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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN GONZALEZ,

Defendant and Appellant.

E054610

(Super.Ct.No. FWV1100733)

OPINION

APPEAL from the Superior Court of San Bernardino County. Jon Ferguson, Judge. Affirmed.

David R. Greifinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting, and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Adrian Gonzales, of two counts of possessing a billy club (Pen. Code, § 12020, subd. (a)(1)). In bifurcated proceedings, the trial court found

true allegations that defendant had been convicted of four prior offenses for which he served prison sentences (§ 667.5, subd. (b)). He was sentenced to prison for seven years and appeals, claiming there was insufficient evidence to support the verdicts. We disagree and affirm the judgment.

### **FACTS**

On March 14, 2011, around 12:45 p.m., a sheriff's department detective, standing in a parking lot in Ontario, observed defendant, accompanied by his minor son and another man, emerge from a residence two houses north of the parking lot and walk towards the parking lot. Defendant's father lived three to four houses north of this home. Two of defendant's minor children, including a 15 or 16-year-old boy, were at the house from which defendant emerged. To the detective's knowledge, defendant did not live at the house. Approximately less than 10 minutes later, defendant approached the detective in the parking lot. The detective later went to the house and contacted there the mother of defendant's children.<sup>1</sup> Inside the fenced-in yard, on the end of the driveway, two to three feet from the house, were a black duffle bag and a green duffle bag, side by side. Although there was no trash or items near the duffle bags, there were numerous pieces of trash strewn throughout the front yard. In the black bag, in different compartments, the detective found "tubular glass," a black 19-inch Maglite brand flashlight, an unopened

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<sup>1</sup> The detective testified that she was the owner or was in charge of the house. He also testified that he asked her to whom the bags referenced later in this opinion belonged, but he did not testify as to what her response was. Later, the detective testified that after he asked the mother of defendant's children to whom the bags belonged, he did not feel the need to ask defendant's children about their ownership.

letter addressed to defendant at an apartment in San Diego, a digital camera containing pictures, inter alia, of defendant's children and their grandfather,<sup>2</sup> two "Jason" "Halloween"<sup>3</sup> masks, the upper slide to a silver semi-automatic handgun (including the barrel)<sup>4</sup> in a black canvas holster, a small digital scale, a broken laptop computer, toiletries in a jail-issue bag, one or two soiled pieces of men's underwear, and two small baseball bats.<sup>5</sup> The detective testified that the two small baseball bats could have been souvenirs, such as those given out at baseball games. In fact, one of them bore the name

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<sup>2</sup> The detective testified that defendant's children were in three to five of the approximately 15 pictures in the camera that he viewed and defendant's father was in two to three of those pictures.

In his opening brief, defendant asserts that the detective gave conflicting testimony about whether defendant appeared in any of the photos the detective had reviewed, citing the Reporter's Transcript at pages 59, 60 and 86. The record does not support this assertion. When asked if he saw photographs of defendant in the camera, the detective testified, at page 59 of the Reporter's Transcript, "I don't remember seeing him . . . ." The detective made no further statements about defendant's presence in the pictures on page 60. On cross-examination, he was asked how many pictures of defendant he saw in the camera. He responded, "I don't remember . . . ." He was then asked if he saw defendant in any of the pictures. He replied, "I don't remember. I do remember seeing . . . his kids . . . and his father." The foregoing is not conflicting testimony. It is completely consistent.

<sup>3</sup> These resemble hockey players' faceguards.

<sup>4</sup> During argument to the jury, the prosecutor apparently performed a demonstration in which the slide was manipulated and situated in such a way that it appeared to be part of a fully assembled gun. While this is completely appropriate for argument to the jury, citation to it by appellate counsel for the People as part of the evidence supporting the verdicts is not appropriate.

<sup>5</sup> The People incorrectly report that the two small bats were found in the green bag.

of the local semiprofessional baseball team and it looked as though it had been used. The detective testified that these two small bats could be purchased legally. In the green bag was an airsoft rifle, magazine, scope and suppressor. The rifle was a replica of a Heckler & Koch MP5 SD rifle, the latter of which is used by SWAT teams. The detective testified that, despite his 15 years of experience in the armed forces and 15 years of law enforcement, when he first saw the airsoft rifle, he was unable to tell that it was not an authentic MP5 SD. He also stated that the airsoft rifle is used to fire pellets, like BBs, and paint balls and that it could be legally purchased at sporting goods stores.<sup>6</sup>

When asked about defendant's other son<sup>7</sup>, the detective responded, "I . . . released the property of [defendant] to [him]." The detective did not specify what that property was, except that when he testified that he found the broken lap top in the black bag and admitted that he had not listed it in his report, he added, "I left those items—I just took the items that were relevant to my investigation . . . ." At that point, he listed, as additional items he had seized, and not previously mentioned, the toiletries in the jail-issue bag and the dirty underwear. The detective later testified during redirect that he gave the toiletries, broken laptop and dirty underwear to defendant's son, adding, "[H]e asked me to release those items . . ." Although the detective did not expressly state that *defendant* was the one who asked the detective to release those items to defendant's son, this is a reasonable inference from the testimony.

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<sup>6</sup> He added that most such airsoft rifles have an orange tip, but this one did not. However, he said that airsoft rifles without orange tips can be purchased on the Internet.

<sup>7</sup> See text preceding footnote one, *ante*, page two.

The jurors were instructed that one of the elements of possessing a billy club is that defendant possessed the item “as a weapon,” and they were to “consider all the surrounding circumstances relating to that question, including when and where the object was possessed, and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.” Defendant here contends that there was insufficient evidence that he possessed the two small bats as weapons.

The prosecutor argued to the jury that the fact that defendant had in the same bag as the two small bats a part of a real gun, the masks and the flashlight<sup>8</sup> and, in the other bag, what appeared to be an automatic rifle, was circumstantial evidence that the two small bats were possessed as weapons. He added that it was not baseball season, so defendant had no legitimate reason for having the two small bats. For his part, defendant’s argument to the jury focused primarily on the element that *he* had to possess the two small bats.

In support of his contention here, defendant points to language in *People v. Grubb* (1965) 63 Cal.2d 614, 621, that “the circumstances of possession [must] demonstrate an immediate atmosphere of danger.” However, there are no facts here other than the presence of other items, i.e., the real looking replica of an MP5 SD rifle, the masks, the semiautomatic handgun slide, the scales and, possibly, the large flashlight, that suggest that defendant was up to a nefarious purpose in possessing all of the items. Unlike in *Grubb*, there were no circumstances here like the time, place and destination of the

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<sup>8</sup> See footnote four, *ante*, page three.

possessor or the alteration of the object from its standard form, to suggest such a purpose. Still, that does not mean that no reasonable jury could conclude, based on defendant's possession of these other items, that defendant possessed the two small bats as weapons. (See *People v. Jennings* (2010) 50 Cal.4th 616.) The cases defendant cites in his opening brief, wherein defendants made admissions suggesting that the items in their possession were being carried for protection, are not helpful to our analysis. This does not mean, however, that a guilty verdict in the absence of such an admission is unsupported by the evidence. We cannot say, based on the evidence discussed above, that no reasonable jury could have concluded that defendant possessed the two small bats as a weapon.

**DISPOSITION**

The judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

HOLLENHORST  
J.

MILLER  
J.