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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER DEAN SIMMONS,

Defendant and Appellant.

A136111

(Marin County
Super. Ct. Nos. SC179305A,
SC180759A)

Christopher Dean Simmons appeals following a jury verdict that found him guilty of a single count felony violation of Penal Code section 422: making a criminal threat. He argues that the trial court committed constitutional error when it sustained an objection to a chart addressed to the reasonable doubt standard of proof that his counsel wished to use during closing argument. He also claims that the trial court erred when it failed to award him credit for all his presentence time in custody in this case.

We conclude that the trial court's exclusion of the chart was not an abuse of discretion, and that its exclusion did not have constitutional implications. We also conclude that the court should have awarded Simmons full credit for his presentence time in custody. Thus, we modify the abstract of judgment to reflect the proper award of credits and, as modified, affirm the judgment.

BACKGROUND

Simmons was arrested after a fellow student at the College of Marin informed campus police that Simmons had threatened her. Following a jury trial, Simmons was convicted of making a criminal threat in violation of Penal Code section 422.

Enhancements were proven true, and he was given a five-year prison sentence.

Discussion of the facts surrounding the offense is not necessary to resolution of this appeal, so we will dispense with them.

During closing argument, Simmons's counsel showed a chart to the jury that at the top bears the heading: "States of Mind Requiring Acquittal." According to Simmons, the "chart sought to describe to the jury the states of mind establishing reasonable doubt and requiring an acquittal." Below the heading, the chart listed the following descriptors with an arrow next to each pointing to the words "Not Guilty." The descriptors were: "Highly likely," "Likely," "Strong Suspicion," "Suspicion," "Possibly" and "Unlikely." The court sustained the prosecution's objection to the use of this chart and denied Simmons's motion for mistrial based on its exclusion.

DISCUSSION

I

A ruling on a motion for mistrial is reviewed for an abuse of discretion, and may be granted by the trial court only when a party's chance at a fair trial is irreparably damaged. (*People v. Ayala* (2000) 23 Cal.4th 225, 283.) Essentially, Simmons argues the chart was so critical to his defense that its exclusion deprived him of his right to present a complete defense and have his lawyer present a closing argument. Even assuming the evidence of Simmons's guilt was hotly contested and in conflict, the record does not support Simmons's characterization that the chart had such critical importance.

First of all, the jury was properly instructed pursuant to CALCRIM 221 on the prosecution's burden to prove each of the allegations beyond a reasonable doubt. But more importantly, Simmons's lawyer argued at length the possibility that the prosecution

had not met its burden. He argued the victim presented a story without corroboration; that the standard is not met by a preponderance of the evidence; that when inferences drawn from the evidence may reasonably point equally to guilt or innocence, the jury had to reject the inference of guilt and accept the inference of innocence; that reasonable doubt is not the impossibility of doubt, but an abiding conviction that leaves jurors convinced of guilt as time passes; that a possibility the crime occurred was not enough and that “[d]oubt is everywhere in this case.”

Even if we were to assume that the proffered chart accurately encapsulates the standards that compel a not guilty verdict, in light of the court’s instruction and the argument made by defense counsel, the court did not abuse its discretion when it denied Simmons’s motion for mistrial.¹ Moreover, nothing in this record approaches the kind of restriction on counsel’s performance that may plausibly lead to constitutional error. The denial of the use of the chart during closing argument just did not have constitutional significance.

II

At the time he was arrested on the charge in this case, Simmons was on postrelease community supervision in Marin County case number SC180759A. He was charged with a violation of his release conditions, and the trial court revoked his postrelease community supervision solely on the basis of his conviction in this case for making a criminal threat.

Because revocation charges were pending for part of Simmons’s time in custody, the trial court split the award of custody credits between the revocation proceedings and this case. Thus, when it sentenced Simmons to prison in this case, the court excluded the time Simmons was in custody pending the hearing on his revocation in case number

¹ To be clear, we need not and do not make any determination that the chart was legally accurate.

SC180759A from the award of presentence credits. As Simmons argues, and the Attorney General agrees, this was error.

At the time he was charged with violating the terms of his postrelease community supervision, Simmons was in custody due to the charges brought against him in this case. He was found to have violated the terms of his postrelease program because he was found guilty in this case. In this way the conduct that led to his conviction was the sole reason for his loss of pretrial liberty, and his sentence in the criminal threats case should be credited with all his time in custody. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191.) Accordingly, the abstract of judgment should be amended to reflect 151 days of presentence credits for time served and 151 days of presentence conduct credits, for a total award of 302 days of presentence credits in case number SC179305A.

Our adjustment of the presentence credits awarded in case SC179305A pursuant to Penal Code section 2900.5 has no effect on the credits awarded by the trial court under section 4019 in case SC180759A, when the trial court sentenced Simmons to 74 days in county jail for the violation of the terms of his postrelease community supervision.

DISPOSITION

The abstract of judgment shall be amended to reflect 151 days of credit for time served and 151 days of conduct credit for a total award of 302 days of presentence credits. As modified, the judgment is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.