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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM TILLMAN,

Defendant and Appellant.

B240143

(Los Angeles County
Super. Ct. No. BA371834)

THE COURT:*

A jury convicted appellant William Tillman of one count of possession of a weapon in a penal institution (Pen. Code, § 4502, subd. (a)).¹ The jury acquitted appellant of a second count of the same offense. Appellant admitted a prior conviction and the court sentenced him to two years in state prison comprised of one year (one-third of the middle term of three years) doubled to two years for the prior strike conviction. The sentence was to be served consecutively to the sentence he was already serving.

* BOREN, P. J., DOI TODD, J., ASHMANN-GERST, J.

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

BACKGROUND

A. *Factual Background*

On May 20, 2010, around 8:00 p.m. Los Angeles County Deputy Sheriffs Adam Nelson and Ryan Ortiz who were assigned to operation safe jails conducted cell searches at the Twin Towers Correctional Facility. Appellant was assigned the upper bunk of cell number 4 in C pod and was on it when the deputies came to the cell. Appellant and his cellmate were escorted out of the cell and taken to the recreational area. Deputies Nelson and Ortiz returned and searched appellant's cell. Deputy Ortiz flipped the mattress from the top bunk over and saw a slit in the middle of the mattress. He reached inside the mattress and recovered a piece of metal approximately seven inches long with one end sharpened to a point. Both deputies testified to substantial training and experience with respect to recovering weapons from inmates, and each opined that based on this training and experience, the item recovered from appellant's mattress was a weapon capable of inflicting harm.

On December 6, 2010, Los Angeles County Deputy Sheriff Nelson Tario was assigned to lockup at the Criminal Courts Building.² His duties included monitoring the flow of inmates in and out of the building and searching the inmates for weapons. At approximately 7:40 a.m. appellant arrived by bus at the service level of the building. He was carrying a bag and Deputy Tario asked him to place the bag on a chair and empty his pockets.

Deputy Tario conducted a search of appellant's person and found broken pieces of a plastic razor which was missing a blade in appellant's right front pants pocket. A four-inch-long pencil that had been cut in half lengthwise and tied together with string was found in appellant's shirt pocket. Deputy Tario requested help from custody assistant Dwayne McGee to search appellant's property. Using a handheld metal detector McGee

² There was a stipulation that on December 6, 2010, appellant was a pro. per. inmate.

found a razor blade inside an envelope that belonged to appellant. It was Deputy Tario's opinion that the razor blade could be inserted in the split pencil and used as a weapon.

On October 15, 2005, at around 1:00 p.m., Donald Nall, a correctional officer at Sierra Conservation Center conducted a search of appellant in the medical department of the prison. He saw "the end of a Bic pen protruding from [appellant's] butt cheeks." The pen had a screw protruding through the cap of the pen. Based on his experience working at the prison Officer Nall opined that the pen was a stabbing weapon.

Appellant offered the testimony of Richard Lichten, a retired lieutenant with the Los Angeles County Sheriff's Department. Lichten had training and experience with inmate culture and police practices, and was familiar with jail-made weapons. He opined that the pencil found on appellant was altered to function as a mechanical pencil, so that the lead would advance without having to sharpen the pencil. Lichten described the item recovered from appellant's mattress on May 20, 2010, as a "bone crusher shank" and opined that it was used for stabbing and slashing.

B. Procedural Background

Appellant was charged with one count of possession of a weapon in a penal institution related to the May 20, 2010 incident. The court granted the prosecution's motion to consolidate that case with the count involving the incident on December 6, 2010. Appellant filed a *Pitchess*³ motion which was denied without prejudice. A second *Pitchess* motion was granted. A motion to sever the previously consolidated cases was denied. After deliberation, the jury convicted appellant on count 1, and acquitted him on count 2. The court denied appellant's *Romero*⁴ motion and motion for new trial. Appellant admitted a prior conviction for carjacking (§ 215) and was sentenced to a two-year consecutive sentence in state prison. This appeal followed.

³ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

⁴ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

DISCUSSION

We appointed counsel to represent appellant on appeal. After examining the record, counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), raising no issues, but requesting a review of the record including the in camera *Pitchess* review. We gave notice to appellant that his appointed counsel had not found any arguable issues, and that he had 30 days within which to submit by brief or letter any grounds of appeal, contentions, or arguments he wanted this court to consider.

