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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES JEFFERY KROL,

Defendant and Appellant.

A132734

(Napa County
Super. Ct. No. CR155322)

Following a jury trial, defendant was convicted of lesser included, misdemeanor offenses of assault and battery. The court denied probation after defendant refused to accept it and sentenced him to county jail. Defendant filed a timely appeal from the judgment of conviction. As required under *People v. Kelly* (2006) 40 Cal.4th 106, 124, we affirmatively note counsel for defendant has filed a *Wende* brief (*People v. Wende* (1979) 25 Cal.3d 436) raising no arguable issue, counsel apprised defendant of his right to file a supplemental brief, and defendant did not file such a brief. Upon review of the record for potential error, we conclude no arguable issues are presented for review and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

This matter arises out of an incident in which defendant stabbed the victim, Donald Turnbow, with a steak knife. Defendant and Turnbow were tenants in a house on Carmel Drive in American Canyon. The landlord, Sharon Rodrigues, also lived in the house.

Prosecution's Case

Turnbow testified on the night of January 24, 2011, he went out “to get some cans and recycling,” returning home around 12:55 a.m. Upon his arrival, he let out the dogs and went to the bathroom he shared with Rodrigues. After Turnbow used the bathroom, he heard defendant in the hallway bathroom say, “I’m gonna to kill him.” Turnbow continued down the hallway leaving the house through the front door to smoke on the front porch. Although he closed the screen door, he left the front door open allowing him to “see back inside the house.” From his vantage point on the front porch, Turnbow observed defendant walk down the hallway into the kitchen. He did not have anything in his hands. When defendant came out of the kitchen, he opened the screen door. He was carrying a knife causing Turnbow to run out the front gate and down the driveway. He ran off of the property and stopped at the corner of Rio Grande and Carmel Drive. As he stood at the corner, defendant ran up to him. Defendant held a knife in his hand. Turnbow, in self-defense, sprayed defendant with an aerosol can of air freshener he had in his back pocket, and defendant stabbed him in the left side underneath his armpit. According to Turnbow, he got the aerosol can from his bathroom to put it in the “other bathroom.” He was going to put it in the “first bathroom,” but defendant was using it at the time.

Following the stabbing, Turnbow attempted to locate an officer. He was able to stop one patrolling the area, Nathalie Verdeille of the Napa County Sheriff’s Department. Verdeille testified around 1:30 a.m. on January 24, 2011, she noticed a man “waving his arms in the air frantically.” She contacted Turnbow, who told her his roommate stabbed him trying to kill him. After he lifted up his jacket, she observed the left side of his shirt and the skin underneath the left armpit were covered in blood.

Verdeille subsequently saw defendant coming towards her and Turnbow. She ordered defendant to the ground. She noticed defendant had a strong odor of an alcoholic beverage emanating from his person and his mood “seemed to fluctuate between being calm, angry, sad, just through moods.” Defendant was eventually handcuffed and placed into the back seat of Verdeille’s patrol car. On the way back to the house, defendant told

Verdeille that after he returned home from work, he was drinking beer while watching a football game. He had about eight beers from 7:00 p.m. “until 11:00, 11:45,” when Turnbow came into his room, yelled, “I’ll kill you,” and sprayed something in his face that burned. According to defendant, because Turnbow kept walking towards him, he was afraid for his life. He grabbed a knife approximately a foot away from his bed and stabbed Turnbow.¹

Defense Case

Defendant testified, with the exception of one break to work for another employer, he had been employed by Home Depot since 1997. He had previously lived next door, renting a room from a coworker, but moved into Rodrigues’s house when the coworker became ill. He occupied the room across the hall from Rodrigues. He described Turnbow as “kind of like a pendulum with just the two extremes. When he likes you, you’re the bestest [*sic*] person in the whole world and you’re his bestest [*sic*] friend. When he’s mad at you, . . . he’s just absolutely livid with you.” Defendant explained Turnbow could be “agitated for days on end” and at times he became violent with the animals.

Defendant’s trial testimony differed, however, from his earlier version following his detention by Verdeille. According to defendant, before the stabbing incident on January 24, he got off work about 9:00 p.m. He got a ride home with a coworker, stopping at 7-Eleven to pick up a 12-pack of Budweiser before being dropped off at home. Once he arrived at home, defendant went to his room to watch football games and drink beer. During a break in the games, he went to the kitchen to retrieve some Velveeta cheese. As he came down the hallway, Turnbow was on the front porch. Defendant stated Turnbow “began spraying something at the door and I just ignored him and went into the kitchen.” As he entered the kitchen, he picked up a steak knife from the “drainage rack” to cut the cheese. When he turned to go towards the refrigerator,

¹ Defendant explained the knife was in his room because he was eating his dinner there.

Turnbow started screaming. In response to the yelling, defendant pushed open the front door to tell Turnbow to “knock it off.” But before he had a chance to say anything, Turnbow “was in my face,” spraying something in his face and eyes. When he brought up his hands defensively, still holding the knife, he hit Turnbow, who screamed. Defendant went back into the house and put the knife back in the butcher block. He acknowledged when he heard Turnbow scream he knew he had “poked him,” but he did not realize “how hard.”

Realizing he had to find Turnbow, defendant left the house, heard something to the left, and headed in that direction. When he went out into the street, Officer Verdeille stopped him and ordered him to lie down on the street.

Four coworkers, as well as defendant’s son, testified defendant was a “great employee” very friendly, kind-hearted, and “not the kind of guy that I would see trying to kill anybody.”

