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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,	C067101
Plaintiff and Respondent,	(Super. Ct. No. 09F01181)
v.	
THEOBALD R. McDONALD,	
Defendant and Appellant.	

A jury found defendant Theobald McDonald guilty of unlawfully carrying a concealed dirk or dagger and found he had a prior conviction. The court sentenced him to 32 months in prison and awarded him 44 days of actual custody credits plus 22 days of conduct credits.

On appeal, defendant raises five issues. He first contends the trial court erred in denying his motion to suppress because the "the patdown search was [not] justified by specific and articulable facts that would lead a reasonable person to suspect that [he] was armed and dangerous." Second, he argues that a statement by the prosecutor during closing argument regarding

his necessity defense amounted to misconduct. Third, he contends the trial court abused its discretion and violated his federal constitutional rights in refusing to take judicial notice that an enhancement on his prior conviction was missing from his "rap sheet." Fourth, he contends the trial court abused its discretion when it failed to strike his prior conviction. Lastly, he contends the equal protection clause "compels that the [most recent] amendment to [Penal Code] section 4019 . . . be applied to award [him] one-for-one conduct credit."

Finding no merit in any of defendant's arguments, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 13, 2009, Officer Mark Redlich of the Sacramento Police Department was patrolling with his partner, Officer Gerald Landberg, near 24th Street and Florin Road. The area is an active "problem-oriented policing" project known for drugs, prostitution, and a lot of foot traffic. While patrolling, Officer Redlich's attention was drawn to a nearby parking lot, where it appeared defendant was in an argument with a woman.

Officer Redlich saw the woman with her arms at her side approximately 12 to 18 inches from defendant, who had his hands raised above his head and appeared to be yelling at her. The officers drove to the parking lot to see if the woman was in danger or, if necessary, to prevent a crime from occurring. Once defendant realized the patrol car was headed his direction,

he put his arms down, bear hugged the woman, and stayed in that position until the officers arrived.

When Officer Redlich arrived on scene he contacted both parties. After obtaining their names and while his partner checked for outstanding warrants, Officer Redlich had a conversation with the two. During the course of the conversation, he decided to conduct a patdown search of defendant, and in preparation for doing so he asked defendant something to the effect of, "Do you have anything illegal on you?" "Do you have anything sharp?" or "Do you have any weapons?" Defendant responded that he had a knife in his right front jacket pocket. Officer Redlich asked defendant if the blade was exposed, and defendant said that it was. Officer Redlich then asked defendant "if it was sticking up or down and if [he] could retrieve it."¹ Officer Redlich then took the concealed knife out of defendant's pocket; it was locked in the open position. He then conducted a patdown search of defendant.

Defendant was charged with unlawfully carrying a concealed dirk or dagger. The information also alleged that he had a prior strike conviction of assault with force likely to produce great bodily injury with a finding that he personally inflicted great bodily injury.

¹ No evidence was elicited at the suppression hearing as to whether defendant answered Officer Redlich's request for permission to retrieve the knife.

Defendant moved to suppress the knife. In opposition, the prosecution argued that the initial contact with defendant was a consensual encounter rather than a seizure and Officer Redlich had reasonable cause to conduct a patdown search because defendant voluntarily stated that he was carrying a knife. The magistrate found "a reasonable basis for the police officer to have approached the [d]efendant" and, "having formed the intent to do the pat-down search," "it was reasonable for the officer to ask if there was anything present on the [d]efendant's person which might have caused the officer harm during the pat-down search." The magistrate also concluded that the knife "would have inevitably been discovered during the pat-down search either with or without the question and the answer." Alternatively, the magistrate concluded that defendant had not been seized "prior to the question and answer" and "once [defendant] answered that he had a knife . . . , the officer independently had probable cause to conduct a search for the knife."

At trial, defendant testified that he was walking through an alley when a gang of four or five "youngsters" tried to "jump" him. He claimed he pulled the knife out as a "show of force," to defend himself and make sure they did not "knock [him] down." After they saw it, he stuck it back in his pocket and crossed the street to get away from them. He was then confronted by the police before he had a chance to close the knife.

Based on defendant's testimony, the court instructed the jury on the defense of necessity. During closing arguments the prosecutor argued that to find defendant not guilty the jury had to "totally believe" defendant's version of the facts. The jury found defendant guilty.

Following receipt of the verdict, the court took a brief recess. During the break, defendant absconded. The trial moved forward in his absence.

