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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LANDRY BOULLARD,

Defendant and Appellant.

B231333

(Los Angeles County
Super. Ct. No. MA048600)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hayden Zacky, Judge. Affirmed.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General; Dane R. Gillette, Chief Assistant Attorney General; Susan Sullivan Pithey and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Landry Boullard was charged with the attempted murder of James Kofahl and assault with a deadly weapon against Mark Albright and Justin Dowd. The evidence at trial showed that Boullard attacked Kofahl with a metal thermometer, and then fought with Albright and Dowd. The jury convicted Boullard on all counts.

On appeal, Boullard argues that there was insufficient evidence to convict him of committing assault with a deadly weapon against Justin Dowd. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 3, 2010, the district attorney filed an information charging defendant Landry Boullard with one count of attempted murder against James Kofahl (Pen. Code, §§ 187, subd. (a) & 664¹), two counts of assault with a deadly weapon against Mark Albright and Justin Dowd (§ 245, subd. (a)(1)), and one count of felon in possession of a firearm (§ 12021, subd. (a)(1).) The information included special allegations asserting that, in attempting to murder Kofahl, Boullard had used a deadly weapon and personally inflicted great bodily injury. (§ 12022.7, subds. (a) & (b); 12022, subd. (b)(1).) The information also alleged that Boullard had suffered one prior serious or violent felony conviction within the meaning of the “Three Strikes” law (§§ 667.5, subds.(b)-(i); 1170.12, subds. (a)-(d)), one prior serious felony under 667, subdivision (a)(1) and four prior convictions for which he had served a prison term. (§ 667.5, subd. (b).) Boullard pleaded not guilty to all counts and the case proceeded to trial.

A. Summary of Trial Testimony

1. Testimony of Aida Kofahl, America Dowd and Justin Dowd

Aida Kofahl, who is the wife of James Kofahl, testified that on February 27, 2010, she and James attended a movie with her brother, Juan Fernandez, her sister, America Dowd, and her brother-in-law, Justin Dowd. The group sat together near the left aisle of

¹ All further statutory citations are to the Penal Code unless otherwise noted.

the theater, three rows up from the entrance. Landry Boullard was seated in the row directly in front of Aida² and was accompanied by a woman and a child.

Aida testified that, after the movie started, the woman sitting with Boullard answered her cell phone and began talking. James said to the woman, “Would you please turn your cell phone off? We all paid good money to come see a movie.” Boullard turned around and said something to James. Approximately one minute later, Aida saw Boullard stand up and walk up the aisle stairway, toward the rear of the theater. Boullard remained in the back of the theater for approximately one minute, and then walked back down the aisle stairway, past Aida’s row, and exited the theater. Shortly thereafter, a second man and a woman walked down the aisle stairway and exited the theater. The woman and child who had been sitting with Boullard then got up and exited the theater.

Toward the end of the movie, Aida saw Boullard re-enter the theater and run toward her and James. Aida was afraid and hid behind James, who was suddenly unconscious and bleeding. Aida stayed with James until paramedics arrived and transported him to the hospital.

About two weeks after the incident, a detective named Richard Cartmill showed Aida a six pack of photographs and asked if she could identify the person who had charged at her husband during the movie. Aida selected a photograph of Boullard, stating that she was “80 percent sure” he was the assailant.

America Dowd testified that she was sitting next to her husband, Justin Dowd, and two seats down from James Kofahl. America said that James asked a woman seated in front of him to stop using her cell phone, which led to an exchange with Boullard. Several minutes later, Boullard walked toward up the stairs to the rear of the theater, and then came back down the stairs and exited. About a minute later, another man walked down the stairs and exited in the same direction as Boullard.

America later saw Boullard come back into the theater, run down the row in which she was seated and make a “closed fist punch type” motion toward James’s face.

² For the sake of clarity, we refer to several witnesses who share the last name by their first names.

America and Justin tried to push Boullard away from James, which caused Boullard to fall into the row in front of them. Justin then tackled Boullard and the two began to struggle. A couple sitting in the row where Boullard landed also began struggling with the defendant. America recalled that, at some point, there was another man involved in the confrontation but was unsure whether Justin ever fought with the second man. Justin eventually let Boullard get off the ground and Boullard left the theater with another man. When America and Justin returned home, America discovered that Justin had a puncture wound underneath his arm and a small hole in his shirt located directly above the puncture wound.

