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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.

ANTHONY BELL,

Defendant and Appellant.

A136335

(San Mateo County  
Super. Ct. No. SC74718)

A jury convicted Anthony Bell of carrying a concealed dirk or dagger (Pen. Code, former § 12020, subd. (a)(4))<sup>1</sup> and resisting arrest (§ 148, subd. (a)(1).) The court sentenced him to five years in prison. Defendant contends his conviction for carrying a concealed dirk or dagger violates his constitutional right to bear arms and that the evidence is insufficient to support the conviction. We shall affirm the judgment.

**Statement of Facts**

On November 1, 2011, around 5:00 p.m., two uniformed police officers responded in marked patrol vehicles to a service call at the residence of defendant and his girlfriend. At trial, the parties stipulated that the police were authorized to contact and to detain defendant.

<sup>1</sup> All further section references are to the Penal Code.

Provisions of the Penal Code governing deadly weapons were recently renumbered and reorganized, without substantive change. (Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.) We cite to the provision in effect at the time relevant here.

The officers saw defendant, whom they knew from prior contacts, standing at the top of a staircase outside the residence. Defendant wore jeans, a shirt, a jacket with six-inch pockets, and a baseball cap. One of the officers testified that he saw nothing in defendant's hands, and no visible knife or sheath on defendant's body. The other officer on the scene testified that she saw something "very small" in one of defendant's hands, "maybe like a cell phone." She said she paid close attention to defendant's hands as part of her training in officer safety. She insisted that the object defendant was handling was "definitely not" the size of the later-recovered kitchen knife.

The police called to defendant by name and asked to talk to him. Without saying a word, defendant turned and ran. Defendant ignored police commands to stop. The officers chased defendant and radioed for backup. The officers had a clear view of defendant as he ran, and neither saw a knife in his hands or on his person.

Defendant was about 30 yards in front of the officer leading the chase when the officer saw defendant reach into the front area around his waistband, remove a metal object, and drop the object over a fence. The officer believed the discarded object was "some type of weapon" and broke off his chase to investigate the object. The officer located a 12-inch long "butcher knife" in a residential backyard. The officer asked the homeowner if the knife was hers and she said no. The homeowner testified she saw the officer find the knife in her backyard and had never before seen the knife. The knife looked like one from a set of knives in defendant's kitchen, according to a relative of defendant's girlfriend who purchased the knives. The police lost sight of defendant after he discarded the knife but, six or seven minutes later, found him hiding under a parked car.

## **Discussion**

### *The concealed weapon statute is constitutional*

Defendant asserts that the statute prohibiting the carrying of a concealed dirk or dagger is unconstitutional, both facially and as applied to him, because it criminalizes conduct protected by the Second Amendment of the United States Constitution.

The Second Amendment provides: “A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” (U.S. Const., 2d Amend.) The Second Amendment “confer[s] an individual right to keep and bear arms.” (*District of Columbia v. Heller* (2008) 554 U.S. 570, 595.) The right, however, is not unlimited. (*Ibid.*) One is not entitled “to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” (*Id.* at p. 626.)

Most jurisdictions “prohibit and penalize carrying concealed weapons.” (Annot., *Constitutionality of State Statutes and Local Ordinances Regulating Concealed Weapons* (2008) 33 A.L.R.6th 407, § 2.) Courts have long upheld prohibitions on carrying concealed weapons, as the *Heller* court itself noted when discussing lawful limits under the Second Amendment. (*District of Columbia v. Heller, supra*, 554 U.S. at p. 626.) All concealed weapon statutes “that have been challenged as violating the Second Amendment right to bear arms have been held constitutional.” (Annot., *supra*, 33 A.L.R.6th 407, § 2.) This line of precedent has not wavered since *Heller*. (E.g., *Caba v. Weaknecht* (Pa. Commw. Ct. 2013) 64 A.3d 39, 51-53; see *People v. Dykes* (2009) 46 Cal.4th 731, 777-778 [*Heller* does not compel conclusion that concealment of a firearm cannot be penalized or considered an implied threat of violence].)

Several California appellate courts have upheld the constitutionality of statutes restricting the carrying of concealed firearms after *Heller*. (*People v. Ellison* (2011) 196 Cal.App.4th 1342, 1346-1351; *People v. Flores* (2008) 169 Cal.App.4th 568, 573-577; *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 311-314.) The constitutionality of the precise statute at issue here, prohibiting the carrying of a concealed dirk or dagger, has also been upheld. (*People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1370-1379.)

