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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTWONE HAROLD MERCER,

Defendant and Appellant.

B291181

(Los Angeles County
Super. Ct. No. BA460993)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed in part, reversed in part, and remanded with instructions.

Alex Green, 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, Kenneth C. Byrne and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant Antwone Harold Mercer of two counts of assault with a deadly weapon (Pen. Code,¹ § 245, subd. (a)(1), counts 1 and 3), one count of attempted second degree robbery (§§ 664 and 211, count 2), and one count of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4), count 4). The jury also found true the allegations that defendant inflicted great bodily injury in the commission of the crimes alleged in counts 1 and 4. (§ 12022.7, subd. (a).) The trial court sentenced defendant to state prison for an aggregate term of 15 years, which included a five-year enhancement for a prior serious felony conviction that defendant admitted to having sustained (§ 667, subd. (a)(1)). The court also imposed various fines and fees.

On appeal, defendant contends there was insufficient evidence to support his conviction for assault with a deadly weapon as alleged in count 3, and also insufficient evidence to support the true findings that he inflicted great bodily injury. Defendant also challenges his sentence. We affirm the jury's true findings that defendant inflicted great bodily injury, reverse and vacate the conviction on count 3, and remand for resentencing.

¹ Further statutory references are to the Penal Code.

II. BACKGROUND

A. *The Prosecution's Evidence*

1. Assault on Mateo

On September 12, 2017, at approximately 8:40 a.m., Francisco Mateo was working at his store, La Tiendita Market, when defendant walked in, announced that he was an undercover officer, and stated he wanted to check Mateo's permit to sell cigarettes. Mateo asked defendant for identification. Defendant responded by demanding that Mateo produce identification that he owned the store. Mateo told defendant that if he did not produce identification, Mateo would call the police. Mateo then directed defendant to leave the store. Defendant did not leave and instead produced a library card and an EBT (electronic benefit transfer) card.

Defendant started touching the cigarettes on display and took two packs from the shelf, at which point Mateo went to retrieve a piece of metal that he used to protect himself. Mateo told defendant to leave or he would hit defendant. Defendant refused and the two began to pull on one another. Defendant grabbed the metal bar and tried to take it away from Mateo. Mateo hit defendant with his fist and defendant hit Mateo with his fist. Defendant also hit Mateo with an object, wrapped in paper, that defendant was carrying in his hand (stick). Defendant hit Mateo about 10 times with the stick, including on the head three or four times. Mateo described defendant's blows on a scale of one to 10 as a "[10] or stronger" in terms of force. The blows caused Mateo pain and "almost knocked [him] out."

During their struggle, defendant dropped the stick and continued to strike Mateo with his fist.

Defendant and Mateo continued to pull on one another and moved their struggle to outside the store, where defendant continued to strike Mateo on the head with his fist. Defendant then suddenly stopped striking Mateo, let go of the metal bar, and walked away. Defendant told Mateo not to call the police or he would come back.

In total, defendant struck Mateo over 30 times on his head, back, shoulder, and neck. Defendant also kicked Mateo approximately five times on each leg. Mateo described the punches as a 10 in terms of force. At trial, Mateo testified that during the attack, he felt like he was going to faint for two minutes, but he “gathered [himself] and made [himself] strong.” Mateo’s vision was blurry and he was “seeing just dark” because of the blows. On the day of the assault, Mateo told the police that the last thing he remembered was being beaten up, defendant telling Mateo not to call the police, and then opening his eyes and seeing defendant about half a block away. Mateo told the police that he had fainted.

The police retrieved the stick and the prosecutor displayed it to the jury. The shaft of the stick was a plastic pipe, which was hollow but rigid, wrapped inside a sock and then covered in paper and a material that was either tape or lint roller paper. One end of the stick was composed of a plastic elbow fitting and on the other end was a four to five inches long piece of wood that had a jagged edge. The wooden end of the stick, similar to a handle, was longer when defendant first approached Mateo, suggesting that a portion had broken off during defendant’s assault.

The prosecutor also played video footage from a number of cameras inside and outside the store. Those videos depicted defendant holding the stick in his hand and striking Mateo multiple times in rapid succession. The videos also depicted that Mateo did not lose consciousness at any time before he and defendant went outside of the store.

As a result of the assault, Mateo suffered: swelling to his head; “redness” on his forehead, right foot, both arms, and both knees; scratches on his knees; and a cut on his finger. Mateo’s pain level was a seven out of 10 on the day of the incident, and a nine out of 10 the day after the incident. Mateo took pain medication for about one week after the attack. Mateo did not visit a doctor or a hospital as a result of his injuries.