Sometime after the incident, Detective Cartmill showed America a series of pictures and America identified Boullard as the man who had attacked James. America informed Cartmill that she was certain Boullard was the suspect.

Justin Dowd testified that after James asked a woman in front of him to get off her cell phone, Boullard turned around and said “What did you say?” Boullard then got up and said “I have your number.” Boullard walked to the back of the theater, talked to a second man, and then left the theater with that man.

Justin stated that, toward the end of the movie, a man came running back into the theater and started swinging at James. Justin grabbed the man and they fell into the row in front of them. Shortly thereafter, Justin saw a second man charging towards him who began throwing punches. Justin started fighting with the second man. Justin was eventually pulled off the man, who then exited the theater.

After the confrontation, Justin discovered that he had a hole near the arm of his sweater and a puncture wound directly underneath the hole. Justin was unable to determine when he sustained the injury.

2. Testimony of Brett Hart

Brett Hart was sitting approximately five rows behind James Kofahl on the night of the attack. Hart testified that, at some point during the movie, he heard an “elevated conversation about [a] phone call” and then saw Boullard walk up the stairs to the back of the theater. Boullard then walked back down the stairs and exited the theater.

Hart later saw Boullard and another man come into the theater together. According to Hart, Boullard ran up a row of seats with a metallic object sticking out from his hand that was about six inches in length. Boullard lunged at a person sitting in the row and “took a few jabs at him” in the area of his neck. Hart then saw a fight break out near the exit of the theater. Boullard and his companion exited the theater together. After they left, Hart saw a metal thermometer in the area where the attack had occurred.

About two weeks later, Detective Cartmill asked Hart to look at a six pack of pictures. Hart identified Boullard and stated that he was “100% sure [he] was the guy” who attacked James.

3. Testimony of Mark and Kimberly Albright

Mark Albright and his wife, Kimberly Albright, were also in the theater the night James was attacked. Mark testified that, shortly before the movie began, Boullard and a woman sat down next to Kimberly. About 15 minutes into the movie, the woman sitting with Boullard began talking on her cell phone. Mark heard someone in the row behind him say “We paid to get into this theater. We have listened to you talk and now we have to put up with your cell phone?” The woman immediately responded by saying “I pay my god damn phone bill, I can use my phone.” There was then an exchange between Boullard and the people sitting in the row behind Mark.

A few minutes after this exchange, Mark observed Boullard go left, up the stairs of the aisle, toward the back of the theater. Boullard then came down the stairs and exited the theater. Shortly thereafter, a second man came walking down from the rear of the theater and exited in the same direction as Boullard. The woman and child accompanying Boullard also left.

About half way through the movie, Mark noticed a commotion in the row behind him and saw Boullard “swinging” at a person. Mark grabbed Boullard around his arms and chest and swung the defendant into the row in which Mark and Kimberly were sitting. While Mark was engaged with Boullard, another man jumped on Mark’s back and all three fell onto a landing area at the bottom of the steps. Eventually, Mark,

Boullard and the other man got up and were all facing each other against the wall of the theater. Boullard and the other man quickly left the theater together.

Mark later discovered that he had a small hole above his left ear lobe that appeared to have been caused by an ice pick. Although Mark was not sure who hit him, he remembered that he was facing Boullard at the time he was struck and that the strike had come from his front side.

Mark went to check on the man Boullard had attacked and observed blood coming from a puncture wound at the base of the man's skull. The wound resembled the wound on Mark's ear and looked like "an ice pick or very pointed object . . . [had been] pushed into something."

About two weeks later, Detective Cartmill showed Mark a six pack of photographs and asked him if he could identify the person seated next to him at the movie. Mark identified a photograph of Boullard and stated that he was 100 percent sure.

Kimberly Albright, who had been sitting next to Mark, testified that a man sitting behind Boullard complained about answering cell phone calls during a movie. Boullard and his female companion began yelling at the man who made the comment. Kimberly then saw Boullard go up the stairs, to the rear of the theater, where he spoke to someone. Boullard then came back down the stairs and left the theater. Shortly thereafter, a second man came down the stairs and "basically left together" with Boullard.

