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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT BRACY,

Defendant and Appellant.

C064948

(Super. Ct. Nos.
05-5454, 08-3660)

Defendant Vincent Bracy appeals from his convictions of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) and failure to appear (Pen. Code, § 1320.5). He claims the trial court abused its discretion when it (1) failed to declare a mistrial upon the jury's announcing it was deadlocked; and (2) denied his motion to strike a prior serious felony conviction. Defendant also asserts (3) the court erred when it imposed penalty assessments and fees for which it had

not orally pronounced the express statutory foundations. We affirm the judgment.

FACTS

A casino security officer using a security camera observed two people inside a car in the casino's parking garage. The officer watched as a male (defendant), who had been seated in the front passenger seat, exited the car and handed a female seated in the driver's seat "something white and in the form of a ball." The female put the item into a compartment in the back of the car. The officer contacted the sheriff's department.

Deputy sheriffs watched the security video and then contacted defendant and his female companion in the casino. Deputies searched the car and found a plastic bag behind a rear seat armrest. Inside the bag was another bag that contained a white substance, and 10 individually wrapped portions of the same substance. The white substance was later determined to be cocaine base. The cocaine weighed in total 8.6 grams. The cocaine in the larger bag weighed 4.05 grams, and the individually wrapped portions weighed, in grams, .37, .36, .27, .44, .45, .51, .34, .64, .60, and .57.

On the first day of trial, May 27, 2008, the district attorney filed an amended information (case No. 05-5454) charging defendant with one count of possession for sale of cocaine base. (Health & Saf. Code, § 11054, subd. (f)(1).) The

information also alleged defendant had a 1984 prior "strike" conviction (Pen. Code, § 667, subds. (c), (e)(1)), and he had served two prior prison terms. (Pen. Code, § 667.5, subd. (b).) On the same day, counsel agreed to bifurcate the case, and defendant waived jury trial on the priors.

On the following day, May 28, defendant failed to appear at trial. Trial proceeded, and the case was submitted to the jury that afternoon.

On May 29, the jury, after having been instructed to continue deliberating despite being deadlocked, acquitted defendant of possession for sale, but it convicted him of the lesser-included offense of possession of a controlled substance. At a later hearing, the court found the prior conviction and prison term allegations to be true.

After trial in case No. 05-5454, the district attorney filed a separate information (case No. 08-3660) charging defendant with failing to appear at trial in case No. 05-5454, a violation of Penal Code section 1320.5. This information also alleged defendant had a 1984 prior "strike" conviction (Pen. Code, § 667, subds. (c), (e)(1)), and he had served two prior prison terms. (Pen. Code, § 667.5, subd. (b).) It further alleged as a separate enhancement that at the time of the failure to appear, defendant was released from custody on bail

or on his own recognizance within the meaning of Penal Code section 12022.1, subdivision (b).

Defendant pleaded no contest to the charge in case No. 08-3660 and admitted the 1984 prior strike conviction. The parties stipulated to a prison sentence of 16 months consecutive to the sentence on case No. 05-5454.

On April 8, 2010, both cases came on for sentencing. Defendant made a *Romero*¹ motion to dismiss his prior strike conviction. The court denied the motion. The court sentenced defendant to a total prison term of seven years four months. This term consisted of six years on the possession count in case No. 05-5454 (the middle term of two years, doubled for the prior strike, plus two years for the prior prison term enhancements), and sixteen months as agreed upon by the parties on the failure to appear count in case No. 08-3660. The court also imposed various penalty assessments, fees, and fines.

Defendant timely appealed, claiming the court erred by (1) not declaring a mistrial when the jury in case No. 05-5454 informed the court it was deadlocked, (2) denying his *Romero* motion, and (3) imposing various assessments, fees and fines it had not imposed orally at sentencing.

¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

DISCUSSION

I

Decision Not to Declare a Mistrial

Defendant contends the trial court abused its discretion and violated his right to due process when it instructed the jury to continue deliberating instead of declaring a mistrial after the jury informed the court it was deadlocked. We disagree. The court acted within its discretion when it directed the jury to continue deliberating. In addition, defendant forfeited his claim of constitutional error by not objecting on that basis at trial. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.)

A. *Additional background information*

Trial in case No. 05-5454 lasted approximately three days. It began on May 27, 2008. On May 28, 2008, at approximately 2:43 p.m., the jury began its deliberations. At about 4:00 p.m. that day, the jury stopped deliberations.

