellant.	B271812 (Los Angeles County Super. Ct. No. PA083869)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hilleri G. Merritt, Judge. Affirmed.

Benjamin P. Lechman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, and Ilana Herscovitz and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

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Jonathan Truong (defendant) threatened two people with a skateboard before police arrested him with methamphetamine in his wallet. He stands convicted of two counts of assault with a deadly weapon, one count of making criminal threats, and one count of possessing a controlled substance. On appeal, he argues that his assault convictions rest on insufficient evidence and that the trial court committed instructional error. We reject his challenges, and affirm his convictions.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

One evening in July 2015, defendant ran up behind a 14-year-old boy and came around to block his path. Defendant then advanced on the teen, dropped a longer skateboard he carried, lifted his other, two-foot long skateboard to just above shoulder height, and shoved and waved the skateboard—and, in particular, the board's metal tracks and wheels—"within inches" of the teen's chin and throat. All the while, defendant shouted, "Where the fuck is Sean?" and threatened to "crack [the teen's] skull open into two pieces and leave [him] there to die" if he did not reveal Sean's whereabouts. When the teen responded that he did not know any "Sean," defendant said, "Good, let's keep it that way" but continued to wave the skateboard and repeat his threats. The teen was eventually able to run past defendant and get away.

A half-hour later, defendant ran up to a man standing in the street near his house. Once defendant was "within arm's distance," he swung a four- or five-foot long skateboard—as before, with the "wheels forward"—"back and forth" "just like . . . a baseball bat" "right up in [the man's] face." All the while, defendant screamed, "Drop the piece, motherfucker." The man had no gun. When the man lunged forward to push the buggy carrying his 17-month-old daughter out of harm's way and

then raised his arm to shield himself, defendant appeared startled, backed away, and yelled to a passing motorist that the man "had a gun."

Sheriff's deputies later arrested defendant in a neighbor's backyard and found 0.11 grams of methamphetamine in his wallet.

II. Procedural Background

The People charged defendant with assaulting the teen with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] and with making criminal threats to him (§ 422, subd. (a)) while personally using a dangerous or deadly weapon (§ 12022, subd. (b)(1)). In separate counts, the People also charged defendant with assaulting the man and his toddler daughter with a deadly weapon. The People further charged defendant with a misdemeanor count of possessing a controlled substance (Health & Saf. Code, § 11377).[2]

A jury convicted defendant of all charges except assaulting the toddler, and found true the weapon enhancement.

The trial court imposed a four-year prison sentence. The court used the criminal threats count involving the teen as the principal count, imposing a base term of two years plus an additional year for the weapon enhancement. The court then imposed a consecutive one-year prison sentence for the assault count against the man. The court stayed the remaining counts under section 654.

Defendant filed a timely appeal.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 The People additionally charged defendant with misdemeanor trespass (§ 602, subd. (m)), but the trial court dismissed the count under section 1118.

DISCUSSION

I. Sufficiency of the Evidence

Defendant argues that there is insufficient evidence to support his assault with a deadly weapon convictions. In assessing defendant's claims, our task is to ask whether each conviction is supported by evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt, and we do so while viewing the record in the light most favorable to the conviction. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

The crime of assault with a deadly weapon has two elements: "(1) the assault, and (2) the means by which the assault is committed." (*People v. Smith* (1997) 57 Cal.App.4th 1470, 1481; § 245, subd. (a)(1) [defining crime as "an assault upon the person of another with a deadly weapon or instrument other than a firearm"].) An assault is "an unlawful attempt . . . to commit a violent injury on the person of another" "coupled with a present ability" to do so. (§ 240; *People v. Licas* (2007) 41 Cal.4th 362, 366-367.) Although assault is colloquially referred to as an "attempted battery" (*People v. Wright* (2002) 100 Cal.App.4th 703, 706), it is not technically an attempt crime (*People v. Chandler* (2014) 60 Cal.4th 508, 516). Thus, assault remains a general intent crime (*People v. Williams* (2001) 26 Cal.4th 779, 784-785 (*Williams*); cf. § 21a), and its intent requirement is satisfied if the People adduce proof that (1) the defendant *willfully* engaged in the conduct constituting assault, and (2) the defendant was subjectively "aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*Williams*, at p. 788; *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1190 [defendant "need only be aware of what he is doing"].)

