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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.

TRAVIS BROWNE,

Defendant and Appellant.

E057970

(Super.Ct.No. FBA1200624)

OPINION

APPEAL from the Superior Court of San Bernardino County. Victor R. Stull,
Judge. Affirmed.

Esther K. Hong, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

I

INTRODUCTION

A jury convicted defendant Travis Browne of one count of assault with a deadly

weapon, violating Penal Code section 245, subdivision (a)(1).¹ The court sentenced defendant to a total term of three years. The court imposed a restitution fine in the sum of \$188.10 pursuant to section 1202.4.

Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 setting forth a statement of the case and a summary of the facts, and requesting this court to conduct an independent review of the record. We offered defendant an opportunity to file a personal supplemental brief, but he has not done so. Pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error and find no arguable issues.

II

STATEMENT OF FACTS

One afternoon in February 2012, Nanette Higdon and Seana and Michael Rasberry observed defendant and three other people drinking beer in a parking lot and harassing an older couple who appeared to be in their 70's. Defendant tried to block the couple from loading their groceries into their RV. When the couple tried to leave, defendant jumped on the RV's trailer and would not get off.

Higdon chastised defendant for his lack of respect and called the police. Higdon and the Rasberrys started to leave in their van and defendant ran towards them, waving a beer bottle and yelling racial epithets. He threw the beer bottle at the van and the window exploded, showering Higdon with glass.

¹ All statutory references are to the Penal Code unless stated otherwise.

Higdon was noticeably shaken when the Barstow police officer arrived, She told the officer that she had observed two men harassing an elderly couple trying to get into their vehicle. She said, “Hey, that’s not cool, what if this were your grandmother, your grandparents.” The two men became confrontational. Higdon was concerned defendant was drunk and might have a weapon, so she got in her van. As they drove away, she heard a loud pop and the window breaking. Defendant wore a red shirt and long, braided hair.

The police apprehended defendant about 10 minutes later. Defendant was identified as the person who had thrown the beer bottle. Defendant admitted to the police he threw the bottle because he was upset about racist comments.

Defendant is 22 years old and employed full-time. He pleaded guilty and was convicted of grand theft in October 2010. He admitted drinking in the parking lot with friends but he denied harassing anyone. He told Higdon to shut up and mind her own business. Defendant claimed the Rasperrys and Higdon had called him names and threatened him. Defendant panicked and threw the bottle at the departing van.

III

HIGDON’S STATEMENTS AND THE 911 CALL

The court granted the prosecution’s request to admit evidence of the statements made by Higdon before defendant threw the beer bottle. The court granted the prosecutor’s motion to admit Higdon’s 911 call and her statements to the police at the scene. For purposes of our independent review, defendant’s appellate counsel suggests multiple issues involving Higdon’s statements and her 911 call.

An out-of-court statement is not hearsay when it is entered for the purpose of showing the effect on the listener, and not for the truth of the matter asserted. (*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907.) It was not hearsay and not an abuse of discretion to admit the Rasperrys' testimony about what Higdon said to defendant in the parking lot. (*People v. Davis* (2005) 36 Cal.4th 510, 535-536; *People v. Gatson* (1998) 60 Cal.App.4th 1020, 1024.)

It was also not an abuse of discretion to admit evidence of the 911 call. (*People v. Gatson, supra*, 60 Cal.App.4th at p. 1024.) Statements made in 911 calls are admissible under the spontaneous declaration exception to the hearsay rule. (Evid. Code, § 1240; *People v. Corella* (2004) 122 Cal.App.4th 461, 465-466.) It also did not violate defendant's Sixth Amendment right to confrontation to admit the 911 call. A 911 call is not considered a testimonial statement. (*Id.* at p. 468.) Furthermore, the audio recording was sufficiently authenticated. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 952; *People v. Patton* (1976) 63 Cal.App.3d 211, 220.)

The trial court did not abuse its discretion by admitting Higdon's statements to the police. (*People v. Gatson, supra*, 60 Cal.App.4th at p. 1024.) Statements that are made "spontaneously while the declarant was under the stress of excitement caused by such perception" are not made inadmissible by the hearsay rule. (Evid. Code, § 1240.) It also did not violate defendant's Sixth Amendment right to confrontation to admit Higdon's statements to the police: "Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation'" and are not considered testimonial. (*People v. Corella, supra*, 122 Cal.App.4th at p. 469.)

IV

SUFFICIENT EVIDENCE THAT A BEER BOTTLE IS A DEADLY WEAPON

During deliberations the jury asked for more information about a deadly weapon. The court answered that the jury should consider whether the weapon was inherently deadly or dangerous, or used in such a way capable of causing, and likely to cause, death or great bodily injury.

The determination of whether a weapon, not inherently deadly, is nevertheless a deadly weapon for criminal law purposes because of the manner in which it was used in the commission of a crime, is a question of fact or a mixed question of law and fact to be determined by the trier of fact. (*People v. McCullin* (1971) 19 Cal.App.3d 795, 801-802.) A beer bottle when used as a missile can constitute a deadly weapon. (*People v. Cordero* (1949) 92 Cal.App.2d 196, 199.)

V

SELF-DEFENSE

The defense counsel did not request a self-defense jury instruction and none was given. A self-defense jury instruction is only required when there is substantial evidence that defendant had both a subjective and objective reasonable belief of bodily injury to himself. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1093; CALCRIM No. 3470.) Defendant could not have a reasonable belief of injury that justified him throwing a beer bottle at the departing van.

VI

RESTITUTION OF \$188.10

After sentencing, the court held a restitution hearing and ordered defendant to pay \$188.10 in restitution for a broken window. Defendant was not present but his mother agreed to pay the amount. Defendant's absence was not prejudicial because it did not affect his opportunity to defend himself. (*People v. Garrison* (1989) 47 Cal.3d 746, 782-783.)

VII

DISPOSITION

We affirm the judgment.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.