On the issue of the prior conviction, the prosecutor offered defendant's "rap sheet" and the certified record of his conviction in the prior case to prove defendant's identity to the court. The prosecutor then offered only the conviction record to prove the fact of the conviction to the jury. Defense counsel asked the trial court to take judicial notice of the fact that where the rap sheet showed the prior conviction it did not show the great bodily injury enhancement, and he asked the court to inform the jury "of that judicial notice, that the mention of [Penal Code section] 12022.7 is not there." The trial court refused because of the potential to confuse and mislead the jury. The court reasoned that the certified record of the conviction was the chief evidence of the prior conviction.

The jury found the prior conviction allegation to be true. When defendant was taken back into custody 15 months later, the court sentenced him to 32 months in prison. The court awarded him 44 days of actual custody credits plus 22 days of conduct credits.

DISCUSSION

I

Denial Of The Motion To Suppress

Defendant contends the magistrate erred in denying his motion to suppress the knife because the prosecution failed to prove "that the patdown search was justified by specific and articulable facts that would lead a reasonable person to suspect that [defendant] was armed and dangerous." He further argues that his "admission regarding the knife" did not give Officer Redlich probable cause to search him because that admission "was the fruit of the unlawful search" because it was "made after the officer's decision to search and after the start of the search process." We disagree.

Defendant argues at length about the legality of the patdown search but in doing so he ignores the fact that Officer Redlich patted defendant down only *after* he removed the knife from defendant's pocket and after defendant admitted its presence there. Because the knife was the only evidence defendant sought to suppress, the legality of the search that occurred after the discovery of the knife is immaterial. The only question here is whether Officer Redlich obtained the knife by means of an illegal search.

On that point, the magistrate found that defendant's admission to the presence of the knife gave Officer Redlich probable cause to conduct a search for the knife. Defendant contends "[t]he trial court was incorrect" because his admission came "after the officer's decision to search and after the start

of the search process" and therefore his admission was "fruit of the unlawful patdown search." In support of this contention, defendant cites *People v. Medina* (2003) 110 Cal.App.4th 171. As we will explain, his reliance on *Medina* is misplaced.

In *Medina*, police officers stopped Medina's car for driving with a broken taillight. (*People v. Medina, supra*, 110 Cal.App.4th at p. 174.) The officers ordered him to step out of the car, then ordered him "to place his hands behind his head, walk backwards toward the officers, and then face an adjacent wall." (*Id.* at pp. 174-175.) Although "there 'wasn't anything specific' about the [defendant] that led [the officers] to believe [he] was armed," one of the officers "decided to search him because he was in a 'high-gang location.'" (*Id.* at p. 175.) The officer "'grabbed' Medina's hands and asked if he had any weapons, sharp objects, 'or anything he should know of prior to the search.'" Medina responded that he had a 'rock' in his pants, which [the officer] understood to mean rock cocaine. [The officer] subsequently found rock cocaine in Medina's pocket. After Medina was arrested, another small amount of cocaine was found in his car." (*Ibid.*)

The trial court denied Medina's motion to suppress the cocaine, but the appellate court reversed. (*People v. Medina, supra*, 110 Cal.App.4th at pp. 175, 179.) The People contended "that Medina's detention was reasonable, that he was not searched until after he revealed he had cocaine in his pocket, and that in any event the officers' actions were supported by reasonable suspicion." (*Id.* at p. 176.) The appellate court

disagreed, concluding that "[b]ecause the decision to restrain Medina's hands and search him was based solely on his presence in a high crime area late at night, both the detention and search were unlawful." (*Id.* at p. 178.) In response to the People's argument that "suppression [wa]s unnecessary because Medina gave a 'spontaneous confession' that led to the discovery of the cocaine," the appellate court concluded that "Medina's statement that he had cocaine in his pants cannot be deemed an intervening act that was sufficiently independent of the unlawful search and seizure." (*Ibid.*) The court explained that "[a]ccording to Officer Lopez's partner, Medina revealed that he had drugs in his possession in response to Officer Lopez's inquiry whether he had weapons or 'anything he should know of prior to the search.' Because the officer's question could reasonably be interpreted to mean that the search would not be limited to weapons, Medina cannot be faulted for revealing that which he believed would be inevitably discovered. Moreover, the question was asked and answered while Officer Lopez had Medina's hands secured behind his head. Although individuals generally are under no obligation to answer questions posed to them during a routine traffic stop that are unrelated to the purpose of the stop [citation], the elements of coercion present here prevent us from relying on that principle. Under the circumstances, Medina's admission cannot be deemed a spontaneous confession. [Citation.] Rather, the admission was obtained through exploitation of the illegal search and seizure and must be

suppressed, along with the other evidence flowing therefrom.”
(*Id.* at pp. 178-179.)

