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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY NELSON,

Defendant and Appellant.

D059762

(Super. Ct. No. SCE298241)

APPEAL from a judgment of the Superior Court of San Diego County, Allan J. Preckel, Judge. Affirmed.

A jury found appellant Jeffrey Nelson guilty in count 1 of attempted escape from custody (Pen. Code,<sup>1</sup> § 4532, subd. (b)) and in count 2 of damaging property in a jail or prison (§ 4600).

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Penal Code.

On appeal, Nelson contends his conviction on count 1<sup>2</sup> should be reversed because there is insufficient evidence to show he took a "substantial step toward escape from a jail, beyond mere preparation." Alternatively, Nelson contends his conviction on count 1 should be reversed because the trial court prejudicially erred in admitting evidence (i) of another alleged escape by Nelson that occurred more than a year after his alleged attempted escape that led to his conviction in the instant case and (ii) of an escape by other inmates years earlier from the same detention facility. As we explain, we disagree with these contentions and affirm Nelson's judgment of conviction.

### FACTUAL AND PROCEDURAL BACKGROUND<sup>3</sup>

In December 2009, Nelson was in custody at the George Bailey Detention Facility in connection with a felony conviction. Nelson at the time had occupied a cell by himself for at least three weeks.

At about 4:00 a.m. on December 26, 2009, Deputy Lloyd Dawson and his partner Deputy Joshua Jackson were conducting a routine security check of cells and inmates. As Dawson walked along the bottom tier of cells in module B, looking in each cell, he heard a "scraping sound" in the vicinity of Nelson's cell. As Dawson continued to walk toward the end of the module, the scraping sound got progressively louder for about 15 to

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<sup>2</sup> Nelson does not challenge his misdemeanor conviction in count 2 for damaging a prison or jail in violation of section 4600.

<sup>3</sup> We view the evidence in the light most favorable to the judgment of conviction. (See *People v. Osband* (1996) 13 Cal.4th 622, 690.) Certain portions of the factual and procedural history related to Nelson's contentions are discussed *post*.

20 seconds and then stopped. Dawson checked every cell in module B, where Nelson was housed, but Dawson could not locate the source of the scraping noise. At one point Dawson looked into Nelson's cell and made eye contact with Nelson, who was sitting up on his bunk. Dawson did not see anything out of the ordinary in Nelson's cell, so Dawson continued to check other cells.

After checking another cell module, Dawson told Jackson what he had heard and asked Jackson to check the cells in module B. Jackson at some point looked into Nelson's cell and saw a dark area around the mortar joints of one of the blocks of the exterior wall. Jackson notified Dawson and together, they returned to Nelson's cell, secured Nelson in an unoccupied cell and then searched Nelson's cell.

The deputies found on the top of one of the blocks, below Nelson's bunk, about a half-inch to one and a half-inch of mortar chiseled away and about 14 inches of grout missing. The deputies also found a five- and a half-inch metal object protruding from the mortar joint, a rolled up newspaper with toothpaste on it sitting on the desk and concrete dust on the floor. The newspaper was roughly the same size as the opening in the mortar, and appeared to fit snugly inside the opening. The deputies also noticed Nelson's cell smelled of concrete dust.

## DISCUSSION

### A. *Attempted Escape Conviction*

Nelson contends his conviction for attempted escape should be reversed because there is insufficient evidence to support the finding he took a direct but ineffective step toward escaping from the detention facility.

" In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] [Citation.] We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. [Citation.] This standard applies whether direct or circumstantial evidence is involved. [Citation.] It also applies when determining whether the evidence is sufficient to sustain a jury finding on a gang enhancement. [Citations.] Reversal is unwarranted unless ' " 'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " ' [Citation.]" (*People v. Mendez* (2010) 188 Cal.App.4th 47, 56.)

The version of section 4532, subdivision (b)(1) applicable in December 2009 (former section 4532)<sup>4</sup> provided in part: "Every prisoner . . . convicted of a felony . . .

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<sup>4</sup> The subsequent amendments to section 4532 have no bearing on this proceeding.

who is confined in any county or city jail . . . who escapes or attempts to escape . . . is guilty of a felony . . . ."