On May 29, 2008, the jury resumed deliberations at 9:00 a.m. About 35 minutes later, the jury sent a note informing the court it could not reach agreement. The court held a hearing with the jurors and both counsel. The jury foreperson informed the court it had taken four votes on the possession for sale

count. Those votes, without indicating guilt or acquittal, were four to eight, three to nine, two to ten, and two to ten.

The court instructed the jury to continue deliberating. It did so for two reasons. First, the jury had not been deliberating long, perhaps a total of only "a couple of hours." Second, the vote numbers were changing, "so obviously people are changing opinions, and obviously the discussion has moved people one way or the other."

The court repeatedly asked the jurors if there was anything it could do to assist the jury in reaching a verdict. The record does not indicate any verbal response by the jurors to these inquiries.

After the jurors left the court room to resume deliberations, the court spoke with counsel. It informed counsel of the vote tallies, and it explained its reasoning for not declaring a mistrial. The court stated: "I don't know if those numbers point to guilty [*sic*] or innocence, but obviously there is a change, and in light of the fact that they really have only been deliberating a total of maybe two hours, it's too early, I think, to declare any kind of impasse. [¶] If they pass me another note, we'll chat with them further."

Defense counsel then objected: "Your Honor, for the record, I'd object to their being sent back. The last two votes are the same, and in viewing the jury, they did look resolute in their position, shaking their heads no when the question was asked to them whether or not further deliberations would aid."

The court responded: "I was watching the jury as well, and I saw a number of heads nodding yes and a couple of people smiling when I indicated that I wanted them to continue to deliberate, so it appeared to me at this very early stage that further deliberations might result in a verdict, and if I get another note, we'll chat with them further and see where it takes us."

At 3:55 p.m. that day, the court reconvened with the jury. Moments earlier, it had received a note from the jury indicating the jury could not reach a decision. The court asked the jury foreperson if that was still the case, and the jury foreperson said it was not. The jury had reached a verdict on the possession for sale count. It acquitted defendant of possession for sale, but convicted him of the lesser included offense of possession of a controlled substance.

B. *Analysis*

A trial court may discharge a jury that has not reached a verdict when "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no

reasonable probability that the jury can agree.” (Pen. Code, § 1140.) “The determination whether there is a reasonable probability of agreement rests in the sound discretion of the trial court, based on consideration of all the factors before it. [Citation.]” (*People v. Halvorsen* (2007) 42 Cal.4th 379, 426.)

The trial court was well within its discretion when it determined there was a reasonable probability the jury could still reach agreement and it instructed the jury to continue deliberating. The jury had deliberated for only two hours, and during that short time its votes had changed on three of the four votes taken. Some of the jurors nodded in approval of the court’s directive to continue deliberations. In addition, the court acknowledged that if the jury could not break the deadlock, it would reconvene the hearing and reconsider whether to declare a mistrial. These were all legitimate factors on which the court could conclude there was a reasonable probability that further deliberations could result in a verdict.

Defendant argues the court’s action was really an exercise of undue pressure on the jury, and particularly on the two holdouts, to reach a verdict based on “considerations of compromise and expediency” (*People v. Carter* (1968) 68 Cal.2d 810, 817), or on matters ““already discussed and considered.””

(*People v. Proctor* (1992) 4 Cal.4th 499, 539.) He claims the jurors were unanimous in their belief that nothing more could be done to change their positions. He asserts the fact that the jurors deliberated for several more hours before sending another note expressing continued deadlock underscores the lack of any reasonable basis to believe at the time the court ruled that a verdict could be forthcoming.

We disagree with defendant's characterization of the court's action. The court did not coerce the jury. It did not direct the jury to reach a verdict by a designated time, or indeed to reach a verdict at all. It simply instructed the jury to continue deliberating. Its actions were not coercive.

Contrary to defendant's claims, there was no unanimous expression by the jurors either for or against continuing deliberations. Defense counsel saw some jurors shake their heads "no," and the court saw some jurors shake their heads "yes" when asked about continuing deliberations. Moreover, the fact that the jury reached a verdict after the second note was sent but before the court could respond to the note indicates the second note's premise of deadlock was incorrect.

The jury's conviction on the lesser included offense indicates the issue likely dividing the jury was whether defendant possessed the cocaine base for sale. The jury obviously could not agree on that issue, but it did agree that

defendant was guilty of possession. His guilt of that offense is beyond doubt. He was videotaped possessing the material, and the jury saw that tape.