Appellant submitted an eight-page letter contending that he received ineffective assistance of counsel and the court erred in consolidating the two cases; denying his request for a continuance; denying his request to represent himself; and in imposing a consecutive sentence.

I. Consolidation

Appellant contends in his supplemental brief that “consolidation was improper as a result of a combination of the judicially recognized *Manriquez* factors”⁵ and that “consolidation also violated the first prong of §[] 954 by joining a weak case with a stronger case.”

A trial court may order consolidation for trial of two or more accusatory pleadings that charge “two or more different offenses connected together in their commission” or “two or more different offenses of the same class of crimes or offenses.” (§ 954; see also *People v. Soper* (2009) 45 Cal.4th 759, 771.) Offenses are of the same class of crimes or offenses if they have common characteristics or attributes. (*People v. Moore* (1986) 185 Cal.App.3d 1005, 1012.) Offenses are connected in their commission if there is a common element of substantial importance in their commission, including the intent or motivation with which different acts are committed. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1210, 1216–1217.) The law prefers consolidation of charges based on

⁵ *People v. Manriquez* (2005) 37 Cal.4th 547.

important policy considerations, including conservation of judicial resources and public funds. (*People v. Manriquez, supra*, 37 Cal.4th at p. 574.)

Here, the class of the two charged offenses was the same (i.e., § 4502, subd. (a), custodial possession of a weapon). The two cases were connected in that appellant was the alleged offender in both. In each, appellant allegedly concealed a weapon capable of inflicting harm on others. The two cases occurred within seven months of each other and although the alleged offenses were committed at two different custodial locations and involved different factual circumstances, section 954's requirements for consolidation were satisfied.

Where the statutory requirements for joinder are met, the defendant must make a clear showing of prejudice to demonstrate that the trial court abused its discretion. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1128–1129, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Improper consolidation violates due process only if it results in a trial that is fundamentally unfair. (*Park v. California* (9th Cir. 2000) 202 F.3d 1146, 1149.) Error involving misjoinder affects substantial rights and requires reversal if it results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict. (*United States v. Lane* (1986) 474 U.S. 438, 449.)

The burden is on the defendant to demonstrate a reasonable probability that the joinder affected the jury's verdicts. (*People v. Grant* (2003) 113 Cal.App.4th 579, 588.) The factors to be considered include: (1) cross-admissibility of the evidence; (2) whether some charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case, or with another weak case, so that the spillover effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense or the joinder of charges converts the matter into a capital case. (*People v. Carter* (2005) 36 Cal.4th 1114, 1154.) As the fourth factor is clearly inapplicable, we limit the discussion to the first three factors. For reasons discussed below, we conclude appellant has failed to meet his burden of showing prejudice.

While the bulk of the evidence at trial was not cross-admissible for both crimes charged, the court did allow evidence of a third shank case to be used in both cases (Evid. Code, § 1101, subd. (b)). In any event, absence of cross-admissibility of evidence does not, by itself, demonstrate prejudice when consolidation of charges is ordered. (*People v. Soper, supra*, 45 Cal.4th at pp. 779–780.)

Next, because the charges were identical in each case, neither charged offense could be considered unduly inflammatory to affect the jury’s proper consideration of the other.

Nor do we conclude that there was a prejudicial “spillover” effect from one case to the other. The People first presented evidence on the December 6, 2010 incident and then presented evidence on the May 20, 2010 incident. This enabled the jury to consider the evidence in each case separately without any prejudicial “spillover” effect from one case to the other. (See, e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 854.)

Contrary to appellant’s contention that the jury “felt as if they had to convict on something,” we conclude that joinder did not bolster a weak case. “[T]he benefits of joinder are not outweighed—and severance is not required—merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried.” (*People v. Soper, supra*, 45 Cal.4th at p. 781.) “The danger to be avoided [in joinder of offenses] is ‘that strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case’ on another crime.” (*People v. Mason* (1991) 52 Cal.3d 909, 934.)

Based on the facts before the trial court, and considering the law’s preference for joinder of cases, we find no abuse of discretion in granting the prosecution’s motion to consolidate the cases.

II. Ineffective Assistance of Counsel

Appellant contends that his counsel invited the jury to convict on count 1, and that this invitation amounted to ineffective assistance of counsel.

In order to establish a claim of ineffective assistance of counsel, appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.)

“Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel (see *People v. Wright* (1990) 52 Cal.3d 367, 412), and there is a ‘strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.’” (*People v. Lucas* (1995) 12 Cal.4th 415, 436–437, quoting *Strickland v. Washington, supra*, 466 U.S. at p. 689.) “[W]e accord great deference to counsel's tactical decisions” (*People v. Frye* (1998) 18 Cal.4th 894, 979), and we have explained that “courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight” (*People v. Scott* (1997) 15 Cal.4th 1188, 1212). “Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.” (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

Appellant's contention that counsel failed to provide a “constitutionally mandated defense” lacks merit. Counsel did not ask the jury to find appellant guilty of count 1. Instead, counsel acknowledged that “if” the jury had to convict on either count that count 1 at least involved a “real weapon” as opposed to count 2. In light of the facts, defense counsel's performance was objectively reasonable. The evidence was strong on both counts and particularly on count 1 where the weapon was discovered inside appellant's mattress in his cell. Counsel elicited testimony from the prosecution's own witnesses that other people had access to appellant's cell and that someone else could have hidden the weapon. The jury could have found that explanation sufficient to acquit appellant on count 1, but did not. On count 2, defense expert Lichten's credibility and opinion was vital to counsel's argument that the pencil and blade found in different locations did not constitute a weapon. Counsel argued to the jury that Lichten's acknowledgement that the item found in the mattress was indeed a “shank” was evidence

of his lack of bias and that “[h]e’s not going to tell you something that’s not true.” It is reasonable to infer that the jury acquitted appellant on count 2 because they found Lichten’s expert testimony credible, justifying counsel’s tactical decision.

Furthermore the jury was instructed to decide the case on the evidence presented and that remarks made by the attorneys in opening statements and closing arguments were not evidence. Jurors are presumed to understand and follow the court’s instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

Appellant also contends that counsel failed to call several “key witnesses” that would have “altered the outcome of the trial.” Appellant does not identify these individuals or how they would have assisted the defense, and does not provide any argument or support for this contention. We cannot consider mere contentions of error unaccompanied by legal argument, since they have not been properly raised. (*People v. Williams* (1997) 16 Cal.4th 153, 206.)

Counsel secured an acquittal on count 2, and we see no reasonable probability that appellant would have received a more favorable outcome in regards to count 1, in light of the compelling evidence of guilt. (*People v. Ledesma, supra*, 43 Cal.3d at pp. 216–218.)

III. Denial of Motion for Continuance

Appellant contends the trial court abused its discretion by denying his request for a continuance filed on November 9, 2011. Appellant is mistaken. The court’s minute order dated November 9, 2011, indicated “[t]he matter is continued for trial as indicated below upon the stipulation of counsel.” The minute order further indicated that the jury trial was scheduled to begin November 22, 2011.

IV. Appellant’s Pro. Per. Status

Appellant contends that “[t]he taking of defendant’s pro. per. status denied the def [sic] of his *Faretta* rights.”⁶

⁶ *Faretta v. California* (1975) 422 U.S. 806.

We note that appellant's claim is "perfunctorily asserted without argument in support." (*People v. Williams, supra*, 16 Cal.4th at p. 206.) We need not consider on appeal mere contentions of error unaccompanied by legal argument. (*People v. Earp* (1999) 20 Cal.4th 826, 884.)

In the interest of judicial economy we address the issue and find that appellant voluntarily waived his right to self representation. On May 12, 2011, at the hearing on the motion to consolidate, appellant appeared in pro. per. on case No. BA371834 (May 20, 2010 incident) and was represented by the public defender's office on case No. BA379936 (December 6, 2010 incident). The trial court granted the motion to consolidate and asked appellant if he wished "to go pro. per. on both or now the one or have [Public Defender] represent him?" Appellant claimed that he was put in a position where he was forced to choose one constitutional right over another and stated: "I choose not to go pro. per. and exercise my *Faretta* rights on this case because it's a more serious case and I'm not going to make the decision, your honor. The court can make the decision." The trial court responded: "All right. Based on that I'm going to revoke your pro. per. privilege because you're indicating you are not affirmatively, unequivocally desirous of that status. So, [Public Defender], you have both cases. All right. So the defendant now is no longer pro. per."

