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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re B.Y., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B279893 (Super. Ct. No. 1435614) (Santa Barbara County)
THE PEOPLE, Plaintiff and Respondent, v. B.Y., Defendant and Appellant.	

During an argument at their home, fourteen-year-old B.Y. threatened his brother with violent injury while they were standing in close proximity. B.Y. seized an 18-inch long metal pole and raised it to strike, but his stepfather pinned his arms to prevent contact. It was an incipient battery sufficient to sustain an assault charge. The juvenile court found that the metal pole could be used to inflict great bodily injury.

B.Y. was sent to a boys' camp after the juvenile court found that he committed an assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).)[1] We conclude that the evidence was sufficient to show an assault; further, that the manner in which the metal pole was displayed reasonably portended the infliction of great bodily injury. We affirm.

FACTS AND PROCEDURAL HISTORY

In 2016, four wardship petitions were filed against B.Y. An original petition in May 2016 alleged that B.Y. committed petty theft by taking $100 from his mother's wallet. (§ 484, subd. (a).) Based on an assessment report, he was found unsuitable for family supervision.[2]

Before trial, a second petition was filed, alleging that B.Y. misrepresented his identity to a police officer. (§ 148.9, subd. (a).) On August 4, 2016, B.Y. waived his right to trial and admitted the charge in the second petition. The court found that B.Y. falls within section 602 of the Welfare and Institutions Code. He was placed on probation and ordered to spend 15 days of house arrest in his mother's custody. The court dismissed the May petition.

On August 23, 2016, deputies found B.Y. off campus during school hours, with a pipe for smoking marijuana, loitering on private property while a cohort stole property from a vehicle. A third petition alleged that B.Y.'s conduct violated the terms of his probation. He admitted the violation. The court ordered B.Y.

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[1] Unlabeled statutory references are to the Penal Code.

[2] The assessment report stated that B.Y. has a history of confrontational and delinquent behavior, as reported by the police, his mother, and his teacher. He admitted using drugs since age eight.

detained in juvenile hall for 14 days, followed by 30 days of electronic monitoring.

A fourth petition filed on September 29, 2016 alleged that B.Y. assaulted a family member with a deadly weapon. (§ 245, subd. (a)(1).) B.Y. was detained pending trial: his mother opposed his release, concerned that someone would be seriously hurt by his escalating violence.

At trial, the evidence showed that B.Y. lives with his mother Mrs. Williams, stepfather Mr. Williams, his older half-brother E.F., and two younger siblings. B.Y. often used a PlayStation console that E.F. owns and keeps in the bedroom they share. One day in September 2016, B.Y. ignored E.F.'s request to stop using the PlayStation. E.F. turned off the devices and told B.Y. to leave the room. B.Y. was upset and restarted the television. E.F. turned the television off, again told B.Y. to leave, and grabbed B.Y.'s arm to pull him out of the room. B.Y. resisted. E.F. was angry because B.Y. had deleted content from the PlayStation.

Once B.Y. was outside the bedroom, E.F. instructed him not to reenter. B.Y. threw himself against the door while E.F. blocked it. When E.F. let his guard down for a moment, B.Y. opened the door forcefully, hitting E.F.'s bare foot. B.Y. pushed E.F. in the chest. E.F., in turn, pushed B.Y., who tried to punch E.F.

The Williamses heard fighting. Mrs. Williams saw her sons shoving each other and rushed to intervene. Mr. Williams testified that he saw B.Y. in the dim hallway with a dark, long object four or five inches from his body "in a striking position," meaning "a raised position . . . at the ready," i.e., a "threatening position." B.Y. held the bottom of the object "so that the length of it [was] . . . above his hand." Mr. Williams grasped B.Y. in a bear

hug to pin his arms and prevent anyone from getting hit. He warned his wife that B.Y. had something in his hand.

Mrs. Williams wrested the object from B.Y.'s hand. It was a metal curtain rod or towel bar that the family uses as a window lock to keep intruders from entering the house. Counsel described it as being about two feet long and hollow. E.F. did not notice that B.Y. was holding the rod until his mother removed it from B.Y.'s hand. Mrs. Williams called the police.

B.Y. told the police that the altercation began when he deleted his brother's PlayStation account, resulting in E.F.'s demand that B.Y. leave the bedroom. B.Y. tried to push his way back into the bedroom, then "went to the bathroom and grabbed the black pipe that was in the window." B.Y. told officers that he intended to hit E.F. with the pipe, but could not because he was stopped by Mr. Williams.

The Judgment

The juvenile court determined that when B.Y. acted, "he had the present ability to apply force likely to produce great bodily injury with a weapon other than a firearm." Although the item he used is not an inherently deadly weapon, the way it was utilized could produce great bodily injury by "striking" or "poking" another person. The People need not prove that B.Y. actually touched or injured someone. Rather, B.Y. used an instrument or weapon "in such a way that it's capable and likely to cause, in this case, great bodily injury, and the Court does find that [the] item . . . is such a weapon." The court found true the allegation of assault with personal use of a deadly weapon.

At disposition, B.Y. continued to be a ward of the court. Release to parental custody was contrary to B.Y.'s welfare because he violated a court order; escaped from a commitment made by the court; was likely to flee; and it is necessary to protect

B.Y. and others. B.Y. was committed to a 120-day program at Los Prietos Boys' Camp. He received 37 days of credit for his detention in juvenile hall.

DISCUSSION

Appeal lies from the judgment. (Welf. & Inst. Code, § 800.) We determine whether any substantial evidence supports the court's findings, reviewing the record in the light most favorable to the judgment. (*In re Roderick P.* (1972) 7 Cal.3d 801, 808.) Here, sufficient evidence sustains a finding that B.Y. violated section 245.