The *Mitchell* court noted that “[t]he dirk or dagger concealed-carrying restriction does not entirely prohibit the carrying of a sharp instrument for self-defense; rather, it limits the manner of exercising that right by proscribing concealed carrying of a dirk or dagger unless the bearer uses a visible knife sheath or nonswitchblade folding or pocketknife. Because the statute regulates but does not completely ban the carrying of a sharp instrument,” the court evaluated its constitutionality using an intermediate level of

scrutiny. (*People v. Mitchell, supra*, 209 Cal.App.4th at p. 1374.) “Under the intermediate scrutiny test, the statute must serve an important governmental interest and there should be a reasonable fit between the regulation and the governmental objective.” (*Ibid.*) The court concluded “the statute does not run afoul of the Second Amendment because it is narrowly tailored to serve the important governmental interest of preventing exposure to the risk of surprise attacks and does not burden the right to bear arms in self-defense beyond what is reasonably necessary to serve that interest.” (*Id.* at pp. 1375-1376.) We agree with *Mitchell*. Moreover, we believe the statute passes constitutional muster even under the strict scrutiny standard of review advocated by defendant.

We also reject defendant’s claim that the statute is unconstitutional as applied to him. “When considering a claim that a facially valid statute has been applied in a constitutionally impermissible manner, ‘the court evaluates the propriety of the application on a case-by-case basis to determine whether to relieve the defendant of the sanction.’ [Citation.] An as-applied challenge ‘contemplates analysis of the facts of a particular case . . . to determine the circumstances in which the statute . . . has been applied and to consider whether in those particular circumstances the application deprived the [defendant] of a protected right.’ [Citation.] When reviewing an as-applied constitutional challenge on appeal, we defer to the trial court’s findings on historical facts that are supported by substantial evidence, and then independently review the constitutionality of the statute under those facts.” (*People v. Mitchell, supra*, 209 Cal.App.4th at p. 1378.)

Preliminarily, we note that defendant did not raise his constitutional challenge in the trial court. “Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 880.) The assertion that a statute is unconstitutional on its face presents a purely legal issue that may be considered for the first time on appeal, in the court’s discretion. (*Id.* at p. 886 & fn. 7.) It is not clear that defendant’s as-applied challenge presents a pure question of law. Defendant makes assertions of fact on appeal concerning his intent in possessing the knife that were not

presented in the trial court for resolution and therefore are outside the scope of our review.

We may consider defendant's claim only to the extent that he asserts an unconstitutional application of the statute to him under the facts established at trial. At trial, it was established that defendant had a 12-inch kitchen knife concealed on his person, ran from the police when they asked to speak with him, threw the knife over a neighbor's fence as the police pursued him, and then hid under a parked car until located and apprehended. Nothing in these facts suggest the statute prohibiting the carrying of a concealed dirk or dagger was applied in a constitutionally impermissible manner. Contrary to defendant's argument on appeal, the statute is constitutionally applied without evidence that the knife was used to threaten someone. The defendant in *Mitchell* made a similar argument, contending that the statute was unconstitutionally applied to him because he "posed no threat to anybody [who] did not attack him." (*People v. Mitchell, supra*, 209 Cal.App.4th at p. 1378.) The court rejected the argument, noting that "the statute survives constitutional scrutiny because it is reasonably necessary to serve the important governmental interest of diminishing the risk of a surprise attack that accompanies concealed carrying of a dirk or dagger." (*Ibid.*) Defendant's constitutional challenge thus fails.<sup>2</sup>

*Substantial evidence supports the conviction*

Defendant contends the evidence is insufficient to support the jury's finding that he concealed the knife. Defendant does not dispute carrying the knife but asserts the "officers did not see enough of [defendant], his clothing or his waistline to determine whether or not he was simply carrying the knife in his hands (or somewhere else legal) or had it concealed on his person." The assertion is not supported by the record.

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<sup>2</sup> Defendant's claim that he was entitled to a jury instruction on his right to bear arms also fails. His right to bear arms does not encompass the right to carry a concealed dirk or dagger.

A police officer testified he was running after defendant when he saw defendant “reaching for something out of his waistband,” “remove[] a metal object” and drop the object over a fence. The officer immediately looked for the object and found the knife. Two officers had good views of defendant before he started running and both testified that defendant did not have a knife in his hands or visible on his body. Defendant was not wearing a belt or knife sheath when he was arrested minutes after discarding the knife. On this evidence, the jury could reasonably infer that defendant had the knife concealed on his person.

### **Disposition**

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuinness, P. J.

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Siggins, J.