Under these circumstances, where the jury had not deliberated long, where the votes were changing, and where the evidence of guilt of a felony offense was overwhelming, we conclude the court did not abuse its discretion when it directed the jury to continue deliberating. Because we conclude there was no error, we do not reach defendant's arguments of prejudice.

II

Denial of Romero Motion

Defendant contends the trial court abused its discretion when it denied his motion to strike his prior "strike" conviction. He claims the evidence indicated he fell outside the spirit of the "Three Strikes" law but the court allegedly ignored all evidence except his criminal history. We conclude the trial court reviewed all the relevant evidence in the record, and it did not abuse its discretion when it denied the motion.

"[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing

such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review the trial court's decision for an abuse of discretion. (*People v. Williams, supra*, 17 Cal.4th at p. 162.) Applying this standard, we ask whether the court's ruling "'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*Ibid.*)

Our review of the facts leads us to conclude the trial court did not abuse its discretion when it determined defendant was not outside the spirit of the Three Strikes law and it denied the motion to strike. We have described above the circumstances of his current offense. Although not necessarily a violent crime, possession of cocaine in his case was nonetheless a felony.

We turn next to defendant's criminal background. He has an extensive record that indicates he is a legitimate candidate for application of the Three Strikes law. According to the probation report and including the current offenses, defendant

has been convicted of 15 felonies and five misdemeanors since becoming an adult.

Born in 1963, defendant has a 1978 juvenile adjudication for first degree burglary and a 1980 juvenile adjudication for second degree burglary. He has 1982 and 1983 convictions for second degree burglary and receiving stolen property; 1984 convictions for first degree burglary and receiving stolen property; a 1991 conviction for gambling; a 1996 conviction for domestic violence; 1997 convictions for possession of drug paraphernalia, second degree burglary, and forgery; and various felony and misdemeanor drug convictions in 2003 and 2005. He has served numerous jail and prison commitments, and he has violated probation and parole many times.

We next review defendant's background, character, and prospects. These aspects of his life do not overcome the seriousness of his criminal background. Defendant has been married once. That marriage is still intact, although defense counsel described the codefendant in the drug case as defendant's girlfriend. Defendant has five children by three different women. Two of them are still minors. They live with an aunt. Defendant does not provide support for them.

Defendant has worked as a warehouse man, a mover, and a forklift driver. His longest period of employment is four years with a moving company.

Defendant admits to having a substance abuse problem. He began using marijuana and methamphetamine when he was 14 years old. He began using crack cocaine when he was 21. He described his alcohol and crack use as ten-year problems, and his methamphetamine use as a three-year problem. There is no history of treatment.

According to defendant's sister, defendant's substance abuse began when he was a teenager, possibly because he was abused by his alcoholic father. The sister believed defendant had become a better person, as demonstrated by his attending church with her and helping care for his terminally ill mother and step-father.

As for defendant's future prospects, a member of a landscaping company stated he had hired defendant on many occasions and found him to be a hard and dependable worker. He stated he was willing to hire defendant once defendant is released from custody.

Taken together, these facts do not demonstrate defendant is outside the spirit of the Three Strikes law. He has been convicted of 15 felonies and five misdemeanors since becoming an adult. He has served numerous prison terms and has committed numerous probation and parole violations. He simply does not keep his promises to do better and obey the law when given repeated opportunities to do so. He has been unable to overcome

what he describes as a long-standing substance abuse problem. In light of the successive links in his unbroken chain of crimes, the trial court was well within its discretion to deny his *Romero* motion to strike his prior "strike."

III

Imposition of Penalty Assessments and Fees

Defendant claims the court clerk, in preparing the abstract of judgment, imposed penalty assessments and fees which the trial court had not orally imposed at sentencing. As a result, defendant claims, we must strike the fees noted in the abstract of judgment. We disagree. All but one of the assessments and fees challenged by defendant were orally imposed by the trial court. The only fee the clerk added which the trial court did not impose was a mandatory fee which the trial court had no discretion but to impose. The abstract of judgment thus needs no correcting.

A. *Additional background information*

The trial court orally imposed the following fines, fees, and penalty assessments (*italicized fees are challenged by defendant*):

In case No. 05-5454:

Restitution fine (Pen. Code, § 1202.4)	\$200
Restitution fine (Pen. Code, § 1202.45)	200
Lab fee (Health & Saf. Code, § 11372.5)	50
<i>Penalty assessments on the lab fee</i>	140
Drug program fee (Health & Saf. Code, § 11372.7)	150
<i>Penalty assessments on the drug program fee</i>	420
<i>Court construction fee</i>	30

In case No. 08-3660:

Restitution fine (Pen. Code, § 1202.4)	\$200
Restitution fine (Pen. Code, § 1202.45)	200
<i>Court construction fee</i>	30

The trial court did not disclose the specific statutory assessments that made up the penalty assessments it imposed on the lab fee and the drug program fee. The court also did not specify the statutory basis for the court construction fee. In addition, the court did not impose a mandatory court security fee of \$30 on each criminal conviction. (Pen. Code, former § 1465.8, subd. (a)(1); Stats. 2009, ch. 345, § 5.)

In the abstract of judgment, the court clerk did not tamper with the amount of fines, fees, and assessments the trial court orally imposed. Rather, the clerk added an attachment to the

abstract that delineated the statutory source for each component of the penalty assessments the court had imposed on the lab fee and the drug program fee. The total amount of penalty assessments disclosed on the attachment to the abstract of judgment equals the amount of penalty assessments the trial court orally imposed.

The clerk also designated the court construction fees imposed by the court as criminal conviction assessments imposed pursuant to Government Code section 70373. That statute imposes a mandatory \$30 fee for each criminal conviction for purposes of "maintain[ing] adequate funding for court facilities." (Gov. Code, § 70373, subd. (a)(1).)

Finally, the court clerk imposed in the abstract of judgment the mandatory court security fee of \$30 on each of defendant's convictions, fees which the trial court had incorrectly omitted.

B. *Analysis*

Defendant claims we must strike from the abstract of judgment (1) the penalty assessments because the trial court did not orally pronounce the specific statutes referenced in the attachment to the abstract of judgment that make up the penalty assessments; (2) the court construction fees because the court did not orally state it was imposing those fees pursuant to

Government Code section 70373; and (3) the court security fees which the court did not orally impose at all.

Defendant relies on our holding in *People v. Zackery* (2007) 147 Cal.App.4th 380 (*Zackery*.) There we reiterated that an abstract of judgment and minute orders cannot add to, or modify the judgment the court orally pronounced. (*Id.* at pp. 387-389.) We ordered stricken from the minutes and the abstract of judgment restitution fines under Penal Code sections 1202.4 and 1202.45 which the trial court had not imposed. We remanded the case to the superior court to determine whether it would impose those restitution fines. (*Zackery, supra*, at pp. 393-394.) We rejected the Attorney General's argument that we could presume from the abstract of judgment that the trial court subsequently corrected its judgment and imposed the restitution fines because they were mandatory. We noted the fees were not mandatory in the strictest sense, as the court retained some discretion not to impose them. Moreover, nothing in those statutes abrogated the requirement that a judgment be pronounced orally in the presence of the defendant. (*Id.* at pp. 388-389.)

The case before us is distinguishable from *Zackery*. Except for the addition of the mandatory court security fees, the abstract of judgment reflected what the trial court had orally pronounced. That the court clerk inserted detailed statutory sources of the penalty assessments and court construction fees

the court had actually imposed did not add to or modify in any way the court's oral judgment.

Even if the clerk's actions did amount to some kind of error, the error would be harmless. Defendant claims the harm arises because he was not given the opportunity to respond to the specific statutory citations. Defendant strains credulity. He had the opportunity to respond to the imposition of the very penalty assessments and fees the court orally imposed and the abstract of judgment explained. He suffered nothing by the clerk's actions. If he believed the court's imposition of penalty assessments and fees without reference to their statutory foundations was a problem, he should have said so.

As for the mandatory court security fees, we agree the court should have orally pronounced them before the clerk added them to the abstract of judgment. However, unlike the restitution fines at issue in *Zackery*, the trial court had no discretion but to impose the court security fees. Thus, there is no need for defendant to be given an opportunity to address its imposition. The trial court's failure to impose the security fees is sentencing error which we may and now do correct on appeal. And since the abstract of judgment already reflects their imposition, we need not order an amended abstract to be prepared.

DISPOSITION

The judgment is affirmed.

_____ NICHOLSON _____, Acting P. J.

We concur:

_____ ROBIE _____, J.

_____ MURRAY _____, J.