First, B.Y. argues that there is no evidence that he committed an assault. An assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) The crime is established if the defendant "'willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery.' [Citations.]" (*People v. Chance* (2008) 44 Cal.4th 1164, 1169 [defendant violated section 245 by holding a loaded gun and looking over his shoulder at an officer 20 feet behind him, though he did not actually point the weapon at the victim, who feared for his life].) The defendant must have the present ability to carry out the assault by "'attain[ing] the means and location to strike immediately.'" (*Id.* at p. 1168.) "'[I]mmediately' does not mean 'instantaneously.'" (*Ibid.)* The "injury" element "is satisfied by any attempt to apply physical force to the victim, and includes even injury to the victim's feelings." (*Ibid*., fn. 2.)

The record shows that Mr. Williams saw B.Y. near E.F. in the hallway of their home. B.Y. was holding the bottom of a metal pole in a "striking," "raised," "ready," and "threatening" position. B.Y. admitted that he seized the pole to hit E.F., and would have done so if Mr. Williams had not forced B.Y.'s arms

down. Moments before, B.Y. had thrown himself against the bedroom door while E.F. tried to keep it closed, forcefully hitting E.F.'s bare foot. B.Y. shoved and tried to punch E.F.

B.Y. reasons that "because [he] did not ever attempt to swing the towel pole towards [E.F.], there never existed a motion where the next step would be the contact that would lead to a battery." B.Y. misapprehends the requirements for an assault. The law requires only that he "have the ability to inflict injury on the present occasion . . . even if the defendant is *several steps away from actually inflicting injury*, or if the victim is in a protected position so that injury would not be 'immediate,' in the strictest sense of that term." (*People v. Chance*, *supra*, 44 Cal.4th at p. 1168, italics added. See *People v. Nguyen* (2017) 12 Cal.App.5th 44 [defendant violated section 245 by brandishing a knife at policemen who were 10 to 15 feet from him].)

B.Y. committed an assault even if his ability to swing the pole and make contact with E.F. from a striking position was prevented by his stepfather's physical intervention. The trier of fact could readily find, based on the testimony, that B.Y.'s "'"next movement would, *at least to all appearance,* complete the battery."' [Citation.]" (*People v. Chance*, *supra*, 44 Cal.4th at p. 1170.) B.Y. relies on a factually inapposite case, in which the defendant had words with a bartender and drew a knife while standing in the center or back of the saloon, "not at any time near enough" to strike, and was moving away from the victim, not toward him. (*People v. Dodel* (1888) 77 Cal. 293, 294.)

B.Y.'s proposed reformulation of the law—to require that a weapon already in hand be in full lethal deployment against a victim within striking distance—would eviscerate the crime of assault. An assault does not require a direct attempt at violence, only an indirect preparation towards it. (*People v. Chance*, *supra*,

44 Cal.4th at p. 1172.) Where, as here, the defendant "equips and positions himself to carry out a battery, he has the 'present ability' required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury." (*Ibid.*) The record supports the trial court's finding that B.Y. violated section 245.

Second, B.Y. argues that the weapon he used could not produce death or great bodily injury because it is hollow and made of a lightweight metal, so that it "would most likely bend or even break" when it struck the victim.

A weapon or instrument likely to produce great bodily injury need not be inherently deadly or dangerous; it may be an ordinary object that could be used in a deadly manner. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029. See *People v. Zermeno* (1999) 21 Cal.4th 927, 929 [beer bottle]; *People v. Page* (2004) 123 Cal.App.4th 1466, 1472 [a pencil could be thrust into the victim's neck]; *People v. Simons* (1996) 42 Cal.App.4th 1100, 1107 [brandishing a screwdriver at police]; *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [fork]; *In re Jose R.* (1982) 137 Cal.App.3d 269, 273 [straight pin embedded in an apple]; *People v. Helms* (1966) 242 Cal.App.2d 476, 486-487 [pillow]; *People v. White* (1963) 212 Cal.App.2d 464, 465 [rock]; *People v. Russell* (1943) 59 Cal.App.2d 660, 665 [fingernail file]; *People v. Nealis* (1991) 232 Cal.App.3d Supp. 1, 3 [use of a dog to attack the victim].) No actual injury or physical contact between the victim and the object is needed for an assault conviction. (*People v. Brown* (2012) 210 Cal.App.4th 1, 7.)

Here, the trial court examined the metal pole and concluded that it could be used to strike or poke in such a way as

to produce great bodily injury.[3] The court's finding is supported by substantial evidence. The pole had sufficient strength and rigidity to hold up curtains or towels, or withstand the force of an intruder trying to gain entrance to the house through a window.

At the time of the assault, B.Y. was in a violent rage. Facing his brother from a few feet away, B.Y. could use the pole to strike or jab E.F. in a vulnerable area such as the neck (crushing the windpipe), the eye socket (inflicting blindness or a brain injury), the mouth, abdomen or genitals. E.F. could not avert injury by grabbing the pole: in the unlit hallway, he did not see that B.Y. held a weapon. A rational factfinder could be persuaded that a metal pole would inflict as much (or more) damage than a pencil, bottle, pin, nail file, pillow, or fork, all of which the courts have found to be potentially deadly weapons.

DISPOSITION

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

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[3] We have also examined the pole and agree with the trial court's assessment of its dangerousness.

Arthur A. Garcia, Judge

Superior Court County of Santa Barbara

Earl E. Conaway, III, 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, Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.