Substantial evidence supports both of the jury's verdicts of assault with a deadly weapon. In both instances, defendant swung or waved the underside of a skateboard—that is, its metal tracks and wheels—"within inches" or "arm's distance" of his victims' faces or necks. From that vantage point, defendant had a present ability to inflict violent injury because he had "'attained the means and location to strike immediately.'" (*People v. Chance* (2008) 44 Cal.4th 1164, 1174 (*Chance*).) Defendant's threat to the teen that he would "crack [his] skull open into two pieces," and defendant's nearly identical conduct with the man just a half-hour later are evidence that defendant was subjectively aware that a battery would "naturally and probably result from his conduct." (*Williams*, *supra*, 26 Cal.4th at p. 788.) Defendant also engaged in his conduct willfully. Although defendant presented evidence that he was suffering from delusions due to his ingestion of methamphetamine, his voluntary intoxication defense was confined to the criminal threats count; the defense does not apply to a general intent crime like assault with a deadly weapon. (*In re V.V.* (2011) 51 Cal.4th 1020, 1027.) Finally, the two skateboards defendant used to commit the assaults were heavy pieces of wood with metal and protruding wheels on one side, and thus constituted "dangerous or deadly weapons" because they were being "'used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029 (*Aguilar*); accord, *People v. Simons* (1996) 42 Cal.App.4th 1100, 1106 [screwdriver is a deadly weapon when brandished]; *People v. Page* (2004) 123 Cal.App.4th 1466, 1472 (*Page*) [same, as to pencil].)

Defendant raises two challenges to the evidence. First, he argues that his threats were conditional because his threats to use force were conditioned on disclosing Sean's location (as to the

teen) or on dropping "the piece" (as to the man). Defendant is incorrect. "A threat which may appear conditional on its face can be unconditional under the circumstances." (*People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1158.) Seemingly "conditional" threats are still unconditional where (1) "the condition [to be met is] present, and not future, and the compliance demanded [is] immediate" (*People v Lipscomb* (1993) 17 Cal.App.4th 564, 570), or (2) there is "no way" that the condition can be met and "the victim therefore had a reasonable apprehension that [the] defendant would act in accordance with the threat" regardless of its seemingly conditional language (*Stanfield*, at p. 1158). In this case, defendant's threat to the teen was unconditional because defendant demanded immediate compliance; because the teen had no way to comply given that he had no idea who Sean was; and, most telling, because defendant continued to wave the skateboard and make threats even *after* the teen said he did not know who Sean was. Defendant's threat to the man was unconditional for many of the same reasons—namely, because defendant demanded that the man immediately drop "the piece" and because the man had no way to comply because he was unarmed.[3]

Second, defendant asserts that his conduct was not likely to result in a battery—and thus cannot be punishable as an assault—because he only swung his skateboards "near" his victims, and never touched them. He is wrong. The thrust of defendant's argument is that there can be no assault without a touching, but that is not the law: "One may commit an assault

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3 Because defendant's threats were unconditional, we have no occasion to reach defendant's further assertion that he could only be held liable for committing assault by virtue of making a conditional threat if he was brandishing an "inherently dangerous weapon."

without making actual physical contact with the person of the victim." (*Aguilar*, *supra*, 16 Cal.4th at p. 1028.) To the extent defendant more specifically argues that there was insufficient evidence that he had the present ability to inflict injury, we disagree because that requirement does not mean that a defendant "must . . . do everything physically possible to complete a battery short of actually causing physical injury to the victim." (*Chance*, *supra*, 44 Cal.4th at p. 1175.) To the extent defendant means that there was insufficient evidence that he was "subjectively aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct" (*Williams*, *supra*, 26 Cal.4th at p. 788), the statements he made during the assaults demonstrate otherwise.

II. Instructional Issues

Defendant raises two challenges to the trial court's jury instructions. We review instructional issues de novo. (*People v. Simon* (2016) 1 Cal.5th 98, 133.)

First, defendant asserts that the trial court erred in not instructing the jury on the crime of simple assault as a lesser included offense to assault with a deadly weapon. A trial court is required to instruct on a lesser included offense only "'where there is "substantial evidence" from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense. [Citations.]'" (*People v. Whalen* (2013) 56 Cal.4th 1, 68, quoting *People v. DePriest* (2007) 42 Cal.4th 1, 50.) Because a defendant's use of a deadly or dangerous weapon is what distinguishes the offense of assault with a deadly weapon from the lesser included offense of simple assault, defendant's argument presents the question: Could a rational jury have concluded that the skateboards were not a dangerous or deadly weapon when defendant swung and waved

them—metal tracks and wheels-side up—"within inches" or "within arm's distance" of his victims' heads and necks? We conclude the answer is no. As a result, "[t]he 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." (*Page*, *supra*, 123 Cal.App.4th at p. 1474.)

Second, defendant seems to suggest that the trial court erred in not giving an instruction on what a jury must find before a conditional threat is actionable as an assault. A trial court's duty to instruct on issues is contingent on whether substantial evidence supports that instruction. (See *People v. Brooks* (2017) 2 Cal.5th 674, 743.) As explained above, defendant's threats were unconditional; as a result, there was no substantial evidence that they were conditional and no need for the trial court to instruct the jury as if they were.

DISPOSITION

The judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.