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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.

EZRA JAY KIRK,

Defendant and Appellant.

B279400

(Los Angeles County
Super. Ct. No. NA104226)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary J. Ferrari, Judge. Affirmed.

Richard L. Fitzer, 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, Steven D. Matthews, Supervising Deputy Attorney General, and Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.

* * * * *

Ezra Jay Kirk (defendant) shot two people with a BB gun. The first victim was an arm's distance away; the second, across the street. A jury convicted defendant of two counts of assault with a deadly weapon. On appeal, he argues that there is insufficient evidence that the BB gun was a "deadly weapon" as to the victim across the street. We disagree, and affirm his convictions.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

One morning in May 2016, defendant stood on a street corner in Long Beach, California. He pulled a BB gun out of his jacket and opened fire. He shot one man, standing an "arm's length" away, in the face; BBs turned the man's face into a bloody mess. Defendant also shot a second man standing on the other side of the street, more than 50 feet away. The man across the street heard the BB pellets and turned away, but was still shot in the arm and the back. The pellets tore through his shirt and caused "really red" welts. Although he did not feel the BBs' impact as they hit, he later felt a "stinging" pain. Defendant was arrested a few minutes later with a BB gun and a backpack filled with extra CO2 cartridges and a full canister of "copper coated premium BBs."

II. Procedural Background

The People charged defendant with two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))¹—one for each man. The People further alleged that defendant's 2012 robbery conviction constituted a strike under our "Three Strikes" law (§§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d)) as well as a

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

prior serious felony (§ 667, subd. (a)(1)). The People further alleged that defendant had two prior prison terms (§ 667.5, subd. (b)).

The trial court instructed the jury on the charged crimes of assault with a deadly weapon as well as the lesser included offense of simple assault. A jury convicted defendant of both counts of assault with a deadly weapon.

The trial court imposed a 13-year prison sentence. The court imposed six years on the assault count involving the man across the street (calculated as three years, doubled due to defendant's prior strike), plus two years for the assault on the nearby man, plus five years for the prior serious felony conviction. The court struck the prior prison term enhancements. The court also awarded defendant 406 days of presentence custody credit (203 days of actual custody credit plus 203 days of conduct credit).²

Defendant filed this timely appeal.

DISCUSSION

To convict a defendant of the crime of assault with a deadly weapon, the People must prove that the defendant (1) "commit[ted] an assault upon the person of another," (2) "with a deadly weapon or instrument other than a firearm." (§ 245, subd. (a)(1).) Defendant only attacks the sufficiency of the

² As defendant notes in his opening brief, the reporter's transcript of his sentencing indicates he was awarded only 46 days of presentence custody credit. Because 203 days is the correct amount of time from his arrest on May 18, 2016, to his sentencing on December 6, 2016, we conclude this is a typographical error. The minute order and abstract of judgment are correct in this regard and need not be amended.

evidence supporting the jury's finding that the BB gun was a deadly weapon as to the second man across the street. In evaluating his challenge, we review the record in the light most favorable to the verdict and ask whether it 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. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

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.’” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) Some objects, such as dirks and blackjacks, are “deadly weapons as a matter of law.” (*Aguilar*, at p. 1029.) But any object can be a “deadly weapon” if it is “used, under certain circumstances, in a manner likely to produce death or great bodily injury.” (*Ibid*; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086-1087 [as used in section 245, great bodily injury is “significant or substantial injury”]; *In re Brandon T.* (2011) 191 Cal.App.4th 1491, 1496-1497 [same].) In determining whether an object's use is “‘capable of producing and likely to produce’” a significant or substantial injury, “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.” (*Aguilar*, at pp. 1029-1030.)

Courts have consistently held that operable BB guns are deadly weapons when they are used to shoot other people. (*People v. Brown* (2012) 210 Cal.App.4th 1, 6-9 (*Brown*); *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 538-541 (*Lochtefeld*); *People v. Sherman* (1967) 251 Cal.App.2d 849, 856-857.) That is because such guns are “capable of” “penetrat[ing] a significant

distance into muscle tissue” or “putting out an eye.” (*Lochtefeld*, at pp. 539-540; *Sherman*, at p. 857.) They are also considered likely to cause such injury, even when they end up producing lesser injuries, because a “jury [can] reasonably infer[] the location and severity of the[] [lesser] injuries were fortuitous.” (*Brown*, at p. 8; accord, *Brown*, at p. 7 [“neither physical contact nor actual injury is required to support a conviction”].) There is no question that the BB gun in this case was operable, and capable of inflicting and likely to inflict great bodily injury: It penetrated the skin and bloodied the face of the nearby man, and it tore through the clothes of the man across the street, and caused redness and stinging pain on that man’s back and arm (and did not penetrate his eyes, mouth, or ears because the man turned to shield himself from those more serious injuries).

Defendant nevertheless asserts that there is insufficient evidence that his BB gun was a deadly weapon as to the man across the street—that is, that no rational jury could find that the gun was capable of inflicting and likely to inflict great bodily injury on a person more than 50 feet away. Defendant is correct that the BB guns found to be deadly weapons in *Brown* and *Lochtefeld* were fired from a closer range (*Brown, supra*, 210 Cal.App.4th at p. 8; *Lochtefeld, supra*, 77 Cal.App.4th at pp. 536-537), but, as discussed below, this does not preclude a rational jury from finding that the BB gun fired from a greater distance in this case was also a deadly weapon.

The jury had before it evidence sufficient to find that defendant’s BB gun was capable of inflicting great bodily injury. The gun inflicted such injury on the nearby man. And even from more than 50 feet away, the gun embedded pellets in a window located behind the man across the street, penetrated that man’s

clothing, and caused red marks on his skin that led to stinging pain.

The jury also had before it evidence sufficient to find that the BB gun was likely to inflict great bodily injury. *In re Jose R.* (1982) 137 Cal.App.3d 269 is instructive. There, the defendant embedded straight pins inside of apples. After he was convicted of assault with a deadly weapon, he appealed on the grounds there was insufficient evidence that the pins were a deadly weapon. The appellate court affirmed his conviction. The court rejected the defendant's argument that the straight pins were not a deadly weapon due to the fact that "there was only a mere possibility that a person might take a bite of an apple with an embedded pin and swallow the pin and sustain great bodily injury." (*Id.* at p. 276.) Instead, the court pointed to testimony that "a pin could perforate the esophagus or any part of the intestinal canal, including the stomach," and ruled that this evidence was sufficient to qualify straight pins as both capable of inflicting and likely to inflict great bodily injury. (*Id.* at pp. 276-277.) Proof of a probability of injury was not required.

The same analysis applies here. Whether or not there is proof of a statistical likelihood that defendant would have shot the man standing over 50 feet away in the eye or mouth, a rational jury could conclude—from the evidence that defendant was shooting at his victims' heads, that the injuries at close range were severe and could have been more severe (if, for instance, the BB had hit an eyeball or other orifice), that the injuries at longer range caused pain and swelling, and that the reason those injuries were not more severe was because the victim turned away—that the BB gun he fired was capable of inflicting and likely to inflict great bodily injury.

DISPOSITION

The judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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