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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.

TIMOTHEUSE J. BERRY,

Defendant and Appellant.

B281011

(Los Angeles County
Super. Ct. No. BA448330)

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

Kevin E. Lerman, 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, Stephanie C. Brennan, Supervising Deputy Attorney General, Jonathan M. Krauss, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Timotheuse J. Berry of assault with a deadly weapon and other crimes. Berry appeals, claiming his assault conviction is not supported by substantial evidence. We affirm.

On July 10, 2016, Flynn Helper and Brandon Bustillos hosted a party at their Los Angeles gallery. Helper and Bustillos went outside to check a disturbance and saw Berry at the recycling center across the street, screaming and acting strangely. They told Berry he should leave before they called the police, but Berry remained. Twice more during the party, Helper and Bustillos told Berry to leave. The confrontations grew heated. Then Berry disappeared.

After the party, Helper and Bustillos emerged from the gallery. They saw Berry running toward them with a claw hammer with a two-foot handle, a machete, and a bottle. Berry threw the bottle at Bustillos and Helper. The bottle shattered and fragments hit Bustillos and Helper. Bustillos wore sandals and the flying glass cut his feet. Berry came after Bustillos and Helper with the machete and hammer, screaming “I am going to kill you.” Berry was coming at the two and closing the distance, which was about 18 to 20 feet, when Bustillos and Helper fled to safety.

After breaking gallery and car windows, Berry was charged with assaulting Helper with a deadly weapon. (Pen. Code, § 245, subd. (a)(1) [all statutory references are to the Penal Code].) Berry also was charged with two felony vandalism counts. (§ 594, subd. (a).) The jury found Berry guilty of assault and vandalism. On appeal, Berry challenges only his assault conviction.

Relying on testimony he was no closer than 18 to 20 feet to Helper and Bustillos, Berry incorrectly contends reasonable

jurors could not have found he had the “present ability” to commit an assault.

We review the record in the light favorable to the judgment to identify substantial evidence from which a reasonable jury could find the defendant guilty beyond a reasonable doubt. (*People v. D’Arcy* (2010) 48 Cal.4th 257, 293.)

An assault is “an unlawful attempt, coupled with a *present ability*, to commit a violent injury on the person of another.” (§ 240, italics added.) When defendants equip and position themselves to commit a battery, they have the required “present ability” if they are capable of inflicting injury at that time, even if some steps remain to be taken, and even if someone or something thwarts the injury. (*People v. Chance* (2008) 44 Cal.4th 1164, 1172.)

Substantial evidence supports Berry’s conviction for assault with a deadly weapon. Hammers and machetes can be deadly. Berry does not dispute this.

Swinging a handheld hammer or machete is one method of assault. Another is to throw these weapons. Either technique can be deadly. Both can be assaults.

Berry was in throwing range of Helper and Bustillos. He proved it. Berry threw the bottle at Helper and Bustillos, which broke and cut Bustillos’s feet. Holding the machete and hammer, Berry then chased the two, closing the distance. When Berry was about 18 to 20 feet away, the victims ran to safety.

The law required Berry to have the present ability to inflict injury. The prosecutor argued Berry’s proximity, ability, and propensity to throw things at people satisfied this element.

The jury had ample grounds for concluding Berry had the present ability to inflict injury. People have been throwing

things to deadly effect for millenia. The jury could infer a bottle thrower dangerous at one distance could, at closer range with deadlier tools, remain capable of inflicting injury.

On appeal, Berry offers neither logic nor precedent to contest the jury finding he had a present ability to inflict injury by throwing weapons.

Berry submits at page 18 of his opening brief that machetes and large hammers are too unwieldy to throw 18 to 20 feet. Berry offers no support for this surprising claim. We can think of none.

Berry cites *People v. Nguyen* (2017) 12 Cal.App.5th 44, 49, but this ruling affirmed the conviction and favors the prosecution. The opinion declined to distinguish between seven or eight feet of separation and 10 or 15 feet of distance. “Such is a factual matter within the province of the trier of fact.” (*Ibid.*) Moreover, *Nguyen* involved neither evidence nor argument about throwing weapons.

Substantial evidence supports Berry’s conviction.

DISPOSITION

The judgment is affirmed.

WILEY, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

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