

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 02 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KENNETH DOWAI,

Defendant - Appellant.

No. 08-10063

D.C. No. CR-07-00013-AWI

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted January 14, 2009
San Francisco, California

Before: FARRIS, NOONAN and McKEOWN, Circuit Judges.

Dowai argues that the prosecution did not meet its burden of proof on all elements of the crime of assault with a dangerous weapon. We reject the argument. Dangerous weapons include objects that are simply used in a manner capable of causing death or serious bodily injury. *U.S. v. Riggins*, 40 F.3d 1055, 1057 (9th

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Cir. 1994). The district court found there was strong evidence that the victim suffered extreme physical pain. Dowai argues that expert testimony was required to show that feet are capable of causing severe bodily injury or extreme physical pain. On this record the jury could properly deduce whether Dowai's shod feet were capable of causing serious bodily injury. See *U.S. v. Smith*, 520 F.3d 1097, 1106-07 (9th Cir. 2008). The record includes sufficient evidence that the victim suffered serious bodily injury and extreme physical pain.

Defendant argues that his 96-month sentence is unreasonable. He claims that the district court placed too much emphasis on the nature of the offense and his criminal history. The record indicates that the district court considered all mitigating factors. Nothing more was required. Further, the 96-month sentence was within the middle of the relevant Guidelines range.

AFFIRMED