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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. HECTOR AZDRUBAL SALDANA, Defendant and Appellant.	B264674 (Los Angeles County Super. Ct. No. PA080156)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hayden A. Zacky, Judge. Affirmed in part and reversed in part with directions.

Sarvenaz Bahar, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

In an amended information, appellant Hector Azdrubal Saldana was charged with one count of carjacking (Pen. Code, § 215, subd. (a) (count 1),[1] and two counts of assault with a firearm (§ 245, subd. (a)(2) (counts 3 & 5). As to count 1, it was alleged that appellant used a handgun. (§§ 12022.53, subd. (b), 1203.06, subd. (a)(1).)

A jury found appellant guilty of count 1, but found the handgun allegation not true. The jury found appellant guilty of the lesser offense of assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1)) on counts 3 and 5. The trial court sentenced appellant to 11 years in state prison as follows: the upper term of nine years on count 1, the principal count; a consecutive one-year term on count 3 (one-third the midterm); and a consecutive one-year term on count 5 (one-third the midterm). Appellant was also ordered to pay certain fines and fees.

Appellant contends the trial court erred in sua sponte instructing the jury on assault with a deadly weapon other than a firearm as a lesser included offense of assault with a firearm, and that, in any event, there was no substantial evidence that appellant used a deadly weapon other than a firearm. We reverse the judgment on counts 3 and 5.

Factual Background[2]

Prosecution Evidence

On March 3, 2014, Silvestre Bravo (Bravo) posted his car, a 2004 Jeep Grand Cherokee (Jeep), for sale on Craig's List. The same day, appellant called him about the Jeep. They arranged to meet that evening, around 8:00 p.m., in a parking lot near the campus of California State University in Northridge, where Bravo was a student. Bravo and his roommate, Eduardo Mendez (Mendez), went to the parking lot and looked for a green Nissan Altima (Nissan) per appellant's directions. They spotted the Nissan. It had tinted windows and Bravo could not see inside.

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

[2] Appellant was tried with two codefendants, Jasmin Alvarez (Alvarez) and Moises Aguirre (Aguirre), who are not parties to this appeal. The codefendants were charged in counts 2 and 4.

Appellant and Bravo spoke about the Jeep and took it for a test drive in the parking lot. Appellant expressed an interest in buying the Jeep and asked if there was a Wells Fargo bank nearby. Appellant drove the Jeep, with Bravo in the front passenger seat and Mendez in the backseat, to a nearby bank. Bravo drove the Jeep back to the parking lot. During the drive, appellant displayed a tattoo of a Chevrolet on his left arm. The Nissan followed them to and from the bank.

Back at the parking lot, appellant asked Bravo if his wife could test drive the Jeep. Bravo agreed. Codefendant Alvarez got out of the Nissan and into the driver's seat of the Jeep. Appellant sat in the front passenger seat and Bravo sat in the rear behind the driver's seat. Mendez stayed near the Nissan. There was someone in the driver's seat of the Nissan, but Mendez could not see the face.

When Alvarez drove the Jeep back to the parking lot, appellant said he needed to use the restroom. Alvarez stopped the Jeep. Appellant got out, walked around the back of the Jeep, opened the left rear door, and told Bravo to get out or else he would take his life. Appellant was pointing a black, metal, semiautomatic gun at Bravo's head and upper body. Bravo thought it was a real gun.

Bravo tried to grab the gun from appellant and they began wrestling. Half of Bravo's body was outside the Jeep. Bravo yelled to Mendez for help. Appellant told Alvarez to "step on it and leave." As the Jeep moved forward, Bravo was pushed out and lost his grip on appellant. Alvarez drove the Jeep out of the parking lot. Appellant started running toward the Nissan and Bravo chased after him. Mendez also started running toward appellant, but stopped when he saw appellant pointing a gun at him. Mendez heard clicking sounds and thought appellant was shooting at him. The clicking sounded plastic, not metal. Bravo called out to Mendez to grab appellant, telling him the gun was fake, not real. Mendez still assumed the gun was real.