Nelson does not dispute that the trial court properly instructed the jury on the elements of attempted escape pursuant to former section 4532, subdivision (b)(1).

Specifically, the jury was instructed in part as follows:

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant was a prisoner who had been convicted of a felony;

"2. The defendant was confined in a county jail;

"3. The defendant took a direct but ineffective step toward escaping from the jail;

"AND

"4. The defendant intended to escape from the jail.

"A *direct step* requires more than merely planning or preparing to commit the escape, and more than merely obtaining or arranging for something needed to commit the escape. A direct step is one that goes beyond planning or preparation and shows that a person is putting his [or her] plan into action. A direct step indicates a definite and unambiguous intent to escape. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

"A person who attempts to escape is guilty of attempted escape even if, after taking a direct step towards committing the crime, his [or her] attempt failed or was interrupted by someone or something beyond his [or her] control.

"*Escape* means the unlawful departure of a prisoner from the physical limits of his [or her] custody. It is not necessary for the prisoner to have left the outer limits of the institution's property. However, the prisoner must pass beyond some barrier, such as a wall or a fence, intended to keep the prisoner within a designated area."

Thus, attempted escape requires a "direct, unequivocal act to effect that purpose" (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 517, fn. omitted) and such an act "must go beyond mere preparation . . . and . . . show that the perpetrator is putting his or her plan into action." (*People v. Kipp* (1998) 18 Cal.4th 349, 376.)

Nelson in his brief primarily relies on *People v. Lancaster* (2007) 41 Cal.4th 50 and *People v. Carrington* (2009) 47 Cal.4th 145 as support for his contention that the evidence in the instant case at most showed mere preparation and not a substantial step toward escape. In *People v. Lancaster*, our high court held the mere presence of a handcuff key in defendant's cell, without more, was insufficient to establish as an aggravating factor " 'criminal activity by the defendant which involved the use or attempted use of force or violence,' " as provided in section 190.3, subdivision (b) in connection with the penalty phase after defendant was convicted of murder. (*People v. Lancaster, supra*, 41 Cal.4th at p. 91.) In determining whether the handcuff key (which

was not an actual key) was even admissible, the trial court suggested it could be relevant to attempted escape and an " 'implied threat to use force or violence.' " (*Ibid.*)

In concluding the handcuff key was not admissible to show attempted escape to establish criminal activity under section 190.3, our Supreme Court ruled the presence of the handcuff key "in defendant's cell showed, at most, mere preparation." (*People v. Lancaster, supra*, 41 Cal.4th at p. 94.)

In *People v. Carrington, supra*, 47 Cal.4th at page 194, our high court found "questionable" whether defendant was planning an escape based on statements of a cellmate of defendant who claimed that defendant had requested and obtained a "hard plastic knife." Similar to *People v. Lancaster*, the issue in *People v. Carrington* was whether the statements of the cellmate was sufficient to establish "criminal activity" of defendant by the " 'implied threat to use force or violence' " for purposes of section 190.3, subdivision (b). (*People v. Carrington, supra*, 47 Cal.4th at p. 193.) Our Supreme Court ruled the admission of the statements and/or plastic knife as evidence during the penalty phase was harmless given the evidence of the two, first degree murders for which defendant was convicted. (*Ibid.*)

Here, in contrast to the facts of *People v. Lancaster* and *People v. Carrington*, we conclude there is substantial evidence in the record to support the finding of the jury that defendant (e.g., Nelson) took a "direct but ineffective step" toward escaping from the detention facility. Although Nelson in his brief states the "evidence showed mere preparation and possible planning," and further states the *only* evidence showing attempt

was the "sharp instrument" in his cell and some "scratches in an area under the bed," our review of the record shows otherwise.