The deferential abuse of discretion standard of review applies to a claim that the trial court erred in ruling on a motion to abandon the right of self-representation. (*People v. Lawrence* (2009) 46 Cal.4th 186, 191–192.) Reviewing the totality of circumstances, the record suggests no abuse of discretion in the trial court's ruling. Appellant's waiver was not coerced or involuntary. The record is clear that appellant knew and understood both his right to counsel and his right to self-representation and had long asserted his right to self-representation in the prior filings. He was knowledgeable on the law as demonstrated by the numerous discovery and continuance motions he persistently asserted. A fair reading of the colloquy between appellant and the trial court belies any inference of coercion. The trial court was satisfied that appellant's decision to accept the

appointment of counsel for the consolidated case was voluntary. That determination was well within the reasonable discretion of the trial court.

V. Sentencing Issue

Appellant contends that the trial court erred by sentencing him to a consecutive sentence for possession of a weapon in a penal institution. Appellant's contention is without merit.

Pursuant to section 1170.1, subdivision (a), when consecutive terms of imprisonment are imposed, the aggregate term for all convictions "shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements" The principal term is the greatest term of imprisonment that can be imposed for any of the crimes. (§ 1170.1, subd. (a).) "The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed" (*Ibid.*) The sentencing rules apply to consecutive sentences regardless of whether the sentences were imposed in the same proceeding or court, or in different ones. (*Ibid.*)

Section 4502, subdivision (a) provides in part that: "Every person who, while at or confined in any penal institution, while being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, possesses or carries upon his or her person or has under his or her custody or control . . . any dirk or dagger or sharp instrument, . . . is guilty of a felony and shall be punished by imprisonment . . . for two, three, or four years, to be served consecutively." Section 4502, subdivision (c) states that "penal institution" includes "a county jail."

On July 8, 2009, at approximately 8:05 p.m., appellant brandished a pair of scissors and threatened the manager of a restaurant before he fled with approximately \$150. Earlier in the day at a Bank of America branch in Los Angeles he simulated possession of a handgun and threatened to shoot a bank patron if the teller did not comply with his demands. The teller placed \$1,595 on the counter which appellant grabbed and left the bank. Approximately one week later, appellant burglarized a woman's home

while she was present. He was arrested and positively identified by the victim. Appellant threatened the victim and the arresting officers.⁷ Appellant was charged with robbery (§ 211) in case No. BA359098 (robbery case). While appellant was in custody on the robbery case and prior to his plea, Los Angeles County Deputy Sheriffs Adam Nelson and Ryan Ortiz discovered a weapon in a search of appellant's bunk on May 20, 2010, at the Twin Towers Correctional Facility. Appellant was charged with possession of a weapon in a penal institution (§ 4502, subd. (a)) in case No. BA371834 (weapons case).

On September, 17, 2010, a judgment was entered following appellant's conviction by plea in the robbery case and he was sentenced to 19 years in state prison. On December 7, 2011, appellant was convicted in the weapons case.

The crux of appellant's contention which he asserts without legal support is that a "defendant must be serving" an "existing term at the time the new offense was committed," and a court cannot impose "a consecutive sentence to a term that did not exist when the instant offense was committed." Appellant's interpretation is inconsistent with the plain meaning of section 4502 and would lead to absurd results. A defendant could avoid harsher punishment despite admitted or proven recidivist conduct by delaying the pronouncement of judgment until after he or she commits additional serious or violent felonies. (Cf. *People v. Johnson* (1989) 210 Cal.App.3d 316.)

Pursuant to section 1170.1, subdivision (a), the principal term here is 19 years for robbery in case No. BA359098. Section 4502 clearly and unequivocally requires consecutive sentencing, but does not mandate full consecutive sentences. (*People v. Mosley* (2007) 155 Cal.App.4th 313, 328.) The court correctly selected a subordinate term of one-third of the middle term of three years (doubled because of the prior strike) to run consecutively to the principal term. We find no error in the court's sentence.

⁷ This information was obtained from the probation report of June 10, 2010, which is part of the record.

Appointed counsel requested that we independently review the sealed transcript of the in camera proceedings on appellant's *Pitchess* motion, which we have done. The trial court's findings during that review, as reflected in the sealed transcript, were sufficient to permit appellate review of its ruling. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229, 1232.) We find no error in the trial court's ruling at the in camera hearing.

The judgment is affirmed.

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