The Nissan drove towards appellant and Bravo, and Bravo had to step out of the way. When the car stopped, appellant tried to get into the front passenger seat and Bravo tried to open the driver's side rear door. Appellant then pointed the gun at Bravo over the roof of the Nissan. Bravo heard a "metal click." He thought the gun might have

misfired. Bravo saw appellant's right hand closed in a gripping fashion on top of the gun and his left hand moving back and forth over the top of his right hand. Bravo, who was familiar with semiautomatic guns, did not understand the reason for appellant's hand motions on top of the gun.

Appellant got inside the Nissan. Bravo tried to get in the car as well, but it drove away. Bravo saw the driver's profile and identified him in court as codefendant Aguirre. Mendez called 911. Bravo told the dispatcher that appellant had a "bad gun." Bravo testified at trial that he did not remember what he meant by "bad" and denied that he meant the gun was fake.

The stolen Jeep was eventually recovered during a traffic stop while appellant was driving it. Appellant was taken into custody. Detective Debbie Prosser of the Los Angeles Police Department interviewed appellant, Bravo and Mendez. Both Bravo and Mendez believed appellant had a real gun. Bravo told the detective that he heard multiple clicks while he was outside of the Jeep. Mendez identified appellant from a photographic line-up.

Detective Prosser had almost 25 years of experience as an officer and had served as a firearms instructor for two years at the police academy. She opined that the movements Bravo saw appellant making above the gun were consistent with "somebody carrying a pistol trying to work the slide to either chamber a round or eject a bad round." There could be several reasons to try to pull the slide of a semiautomatic handgun, including to eject a round that misfired and had not discharged from the chamber. Multiple clicking sounds from a gun would indicate that the trigger was pulled multiple times. If a bullet did not fire the first time, the gun would make a clicking sound the next time the trigger was pulled, even if there were no rounds in the chamber, there was a bad round in the chamber, or the magazine was not seated properly.

No firearm was recovered during the investigation.

Defense Evidence

Appellant and Aguirre did not present any evidence. Alvarez testified that she did not know appellant was going to steal the Jeep or bring a gun. When she saw appellant with a gun and heard him tell Bravo to get out of the Jeep, she panicked and drove away.

DISCUSSION

I. Introduction

Section 245, subdivision (a)(1) provides punishment for "[a]ny person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm. . . ." Section 245, subdivision (a)(2) provides punishment for "[a]ny person who commits an assault upon the person of another with a firearm . . . ." In counts 3 and 5, appellant was charged with violating section 245, subdivision (a)(2).

After the close of evidence and before closing arguments, the trial court informed counsel that it sua sponte would instruct the jury on section 245, subdivision (a)(1) as a lesser included offense on counts 3 and 5. The court ultimately instructed the jury with CALCRIM No. 875, which began: "Defendant Aguirre is charged in Count 4 with Assault with a Deadly Weapon other than a Firearm, an Automobile. Assault with a Deadly Weapon other than a Firearm, is also a lesser included offense to Assault with a Firearm, as charged in Counts 3 and 5." There was no mention of appellant's name or what deadly weapon he used. The instruction defined "*deadly weapon other than a firearm*" as "any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." "Great bodily injury" was defined as "significant or substantial physical injury. It is injury that is greater than minor or moderate harm." A firearm was defined as "any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion."

Appellant contends the trial court erred in sua sponte instructing the jury on the offense of assault with a deadly weapon other than a firearm as a lesser included offense to assault with a firearm because "(1) assault with a deadly weapon other than a firearm is

not a lesser included offense to assault with a firearm; and (2) there is no substantial evidence to establish that appellant used a deadly weapon other than a firearm."

We need not reach the issue here of whether assault with a deadly weapon other than a firearm is a lesser included offense of assault with a firearm because, even if we were to assume that it was, we agree with appellant that the evidence was insufficient to support the jury's finding that he used a deadly weapon other than a firearm.