In fact, there is other, additional evidence in the record Nelson simply ignores that supports the jury's finding of "direct but ineffective step," including the scratching sounds heard by Dawson for about 15 to 20 seconds in the vicinity of Nelson's cell at about 4:00 a.m. while Dawson was making his hourly security checks of the module. In addition, there was a rolled-up newspaper with toothpaste on it that fit snugly within the opening left by the missing mortar, supporting the inference that the newspaper was used by Nelson to conceal the opening. There also was the smell of the concrete dust and, of course, the fact that when Dawson walked by Nelson's cell at 4:00 a.m., Nelson was sitting up on his bunk and was not sleeping.

The record also shows that the block where Nelson was digging inside his cell was part of the exterior of the building, leading to a fenced-in grassy area. The record shows that if Nelson got outside and scaled or cut the fence, he would be free.

That there are facts in the record that lead to a different or opposite finding or support conflicting inferences, all of which Nelson raises in his brief in support of his contention, is largely immaterial on the issue of whether substantial evidence in the record supports the finding of the jury that Nelson took a "direct but ineffective step" toward escape from the detention facility. (See *People v. Riazati* (2011) 195 Cal.App.4th 514, 532 [noting a court of review does "not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses"]; see also *People v. Fuiava*

(2012) 53 Cal.4th 622, 711 [noting that a " 'substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence . . . upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question," and noting that "[o]nce such evidence is found, the substantial evidence test is satisfied . . . [e]ven when there is a significant amount of countervailing evidence' "].)

Viewing the evidence in the light most favorable to the judgment, we conclude there is substantial evidence in the record showing Nelson took a direct but ineffectual step toward escape from the detention facility.

*B. Admission of Evidence of Subsequent Escape Attempt*

Nelson next contends the trial court erred when it admitted "other crimes" evidence within the meaning of Evidence Code section 1101, subdivision (b).<sup>5</sup> Specifically, he contends the trial court erred when it admitted evidence of another alleged attempted escape by him in early January 2011.

Briefly, Deputy Gregory Biggs testified that he was working at the detention facility in January 2011 when he was alerted by another inmate of scraping noises coming from Nelson's cell. Biggs testified he searched Nelson's cell and found about a

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<sup>5</sup> Evidence Code section 1101, subdivision (b) provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . ) other than his or her disposition to commit such an act."

six-inch section of mortar had been scraped out of the brick wall. The trial court subsequently ruled to admit this evidence under Evidence Code section 1101, subdivision (b) to show knowledge, intent and absence of accident or mistake in connection with the instant offense, which as noted *ante*, occurred in late December 2009. Although defense counsel objected to this evidence on the basis of late discovery, defense counsel did not object on relevancy grounds.<sup>6</sup>

"Pursuant to Evidence Code section 1101, evidence that the defendant in a criminal prosecution committed an uncharged offense may be admitted if relevant to prove some relevant fact other than the defendant's character—such as intent or identity, or that the defendant acted pursuant to a common design or plan." (*People v. Balcom* (1994) 7 Cal.4th 414, 422.) " 'Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. . . . ' " (*Ibid.*)

Here, the People were required to prove a specific intent to escape, among other elements, to establish attempted escape under former section 4532, subdivision (b). (See *People v. Gallegos, supra*, 39 Cal.App.4th at p. 517.) Thus, evidence that Nelson engaged in the same conduct while in another cell, even after the fact (see *People v. Balcom, supra*, 7 Cal.4th at pp. 422-425), was clearly relevant to the issue of intent.

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<sup>6</sup> Nelson contends that to the extent defense counsel failed to object on relevancy grounds, he received ineffective assistance of counsel. Because we reach the merits of this contention, we neither address his ineffective assistance of counsel claim nor the People's claim that Nelson forfeited the issue.

Moreover, the trial court did not err in finding the probative value of the "other crimes" evidence from January 2011 was not substantially outweighed by the probability that its admission would create undue prejudice to Nelson. (See Evid. Code, § 352, subd. (b).) We will not disturb a trial court's exercise of discretion under Evidence Code section 352 unless its decision exceeds the bound of reason. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1519.)