2. Assault on Montiel

Later that same date, at approximately 2:00 p.m., Montiel walked toward a school in order to pick up his son. Along the way, Montiel met Teresa Salado, who was with her two daughters, at the corner near Valencia Street and Olympic Boulevard in Los Angeles. While talking to Salado, Montiel saw defendant approach with a rock in his hand. The rock was approximately six to eight inches in length and weighed approximately five to seven pounds. Montiel moved to the side to let defendant walk by. Defendant walked by, but then returned with the rock, threatening to throw it at Montiel. Montiel told Salado to move to the side while he ran in a different direction, so that defendant would move away from Salado and her children. Defendant chased after Montiel, yelling at him in English.

Montiel, who did not speak English, did not understand what defendant was saying.

When defendant was within four feet of Montiel, defendant threw the rock, hitting Montiel in the stomach. Montiel lost his breath and fell forward onto his hands. Defendant hit Montiel in the head three or four times with his fists and then picked up the rock and used it to strike Montiel on the back of his head and back. According to Montiel, he felt like he was about to faint, but did not do so. Montiel and defendant exchanged words. Defendant then lowered the rock and walked away.

Salado saw Montiel fall down on the sidewalk with his eyes closed. Montiel was passed out for under five seconds. Salado's daughter called for an ambulance. As a result of the assault, Montiel bled from a half-inch laceration to his head. The laceration required five staples to close.

When defendant was arrested, the arresting police officer observed that defendant's right shoe tip and heel had what appeared to be fresh blood on it.

C. *Defense Case*

Defendant, who was previously convicted of misdemeanor assault in 2000 and petty theft in 2003 and 2015, testified at trial.

1. Mateo Incident

On the morning of September 12, 2017, defendant, who was homeless, waited outside the store for it to open so that he could purchase cigarettes. Defendant believed Mateo was being

disrespectful and asked Mateo whether he was the store owner. Defendant provided his EBT card to buy cigarettes. Mateo told defendant that he would call the police if defendant did not leave. Defendant admitted that he fought with Mateo.

Defendant testified that he had manufactured the stick, which was “a . . . very light plastic tubing . . . wrapped around with the lint brush and a piece of wood.” Defendant called the stick “a cordless microphone,” which did not require electricity or battery for operation. Defendant denied using the stick as a weapon. According to defendant, he used the necessary force to ensure he was not beaten up by Mateo.

2. Montiel Incident

Defendant eventually began to walk towards Union Station. Defendant carried a brick in his hand because he had been “jumped” in the area and harassed by store owners. Defendant walked by Montiel. Defendant thought he heard Montiel gnash his teeth and believed Montiel spat on him. Defendant turned around and told Montiel, “You better not fucking ever do that again.” Defendant felt something hit him again. Defendant turned and saw Montiel jerk his hand back and put something in his pocket. Defendant saw the onlookers laughing at him and “just snapped.” Defendant threw the brick at Montiel but missed. Defendant’s momentum took him to the ground. As defendant was getting up, Montiel threw a punch that grazed defendant’s nose. Defendant tackled Montiel to the ground. Montiel reached for the brick, but defendant grabbed the brick himself and used it to strike Montiel.

Defendant described the fight as mutual combat and claimed that he used the amount of force, which he described as “hard,” needed to protect himself “from imminent harm.”

III. DISCUSSION

A. *Count 3 Not Supported by Substantial Evidence*

Defendant contends that the evidence presented at trial was insufficient to support the jury’s conclusion that the stick he used was a deadly weapon under section 245, subdivision (a)(1). “[A] ‘deadly weapon’ under section 245, subdivision (a)(1) 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.” (*People v. Perez* (2018) 4 Cal.5th 1055, 1065.) “The use of an object in a manner ‘likely to produce’ death or great bodily injury [citation] requires more than a mere possibility that serious injury could have resulted from the way the object was used.” (*In re B.M.* (2018) 6 Cal.5th 528, 534.) “[T]he determination of whether an object is a deadly weapon under section 245[, subdivision] (a)(1) must rest on evidence of how the defendant actually ‘used’ the object.” (*Ibid.*)

We review the jury’s finding on whether an object is a deadly weapon for substantial evidence, that is, ““evidence which

is reasonable, credible, and of solid value.’” (In re B.M., *supra*, 6 Cal.5th at p. 536; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086.)

Viewing the evidence in the light most favorable to the judgment, we conclude that the stick used by defendant does not satisfy the deadly weapon test. The stick was a plastic pipe wrapped inside a sock and then covered in paper and tape or lint roller paper, with a thin wooden handle. Although defendant’s use of that stick, particularly his use to strike Mateo’s head, *could* have produced great bodily injury, it was not *likely* to produce death or great bodily injury, as demonstrated, in part, by what happened to the stick when defendant used it to apply force: the handle broke. (See, e.g., *In re Brandon T.* (2011) 191 Cal.App.4th 1491, 1497 [noting that the knife used by defendant broke during the assault, which suggested that it was not likely to produce great bodily injury].) Moreover, although Mateo suffered swelling on his head and “redness” to his forehead, it was never established at trial that he suffered these injuries as a result of defendant’s assault with the stick, rather than as a result of defendant’s punches with his fist. Indeed, the evidence suggests any injury suffered prior to the breaking of the stick was relatively mild, demonstrating that defendant’s use of the stick was not *likely* to cause death or great bodily injury. (*In re B.M.*, *supra*, 6 Cal.5th at p. 549 [“although it is appropriate to consider the injury that could have resulted from the way the object was used, the extent of actual injury or lack of injury is also relevant”].)