Near the end of the movie, Kimberly heard a "scuffle" going on and saw Boullard in the row behind her, leaning over a man in his seat. She then saw Mark grab Boullard by the coat and hoist him over the seats, down the stairs. Another man charged Mark, jumped on his back and the three rolled down the stairs together. After Mark pushed Boullard against the wall, Kimberly saw that Boullard had something in his hand and cautioned Mark to back away. Kimberly then saw Boullard throw what looked like a meat thermometer on the floor and exit the theater with the man who had jumped on Mark's back.

Kimberly went over to the man Boullard had been leaning over and saw that he had blood "running down his neck," which appeared to be caused by a puncture wound in

the left side of his neck. Sometime after the attack occurred, Detective Cartmill showed Kimberly a six pack of photographs and she identified Boullard as the man who had been sitting next to her at the theater.

4. Testimony of responding officers

Los Angeles Deputy Sheriff Jason Elizondo testified that, on the night of the February 27, 2010, he received a report that an assault had occurred at a movie theater. When Elizondo arrived at the theater he found James Kofahl on the ground with “spittle coming out of his mouth.” Several witnesses told Elizondo that there was a “thermometer or weapon in the aisle” of the theater. Elizondo searched the aisle and recovered a rectangular thermometer that had a five or six inch metal rod extending from it.

Detective Richard Cartmill arrived at the scene shortly after Elizondo. Cartmill obtained a security tape from the theater and immediately showed it to several witnesses. The witnesses pointed out the man who attacked James. Based on this identification, Cartmill prepared a still photograph from the video and released the image to the public. Several days later, Cartmill received an anonymous call about the identity of the man in the picture. Cartmill used this information to prepare a six pack of photographs that included an image of Boullard. Cartmill showed the six pack of photographs to several witnesses and at least four of them identified Boullard as the man who had attacked Kofahl.

On March 17, 2010, Cartmill executed a search warrant on Boullard’s residence and found a pistol located in a lock box. Cartmill also recovered an identification card for Charter College School that had Boullard’s name and picture on it. Cartmill contacted Daniel Bushey, who was an instructor for the air conditioning technician program at Charter College. Bushey stated that Boullard had attended the program and gave Cartmill a digital read thermometer used by students in the class. The thermometer had the same make and model number as the thermometer found in the theater.

5. Testimony of treating physician

Makeet Gupta testified that on the night of February 27, 2010, he provided medical treatment to James Kofahl at the Antelope Valley Hospital emergency room. When James arrived, he had a puncture wound above his clavicle and was in a comatose state. Gupta determined that Kofahl had likely sustained a traumatic brain injury and placed him on life support. Although Gupta saw few signs of external trauma, a scan revealed that Kofahl had extensive bleeding in his brain. A neurosurgeon placed a drain in Kofahl's skull to relieve pressure caused by the bleeding. James spent five weeks in the hospital and suffered permanent damage to his vision.

B. Jury Verdict and Sentencing

On December 16, 2010, the jury convicted Boullard on all four counts and found each of the special allegations to be true. The same day the jury returned its verdict, Boullard admitted he had one prior "strike" (§§ 667.5, subds.(b)-(i); 1170.12, subds. (a)-(d)), one prior serious felony conviction (§ 667, subd. (a)(1)) and four prior convictions for which he had served a prison term. (§ 667.5, subd. (b).)

The trial court sentenced Boullard to an aggregate sentence of 40 years and four months to life in prison. On count one, attempted murder, Boullard received a sentence of 29 years to life; on count two, assault with a deadly weapon against Mark Albright, he received a consecutive sentence of 8 years; on count three, assault with a deadly weapon against Justin Dowd, he received a consecutive sentence of two years; on count four, felon in possession of a firearm, he received a consecutive sentence of 16 months. Boullard filed a timely appeal.

DISCUSSION

On appeal, Boullard argues that there was insufficient evidence to convict him of committing assault with a deadly weapon against Justin Dowd.