Given that the testimony regarding the January 2011 incident was extremely brief, that there was substantial evidence (as discussed *ante*) in support of Nelson's attempted escape conviction apart from the evidence of this incident, and that the jury was properly

instructed<sup>7</sup> it could use the "other crimes" evidence solely for the purpose of determining Nelson's mental state in count 1 and *not* for the purpose of showing Nelson had a bad character or was disposed to commit crimes,<sup>8</sup> we conclude Nelson was not unduly prejudiced by, and the trial court properly exercised its discretion in admitting, such evidence. (See *People v. Waidla* (2000) 22 Cal.4th 690, 724 [noting a court of review "applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and

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<sup>7</sup> The trial court gave the jury a modified version of CALCRIM No. 350 as follows: "The People presented evidence that the defendant committed other offenses, Attempted Escape and/or Damage to Jail or Jail Property, that were not charged in this case. [¶] You may consider this evidence concerning the events . . . on or about January 4, 2011, only if the People have proved by a preponderance of the evidence that the defendant in fact committed an uncharged offense. Proof by a preponderance of the evidence is a different standard of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden, you must entirely disregard this evidence concerning the events . . . on or about January 4, 2011. [¶] If you decide that the defendant committed the uncharged offense or offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: [¶] The defendant, on or about December 26, 2009, acted with the intent to escape; or [¶] The defendant's actions, on or about December 26, 2009, had a plan or scheme to commit the offenses charged in this case. [¶] In evaluating the evidence concerning the events . . . on or about January 4, 2011, consider the similarity or lack of similarity between the uncharged offenses and the charged offenses. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offense(s), that conclusion is only one factor to consider along with the other evidence. It is not sufficient by itself to prove that the defendant is guilty of either charged crime in this case. The People must still prove each charged crime beyond a reasonable doubt."

<sup>8</sup> We conclude this instruction, which the jury is presumed to have followed, helped to nullify any potential for prejudice to Nelson. (See *People v. Delgado* (1993) 5 Cal.4th 312, 331.)

prejudice of the evidence in question"]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124 [recognizing a court of review will not disturb a trial court's discretionary ruling " 'except on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' "].)

### C. *Evidence of an Escape by Other Inmates*

Lastly, Nelson contends his conviction for attempted escape must be reversed because the trial court prejudicially erred when it allowed the prosecution to introduce evidence of an escape from the detention facility by other inmates.

The alleged error occurred during the prosecutor's questioning of Dawson. The prosecutor asked whether there was any concern about an inmate cutting the fence outside the building module where Nelson was held. After the trial court overruled defense counsel's objection to this question, Dawson testified he was concerned because "three inmates, probably four years ago, escaped from [the detention facility]." The prosecutor then asked if the escape involved cutting the fence, to which Dawson replied, "Yes it did."

We conclude that even if the trial court erred by overruling defense counsel's objection, this inconsequential line of questioning did not prejudice Nelson. (See *People v. Watson* (1956) 46 Cal.2d 818, 836–837 (*Watson*) [reversal required only if a reasonable probability exists that a result more favorable to defendant would have been reached absent the error].)

Nelson, however, argues for application of the more stringent test of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824] (*Chapman*), claiming the error affected the fairness of his trial. We disagree. Generally " 'violations of state evidentiary rules do not rise to the level of federal constitutional error' " (*People v. Samuels* (2005) 36 Cal.4th 96, 114), and we discern no reason to depart from that rule here. (See also *People v. Benavides* (2005) 35 Cal.4th 69, 91 [applying *Watson* standard of prejudice to trial court's error in admitting evidence]; *People v. Malone* (1988) 47 Cal.3d 1, 22 [rejecting *Chapman* standard of prejudice in determining whether trial court's error in admitting other crimes evidence was prejudicial].)

In any event, even if we applied the *Chapman* standard of prejudice, on this record we still would conclude the trial court's alleged error in overruling Nelson's objection to this evidence was harmless beyond a reasonable doubt, inasmuch as he was charged and convicted of *attempted* escape, there was never any evidence (nor was the prosecution required to prove) that Nelson actually escaped the detention facility, and there was substantial *other* evidence in the record to support his conviction in count 1.

DISPOSITION

The judgment of conviction is affirmed.

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BENKE, Acting P. J.

WE CONCUR:

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McDONALD, J.

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O'ROURKE, J.