An information filed against defendant on February 9, 2011 charged him with attempted murder (Pen. Code,² § 664/187; count one); assault with a deadly weapon by means of force likely to produce great bodily injury (§ 245, subd. (a)(1); count two); battery with serious bodily injury (§ 243, subd. (d); count three); and criminal threats (§ 422; count four). The information alleged each count constituted a serious felony (§ 1192.7, subd. (c)); counts one and two resulted in great bodily injury (§ 12022.7, subd. (a)); and counts one and three involved use of a deadly weapon (§ 12022, subd. (b)(1)).

The matter proceeded to trial on April 25, 2011. Jury deliberations began on April 28, 2011. The next day, the jury returned a verdict of not guilty on all counts and found all special allegations not true, but found defendant guilty of the lesser included offenses of assault (§ 240) and battery (§ 242).

Following the sentencing hearing held on July 20, 2011, defendant declined to accept probation even though it was recommended by the probation department. As a

² All statutory references are to the Penal Code.

result, the court denied probation and sentenced defendant to 144 days in county jail, with credit for time served of 96 actual days and 48 days of conduct credits, imposing all required fines and fees.

DISCUSSION

Defendant was ably represented by counsel throughout the proceedings.

Before trial, the principal matter contested in limine was whether the bailiff could be seated behind defendant while he testified. The court allowed the bailiff to station himself near the defendant during his testimony. We requested both parties to submit additional briefing to answer the following questions: (1) “Did the trial court commit error by allowing a bailiff to sit behind defendant while he testified? If so, was the error prejudicial?”; and (2) “On page 918 of the trial transcript, the court stated it would explain to the jury that the policy of the court was to let a bailiff sit behind ‘all in-custody defendants’ and ‘they can draw their own conclusions.’ Was any admonition or instruction ever given to the jury regarding the bailiff sitting behind defendant during testimony?” After reviewing the briefs filed by both parties, we find no cognizable error or prejudice.

The trial judge explained he had spoken with Deputy Mosley “about the security policy, with regards to defendants testifying [and] [t]he general policy is for a bailiff to sit near the in-custody defendant while he’s testifying. And that is certainly a dead giveaway as to the defendant being in custody.” The judge indicated, however, he would allow the bailiff to be seated behind defendant when he testified because, “Due to the nature of this charge, and the charges in this case, an attempted murder charge, and Deputy Mosley has advised me that Mr. Krol has seemed agitated to him today, that I’m not going to change that policy.” At defense counsel’s request, the court agreed to explain to the jury, if defendant testified, it is the policy of the court “that a bailiff will sit behind any and all in-custody defendants. So I don’t think I need to say that he is in custody.”

Later, at a break in defendant’s testimony and out of the jury’s presence, the trial court asked defense counsel whether he wished the court to admonish the jury about the

deputy's placement. Defense counsel asked the court not to draw attention to the issue and waived an admonition: "No I've rethought it and in rethinking it it's probably better if the court just says nothing. So that would be my request." The court agreed not to address the issue with the jury. Defense counsel summarized as follows: "Just for the record, I should note that the bailiff is not seated behind Mr. Krol, he is seated over against the wall as inobtrusively [*sic*] as we can place him in the courtroom."

The propriety of stationing a bailiff near a defendant during his or her testimony was addressed in *People v. Hernandez* (2011) 51 Cal.4th 733 (*Hernandez*). The Supreme Court held the stationing of a uniformed deputy at the witness stand during a defendant's testimony is different from other security practices that "inordinately risk prejudice to a defendant's right to a fair trial and must be justified by a higher showing of need," for example, visible physical restraints like handcuffs or leg irons. (*Id.* at pp. 741–742.) The court explained in such cases where a deputy is stationed near a defendant during his or her testimony, that although the "practice is not inherently prejudicial, we cautioned [in *People v. Stevens* (2009) 47 Cal.4th 625, 644] that 'the trial court must exercise its own discretion in ordering such a procedure and may not simply defer to a generic policy.' [Citation.] We explained: 'The court may not defer decisionmaking authority to law enforcement officers, but must exercise its own discretion to determine whether a given security measure is appropriate on a case-by-case basis. . . . [T]he trial court has the first responsibility of balancing the need for heightened security against the risk that additional precautions will prejudice the accused in the eyes of the jury. . . . The trial court should state its reasons for stationing a guard at or near the witness stand and explain on the record why the need for this security measure outweighs potential prejudice to the testifying defendant. In addition, although we impose no sua sponte duty for it to do so, the court should consider, upon request, giving a cautionary instruction, either at the time of the defendant's testimony or with closing instructions, telling the jury to disregard security measures related to the defendant's custodial status.' " (*Hernandez*, at pp. 742–743, italics omitted.)

Here, defendant was not prejudiced when the court allowed the bailiff to station himself near the defendant during his testimony. First, as noted by defense counsel, the bailiff was not even seated behind defendant, but “over against the wall as inobtrusively [*sic*] as we can place him in the courtroom.” Second, the court exercised its discretion, specifically explaining its decision was based on the nature of the charge, attempted murder, and the fact his courtroom deputy had informed him defendant seemed “agitated to him today.” The court’s rationale was reasonable under the circumstances of this particular case. Third, when the court offered to admonish the jury, defense counsel declined the offer because he did not want to draw undue attention to the issue. We see no reason to second-guess counsel’s decision to waive the admonition.

Finally, even if a more particular showing was required to justify posting a bailiff near defendant during his testimony, there is no reasonable probability that doing so here affected the outcome (see *Hernandez, supra*, 51 Cal.4th at pp. 744–745 [harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 837 applies]) because the jury acquitted defendant of the greater charges and instead found him guilty of misdemeanor assault and misdemeanor battery. Given the jury’s verdict, the court’s decision to station the bailiff near defendant, even had it been error, was not prejudicial.

We find no meritorious sentencing issues requiring reversal of the judgment. There are no issues requiring further briefing. The judgment is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Banke, J.

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People v. Krol