A. Standard of Review

To assess a claim of insufficient evidence in a criminal case "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must

disclose substantial evidence to support the verdict – i.e., evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.’ (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

B. The Record Contains Substantial Evidence That Boullard Assaulted Dowd With a Deadly Weapon

To find Boullard guilty of assaulting Justin Dowd with a deadly weapon, the People were required to prove that: (1) the defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person; (2) the defendant did that act willfully; (3) when defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; (4) when defendant acted, he had the present ability to apply force with a deadly weapon. (See CALCRIM No. 875; *People v. Golden* (2008) 163 Cal.App.4th 101, 120-122 [affirming use of CALCRIM No. 875].)

The California Supreme Court has clarified that “the criminal intent which is required for assault with a deadly weapon . . . is the general intent to wilfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another. . . . The intent to cause any particular injury [citation], to severely injure another, or to injure in the sense of inflicting bodily harm is not

necessary.’ [Citations.]” (*People v. Colantuono* (1994) 7 Cal.4th 206, 214) Thus, “assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.” (*People v. Williams* (2001) 26 Cal.4th 779, 790.)

In this case, the district attorney argued to the jury that Boullard committed assault with a deadly weapon by stabbing Dowd with a thermometer. Boullard does not dispute that the act of stabbing an individual with a thermometer constitutes assault with a deadly weapon. He argues, however, that there was insufficient evidence to prove that he actually stabbed Dowd with the thermometer that was found on the theater floor. More specifically, he argues that, based on the evidence at trial, the jury could only speculate as to “how Dowd received the puncture wound.” We disagree.

At trial, America and Justin Dowd both testified that Justin tackled Boullard into the row of seats directly in front of them. America stated that, after Boullard and Justin fell over the seats, they began wrestling on the floor. When Justin returned home, he discovered a small puncture wound in his left side. He also discovered a small hole in his clothing located directly over the puncture wound.

Multiple witnesses provided testimony indicating that Boullard was in possession of a metal thermometer at the time Justin tackled him over the seats. Brett Hart testified that when Boullard re-entered the theater, he was holding what appeared to be a metal object that extended five or six inches from his hand. Kimberly Albright testified that after Boullard had been knocked into her row, she saw him holding an object in his right hand. She later saw him discard the object, which appeared to be a meat thermometer. Officer Elizondo found a metal thermometer on the ground of the theater that had a five or six inch rod extending from it.

Finally, there was evidence that Boullard inflicted puncture wounds on James Kofahl and Mark Albright that were consistent with the puncture wound on Justin Dowd’s side. Several witnesses saw Boullard make jabbing or swinging motions in the

area of James's neck and head. Mark Albright stated that James had a puncture wound that looked like it had been caused by an ice pick. Doctor Gupta testified that, when James arrived at the emergency room, he had a small puncture wound with a red appearance around it.

Mark Albright, who had wrestled with Boullard during the altercation, also suffered a small puncture wound to his ear. Although Mark was unsure who had hit him, he recalled that he was facing toward Boullard when he was hit and that the strike came from the front. Mark also stated that his puncture wound looked similar to the injury inflicted on James's head, and appeared to have been caused by an ice pick.

In summary, the record contains substantial evidence that: (1) Justin Dowd fell over the seats with Boullard, and then struggled with him briefly; (2) at the time Justin and Boullard fell over the seats, Boullard was in possession of a meat thermometer that had a five or six inch metal rod; (3) Boullard stabbed James Kofahl and Mark Albright with the thermometer; (4) Justin's injury appeared to be caused by the same instrument that was used to stab Kofahl and Albright. Based on this evidence, a jury could reasonably infer that Boullard stabbed Justin with the thermometer while they wrestled on the ground.

Boullard, however, contends that "no reasonable inference could be drawn by the jury that [he] fought with Dowd . . .; the evidence indicated that Dowd fought with a second man." In support, Boullard cites trial testimony in which Justin stated that, after falling over the seats with Boullard, he "lost" Boullard and began fighting with a second individual. Justin further stated that, once he started fighting with the second individual, he had no further contact with Boullard. Boullard contends this testimony shows that he could not have inflicted the wound on Justin.

Boullard ignores the fact that: (1) Justin testified that he tackled Boullard over the seats before he began fighting with the second individual, and (2) America stated that she saw Justin wrestle with Boullard. Based on this evidence, the jury could reasonably infer that that Boullard stabbed Justin with the thermometer before Justin began fighting with the second assailant.

DISPOSITION

The trial court's judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.