B. *Substantial Evidence Supports Great Bodily Injury Enhancements*

Defendant next contends there was insufficient evidence to support the great bodily injury enhancements for counts 1 and 4, that is, the allegations that Mateo and Montiel suffered great bodily injury as a result of defendant's crimes.² "Great bodily injury 'means a significant or substantial physical injury.' (§ 120227, subd. (f) . . .)" (*People v. Cross* (2008) 45 Cal.4th 58, 63.) However, "the injury need not be so grave as to cause the victim "permanent," "prolonged," or "protracted" bodily damage." (*Id.* at p. 64.) We review the jury's true finding on the great bodily injury enhancements for substantial evidence. (*People v. Woods* (2015) 241 Cal.App.4th 461, 486.)

1. Mateo's Injuries

Defendant contends Mateo did not suffer any significant or substantial injury, citing Mateo's testimony that he did not faint in support. While we conclude there was insufficient evidence to support a conviction on count 3, we note that there was evidence that defendant used his fist to strike Mateo, and that defendant struck defendant a total of 30 times, with a force described as a 10 out of 10. Further, Mateo testified that a number of these strikes were to Mateo's head. (See *People v. Saez* (2015) 237 Cal.App.4th 1177, 1189 [wounds to the head are significant as

² Count 4 charged defendant with assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)) and defendant does not challenge the sufficiency of the evidence in support of that count.

the head is “an obviously vulnerable area”].) Although Mateo testified that he “made [himself] strong” so as not to pass out while defendant hit him, he further testified to “seeing just dark” after getting hit on the head. On the day of the assault, Mateo reported that he lost consciousness and when he woke up, he saw defendant walking away on the sidewalk. Although Mateo gave seemingly conflicting evidence as to whether he fainted, on appeal, we do not re-weigh the evidence. (*People v. Penunuri* (2018) 5 Cal.5th 126, 142.) The jury could conclude on this evidence that Mateo did not faint while defendant hit him, but did faint outside after defendant left. Substantial evidence thus supports the jury’s true finding that Mateo suffered great bodily injury. (See *People v. Wade* (2012) 204 Cal.App.4th 1142, 1149–1150 [loss of consciousness supports a finding of great bodily injury, even without requiring medical treatment].)

2. Montiel’s Injuries

Defendant argues that because Montiel did not lose consciousness and suffered, at most, a headache and a half-inch laceration, he did not suffer any significant or substantial injury. We disagree. Defendant inflicted a half-inch wound to Montiel’s head, which, as depicted in a photograph exhibit, caused sufficient injury to cover the back of his head in blood. The wound required five staples to close. This is sufficient evidence of great bodily injury. (See, e.g., *People v. Clay* (1984) 153 Cal.App.3d 433, 459–460 [sufficient evidence of great bodily injury; victims suffered head wounds inflicted by a pistol, requiring three to seven stitches]; *People v. Saez, supra*, 237 Cal.App.4th at p. 1189 [sufficient evidence of great bodily injury

as “many of the victim’s injuries were to her head”].) Moreover, Salado testified that Montiel fell down unconscious from the strikes. Although Montiel testified that he did not pass out, he also testified that he was “fainting.” As noted, loss of consciousness supports a finding of great bodily injury, even without requiring medical treatment. (*People v. Wade, supra*, 204 Cal.App.4th at pp. 1149–1150.) Accordingly, substantial evidence supports the jury’s true finding that Montiel suffered great bodily injury.

C. *Remand for resentencing*

Having concluded that there was no substantial evidence to support defendant’s conviction on count 3, we remand for a full resentencing as to all counts, so that the trial court may exercise its sentencing discretion in light of the changed circumstances. (*People v. Navarro* (2007) 40 Cal.4th 668, 681.) Because we remand for a full resentencing, we need not consider defendant’s argument that a limited remand is appropriate for the court to exercise its discretion pursuant to section 1385 whether to strike the five-year sentence enhancement under section 667, subdivision (a)(1), or to consider whether defendant has the ability to pay certain fines, fees, and assessments, as defendant can raise those arguments at the resentencing hearing. We note the parties agree that it was unlawful for the court to impose the full three-year term for the great bodily enhancement for count 4, rather than a one year term, because count 4 was a subordinate term. (§ 1170.1, subd. (a).) Because we remand for a full resentencing, we need not decide the matter.

IV. DISPOSITION

The judgment on count 3 is reversed and the matter is remanded for resentencing on the remaining counts. In all other respects, the judgment is affirmed.

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KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.