The present case is distinguishable from *Medina* because here Officer Redlich did not obtain defendant's admission that he had a knife in his pocket by exploitation of a detention or seizure. Defendant contends that because Officer Redlich had already decided to conduct a patdown search when he asked defendant the question that led to his admission about the knife, the “question was part of the search process that was initiated prior to the admission, and [defendant]'s response was compelled by Officer Redlich's unlawful action.” Not so. Defendant does not and cannot point to any action taken by Officer Redlich before he asked defendant the question that led to defendant's admission -- like the securing of Medina's hands behind in head -- that could be deemed to constitute an illegal detention and/or the initiation of an illegal search. The fact that Officer Redlich may have *decided* to conduct a patdown search that would have been unlawful is of no legal significance because we review the lawfulness of the officer's actions under a standard of objective reasonableness without regard to his underlying intent or motivation. (See *People v. Gonzales* (1989) 216 Cal.App.3d 1185, 1190.) Because at the time Officer Redlich asked defendant the question that led to his admission about the knife Officer Redlich had not detained or begun to search defendant, there was no illegality to taint the question or defendant's incriminating response.

In an attempt to avoid this conclusion, defendant contends "that at the time of the admission [he] was under Officer Redlich's control and not free to disregard the question," but he points to no evidence supporting this contention. "Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.) Here, there was no physical force (as in *Medina*) or show of authority and therefore no seizure. Accordingly, defendant has failed to show any error in the magistrate's denial of his motion to suppress.

II

Prosecutorial Misconduct

As we have noted, defendant attempted to avoid conviction by relying on the defense of necessity. The trial court instructed the jury that defendant had the burden of proving this defense by a preponderance of the evidence.

During his rebuttal argument, the prosecutor began by asserting as follows: "I have two fairly big problems with the defense argument, and I will go through them both here. First of all, to find the defendant not guilty, one, you got to totally believe the defendant that his rendition of what happened that day is the total truth. There is no difference what he said here. That is it, that is what happened. And two, that necessity applies. And elements of necessity are not met here. [¶] And one thing the defense failed to mention in his closing argument is that I don't have to disapprove [*sic*]

necessity. The defense has to prove necessity to you. That is not my job. That is his job. And the defense failed at that. They did not prove necessity."

Defendant contends that by telling the jurors they had to "totally believe . . . that [defendant's] rendition of what happened that day is the total truth" to find him not guilty, the prosecutor "misstate[d] the law of the defense of necessity" by "inflat[ing] [defendant]'s burden of proof to a total lack of doubt standard," rather than the preponderance-of-the-evidence standard.

We are not persuaded. While defendant's assertion that "a prosecutor must not misstate the law" is accurate (see *People v. Bell* (1989) 49 Cal.3d 502, 538), there was no misstatement here. In assessing a claim of prosecutorial misconduct in closing argument, we cannot (as defendant does) "single[] out words and phrases, or at most a few sentences" but instead "must view the [allegedly offending] statements in the context of the argument as a whole." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) Doing that here, it is clear that the prosecutor's opening remarks in his rebuttal argument were not intended to address the burden of proof, nor would the jury have reasonably understood them to do so. This is most apparent from the fact that later during the rebuttal argument, immediately before he went through each of the elements of the necessity defense to argue that defendant's version of the facts was not sufficient to establish that defense, the prosecutor stated as follows: "Now, what you need to consider is whether the defense has

proved necessity to you. And again, it's not my burden to prove the defense. It's the defense's burden. And every single one of these elements one through six have to be proven to you *by a preponderance of the evidence* that the defendant acted in an emergency to prevent a significant bodily harm or other evil." (Italics added.)

Because defendant has shown no misstatement of the law by the prosecutor, he has failed to show any misconduct.

III

Judicial Notice Of Omissions In The Rap Sheet

Defendant contends the trial court abused its discretion and violated his federal constitutional rights in refusing to take judicial notice that the great bodily injury enhancement on his prior conviction was missing from his rap sheet. The only authority defendant mentions, however, related to whether the rap sheet -- or, more specifically, an omission in the rap sheet -- was subject to judicial notice is Evidence Code section 452, subdivision (d), which he cites in passing in a footnote in his brief. Under that provision, judicial notice may be taken of "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." Defendant fails to show, however, how a rap sheet qualifies as a court record. In the absence of any better showing of why the omission of the enhancement from his rap sheet was properly subject to judicial notice, we conclude defendant has failed to demonstrate either an abuse of

discretion or a violation of his constitutional rights by the trial court's refusal to take judicial notice of the omission.