II. Standard of Review

When the sufficiency of the evidence is challenged on appeal, this court reviews the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Welch* (1999) 20 Cal.4th 701, 758; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Substantial evidence, however, does not mean "any" evidence. Rather, it is evidence that is reasonable, credible, and of solid value. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) "While substantial evidence may consist of inferences, such inferences must be 'a product of logic and reason' and 'must rest on the evidence' [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations]." (*Ibid*.)

III. Evidence Presented

Appellant postulates that since the jury found he did not use a firearm (as based on its verdicts), and as the trial court and trial counsel surmised after the verdicts,[3] the jury must have found that appellant used either a BB gun or a fake gun.

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[3] During sentencing, the trial court stated that the jury "didn't find it to be a real firearm. Obviously, it was a replica or BB gun of some type." The trial court disagreed with the jury's finding. It selected the high term on count 1, stating, "Even though the jury found the gun allegation not true, I don't find it unreasonable to believe that if it was a firearm that when . . . the trigger was pulled and a click was heard that it was a misfire because shortly after that happened the evidence established that [appellant] was manipulating the slide of the gun, which is something done to clear a round from the chamber." The prosecutor also stated that the jury believed appellant used "perhaps . . . a fake—or that it wasn't enough evidence to prove that it was a real gun, albeit the victims all believed it was a real gun."

The evidence viewed in the light most favorable to support the jury's finding that appellant did not use a real firearm consists of the following: Mendez's testimony that while he was running toward appellant, Bravo told him the gun was not real; Mendez's testimony that the clicking he heard from the gun sounded plastic; and Bravo's statement to the 911 dispatcher that appellant's gun was a "bad gun." None of this evidence establishes that appellant used a deadly weapon other than a firearm.

BB Gun

Assuming the jury found that appellant used a BB gun instead of a real firearm, there was no evidence presented to the jury on BB guns. No description of a BB gun was provided. For example, the jury was never told whether a BB gun is metal or plastic; how closely it resembles a real gun; how it works; how it is loaded; whether it has chambers or use magazines; whether it makes clicking sounds and what kind; its operating speed or the extent to which projectiles expelled from it can penetrate the body.

While defense counsel requested that the jury be instructed with a description of a BB gun, the trial court refused. During his opening statement, defense counsel told the jury he would read to them the statutory definition of a BB gun, but he was stopped by the trial court before he could do so. The trial court stated in the jury's presence: "Counsel, don't do this, please. That's not charged in this case. Move on." Later, outside the presence of the jury, the trial court denied defense counsel's request to instruct the jury on the definition of a BB gun as set forth in former section 16250.[4] The trial court stated: "There is no evidence that a BB gun was used." Finally, during his closing argument, defense counsel told the jury that he wanted to read to them the statutory definition of a BB gun set forth in the Penal Code, but he was stopped again by the trial court before he could do so. The court stated: "No, You're not. That's not in evidence. [¶] There is no jury instruction regarding that, Ladies and Gentlemen."

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[4] Prior to January 1, 2016, section 16250, subdivision (a) defined "BB device" as "any instrument that expels a projectile, such as a BB or a pellet, not exceeding 6 mm caliber, through the force of air pressure, gas pressure, or spring action, or any spot marker gun."

Though defense counsel argued that appellant used a BB gun, arguments are not evidence, as the jury was instructed.

Moreover, there was no evidence presented that a BB gun is a deadly weapon. The jury was instructed that a deadly weapon is "any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." As noted above, there was no description of the nature of a BB gun or how it is used, and therefore nothing for the jury on which to base a finding that it is an inherently deadly weapon or that it was capable of inflicting substantial physical injury.

Fake Gun

If the jury instead found that appellant used a fake gun, its verdicts on counts 3 and 5 also cannot stand because a fake gun does not satisfy the definition of a deadly weapon given to the jury. A fake gun is not an inherently dangerous weapon. And, if the gun was fake, appellant did not use it in a manner likely to produce death or great bodily injury (e.g., striking the victims with it).

DISPOSITION

The judgment is reversed as to counts 3 and 5. The trial court is directed to strike the convictions on counts 3 and 5 and any corresponding assessments, and to forward a copy of the modified abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT