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

THE PEOPLE,

Plaintiff and Respondent,

v.

LEO JAMES PATRICK,

Defendant and Appellant.

C067982

(Super. Ct. No. 10F5415)

Police officers searched the home of Leo James Patrick in June 2010. Inside a toolbox on the master bedroom's balcony, officers found a collapsible baton (the tip of which was broken) with the word "'police' on the handle" that was a knock-off of the brand used by police. The officers arrested defendant, who told them he did not know that possessing the baton was illegal and that he was just fixing it for a friend. The officers at trial described the baton as a billy. Specifically, the officers described a billy as an item "used for impact" that could be a "straight stick[], expandable baton[], and so forth," and testified that the collapsible baton found in defendant's

toolbox was a billy. A jury found defendant guilty of possessing a deadly weapon, a billy.

Defendant appeals from the resulting conviction, raising the following three contentions: (1) his conviction for possessing a billy violated the Second Amendment; (2) there was insufficient evidence he possessed a billy; and (3) trial counsel was ineffective. Disagreeing, we affirm.

DISCUSSION

I

Defendant Forfeited His Second Amendment Challenge

Defendant contends the prohibition on possessing a billy violated his Second Amendment right to bear arms, relying on *District of Columbia v. Heller* (2008) 554 U.S. 570 [171 L.Ed.2d 637]. There, the Court held that the Second Amendment confers an individual right to keep and bear arms for the purpose of self-defense. (*Id.* at pp. 626-627 [171 L.Ed.2d at p. 678].)

Defendant's contention is forfeited because he failed to raise it in the trial court. Defendant's trial postdated *Heller* by almost three years, so he could have raised the *Heller* issue then. (Cf. *People v. Villa* (2009) 178 Cal.App.4th 443, 448 [the "[m]ost important[]" reason the defendant "ha[d] the right to bring this *Heller* claim, even though he did not raise it in the trial court" was because the "defendant's trial predated *Heller*, making a timely objection impossible"]; *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 310-311 ["the defense had no reason to challenge the statute on the grounds asserted here until the decision in *Heller* was issued after trial of the matter was

concluded and judgment was entered"].) By failing to raise his *Heller* contention in the trial court, defendant's Second Amendment claim is forfeited.¹

II

There Was Sufficient Evidence Defendant Possessed A Billy

Defendant contends there was insufficient evidence he possessed a billy because a billy is a wooden stick and the stick here was not made of wood. He is wrong because there is no requirement a billy be made of wood.²

People v. Mercer (1995) 42 Cal.App.4th Supp. 1 is instructive. There, the court held that a collapsible baton was a billy. (*Id.* at p. 5.) The defendant in *Mercer* described the item at issue as a "truck antenna" and the policeman described it as "'weapon commonly known as a [collapsible] baton. The

¹ Defendant requests we take judicial notice that sticks, clubs, bludgeons, and cudgels were arms in common use at the time the Second Amendment was passed. We deny this request as irrelevant in light of our holding that defendant's Second Amendment contention is forfeited. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135, fn. 1 [matters to be judicially noticed must be relevant to a material issue in the matter].)

² The statute does not define billy. (Pen. Code, § 12020, subd. (a)(1).) The court's instruction did not define billy either.

The instruction stated defendant was "charged with unlawfully possessing a weapon commonly known as a billy or billy club. To prove the defendant is guilty of this crime the People must prove that: One, the defendant possessed a billy or billy club; two, the defendant knew that he possessed the billy or billy club; and three, the defendant knew or reasonably should have known that the object had the characteristics that made the object a billy or billy club."

weapon, when extended by a flick of the wrist, is extended and used as a club. [¶] I have seen this weapon on several occasions and it is used by police and martial arts as an offensive weapon used to strike.'" (*Ibid.*) The court held that "possession of such an item is proscribed by section 12020, subdivision (a). [¶] We note that Webster's New World Dictionary defines a 'billy' as 'a club or heavy stick; truncheon, esp. one carried by a policeman.' (Webster's New World Dict. (2d college ed. 1986) p. 141.) A 'truncheon' is defined as '1. a short, thick cudgel; club 2. any staff or baton of authority 3. . . . a policeman's stick or billy' (*Id.* at p. 1527.) The item which appellant was carrying fits into these definitions." (*Mercer*, at p. 5.)

Nothing in these definitions requires a billy to be made of wood. Rather, the baton here fit within the definitions quoted above and was very similar to the one in *Mercer*. It was a "collapsible baton" that extended out in a "rigid, fixed manner" with the word "'police'" on the handle that was a "knock-off" of the brand used by police. Nothing more was required to qualify it as a billy.³

³ In reaching its holding, *Mercer* noted two other salient facts.

One, "other sections in the Dangerous Weapon Control Law, of which [Penal Code] section 12020 is a part, also convinces us that possession of a baton is proscribed by section 12020, subdivision (a). Section 12002, subdivision (a) provides: '(a) Nothing in this chapter prohibits police officers, special police officers, peace officers, or law enforcement officers from carrying any wooden club, baton, or any equipment

Defendant requests we take judicial notice of several dictionary definitions of the term "billy" or "billy club" that refer to a billy being made out of wood. We grant this request (see Evid. Code, § 451, subd. (e) [judicial notice shall be taken of "[t]he true signification of all English words and phrases and of all legal expressions"]), but it does not assist defendant. Even in those definitions to which defendant cites, a billy or billy club is defined variously, sometimes with reference to being made out of wood (Merriam-Webster's Collegiate Dict. (11th ed. 2009) p. 122, col. 1 ["a heavy usu. wooden club"]); sometimes with reference to being a police officer's club or baton (Dictionary.com, available online at <http://dictionary.reference.com/browse/billy?s=t&ld=1087> [as of July 23, 2012] ["a police officer's club or baton"]); or sometimes with reference to being used for protection or defense (Webster's New Complete Desk Reference Book (1993) p. 33, col. 1

authorized for the enforcement of law or ordinance in any city or county.' (Italics added.) In addition, section 12020, subdivision (b)(14) provides that subdivision (a) does not apply to '[t]he manufacture for, sale to, exposing or keeping for sale to, importation of, or lending of wooden clubs or *batons* to special police officers or uniformed security guards authorized to carry any wooden club or *baton* . . . by entities that are in the business of selling wooden *batons* or clubs to special police officers and uniformed security guards when engaging in transactions with those persons.' (Italics added.)" (*People v. Mercer*, 42 Cal.App.5th Supp. at p. 6.)

And two, there was a 1982 California Attorney General Opinion holding that a policeman's baton was prohibited by Penal Code section 12020, subdivision (a). (*People v. Mercer*, 42 Cal.App.5th Supp. at p. 6.)

["A short wooden club used for protection or defense"]). Simply because some definitions refer to a billy as being made out of wood or usually made out of wood does not mean that the statutory definition of the "billy" requires it to be made of wood.

III

Trial Counsel Was Not Ineffective

Defendant contends trial counsel was ineffective for failing to object to the officers' expert testimony on the definition of a billy and on the issue of defendant's guilt. The testimony with which defendant now takes issue was that a billy was an item "used for impact" and could be a "straight stick[], expandable baton[], and so forth," and that the collapsible baton found in defendant's toolbox was a billy.

In defendant's mind, this testimony was similar to that in *People v. Torres* (1995) 33 Cal.App.4th 37. In *Torres*, a police officer gave his definitions of robbery and extortion and expressed the opinion that the defendant was guilty of robbery. (*Id.* at p. 42.) The appellate court held it was error to admit the officer's definition of these statutory terms and his opinion because the jury was just as competent as an expert to consider the evidence and draw the necessary conclusions. (*Id.* at p. 47.) The court added, however, "There are some crimes a jury could not determine had occurred without the assistance of expert opinion as to an *element* of the crime. Robbery and extortion, however, are not among them. Neither, unfortunately, is 'sufficiently beyond common experience' that the jury needs

an expert to determine whether they have been committed.”

(*Ibid.*, fn. omitted.)

Torres is distinguishable. The officers here did not testify as to the definition of the crime or give their opinions on defendant’s guilt. Rather, they explained the meaning of a term (billy) that might not have been familiar to the jury and offered their opinion as to whether the object here was one. Expert testimony on matters that may be beyond the common experience of the jury is appropriate. (See, e.g., *People v. Clay* (1984) 153 Cal.App.3d 433, 459 [expert testimony is properly admitted that injuries qualified as great bodily injuries, even though it embraced the ultimate issue to be decided by the trier of fact, because lay jurors may not understand the gravity of certain injuries].) Because there was nothing objectionable about the expert testimony here, defense counsel was not ineffective for failing to object.

DISPOSITION

The judgment is affirmed.

We concur: _____ ROBIE _____, J.

_____ HULL _____, Acting P. J.

_____ BUTZ _____, J.