IV

Refusal To Strike The Prior Conviction

Defendant contends the trial court abused its discretion when it failed to strike his prior strike conviction. We disagree.

A trial court has the discretion to strike a prior serious felony conviction for purposes of sentencing only if the defendant falls outside the spirit of the three strikes law. (Pen. Code, § 1385; *People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.) In deciding whether a defendant falls outside the spirit of the three strikes law, the court "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." (*Williams*, at p. 161.) The court's discretion is limited by the concept of "furtherance of justice," requiring the court to consider both the defendant's constitutional rights and the interests of society. (*Romero*, at p. 530.)

The trial court's "failure to . . . strike a prior conviction allegation is subject to review under the deferential

abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) In reviewing for abuse of discretion, we are guided by the principle "that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.)

Here, defendant argues the present offense and his prior criminal history fall outside the "spirit" of the three strikes law based on the factors set forth in *Williams*. First, defendant contends the present offense was victimless and relatively unremarkable because it involved carrying "an otherwise lawful knife in a manner which rendered it an unlawful dirk or dagger." Second, defendant asserts his criminal record consists of "all misdemeanor offenses that are for the most part non-violent and . . . occurred over a decade ago." Lastly, defendant argues his last strike offense occurred roughly 11 years prior to the present offense.

"Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) Here, the record shows the trial court considered all relevant factors under *Romero* and found defendant fell within the spirit of the three strikes law.

As to the present offense, the court emphasized that defendant "acknowledged he had [the knife] specifically for the purpose of displaying it or brandishing it to put off anyone he

thought might be threatening him in some way”

Furthermore, defendant “indicated he had in fact brandished [the weapon] . . . 24 hours prior to the offense here.” The weapon and defendant’s willingness to brandish it created a dangerous combination of factors that could have led to serious injury or death.

The court also found defendant’s criminal history “horrendous.” Although most of defendant’s criminal past involves nonviolent behavior, defendant has 10 prior convictions and was placed on probation on 10 separate occasions.² Defendant’s numerous prior convictions and placements on probation influenced the court’s consideration of the last *Williams* factor.

The court found defendant was not likely to be rehabilitated. As the court noted, it “appears probation has had absolutely no impact on [defendant] whatsoever.” Additionally, the court stressed the fact that defendant absconded while the jury was deliberating and did not return for

² The trial court narrated defendant’s criminal history during sentencing: “First convicted in 1972 in Alameda County for failure to provide support apparently. Also 1972 a DUI in Alameda. 1986 transportation of controlled substances for sale in Alameda. 1988 vandalism again in Alameda. 1993 petty theft 484, again in Alameda. 1996, petty theft with prior in Alameda. 1997, false imprisonment and aggravated assault, again in Alameda. 2002, welfare fraud in Alameda. 2006, cruelty to animals in Sacramento County. [¶] The defendant on January 11, 2007, was placed on three years['] informal probation. Was on probation at the time of this incident which he’s been convicted.”

sentencing until he was involuntarily taken into custody 15 months later.

As evidenced by the court's consideration of defendant's history, ongoing conduct, and the unlikelihood of rehabilitation, the court's characterization of defendant as a serious, although nonviolent offender, was reasonable. The trial court's determination was neither irrational nor arbitrary. Accordingly, we find no abuse of discretion in the trial court's refusal to strike his prior conviction.

V

Conduct Credits

Defendant spent 44 days in local custody before he was sentenced on November 12, 2010. At sentencing, everyone agreed defendant was entitled to 44 days of actual custody credits and 22 days of conduct credits.

On appeal, defendant contends the equal protection clause "compels that the [most recent] amendment to [Penal Code] section 4019 effective October 1, 2011, be applied to award [him] one-for-one conduct credit." He is mistaken. (See *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9 [prospective application of law increasing conduct credits does not violate equal protection because "prisoners who serve their pretrial detention before such a law's effective date, and those who serve their detention thereafter, are not similarly situated with respect to the law's purpose"].)

DISPOSITION

The judgment is affirmed.

_____ ROBIE _____, Acting P. J.

We concur:

_____ BUTZ _____, J.

_____ MURRAY _____, J.