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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RAELYN RENEE WELLS, Defendant and Appellant.	D073814 (Super. Ct. No. SCD272957)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Rubin, Judge. Reversed and remanded with directions.

Lindsey M. Ball, under appointment by the Court of Appeal; Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos, Kathryn Kirschbaum, Britton B. Lacy and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury convicted Raelyn Renee Wells of assault with a deadly weapon with the intent to inflict great bodily injury. The jury also found true allegations Wells personally used a dangerous and deadly weapon and personally inflicted great bodily injury upon the victim. (Pen. Code,[1] §§ 245, subd. (a)(1), 1192.7, subd. (c)(8), 1192.7, subd. (c)(23), 12022.7, subd. (a).) Wells separately pleaded guilty to resisting an officer. (§ 148, subd. (a)(1).)

The trial court sentenced Wells to five years in state prison.!1 (CT 104)! The court also imposed a $300 restitution fine (§ 1202.4, subd. (b)); a matching $300 parole revocation fine (§ 1202.45), which the court stayed; an $80 court operations assessment (§ 1465.8); a $60 conviction assessment (Gov. Code, § 70373); and a $154 booking fee (Gov. Code, § 29550).

Wells appeals, contending we must reverse her assault with a deadly weapon conviction because the court abused its discretion in admitting into evidence body-worn camera footage of her fleeing, which Wells asserts was unduly prejudicial and cumulative. Wells additionally contends we must reverse her assault with a deadly weapon conviction because the court erred in instructing the jury about mutual combat, which Wells asserts was not supported by substantial evidence and undermined her case for self-defense.

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

While this appeal was pending, the Legislature enacted sections 1001.35 and 1001.36 (Stats. 2018, ch. 34, § 24), effective June 27, 2018, to authorize pretrial diversion for defendants with mental disorders (mental health diversion statutes).[2] Wells contends the mental health diversion statutes apply retroactively to this case because the case is not final, and she requests we conditionally remand the matter for the court to consider whether to grant diversion to her.

Also while this appeal was pending, the appellate court in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) held the due process clauses of the federal and state Constitutions preclude a court from imposing a nonpunitive fee or assessment without first determining a defendant's ability to pay. (*Id.* at pp. 1164, 1168.) The appellate court further held these due process clauses require a court to stay execution of a mandatory punitive fine until the court determines the defendant has the ability to pay the fine. (*Id.* at pp. 1164, 1172.) Based on the *Dueñas* decision, Wells contends we must stay execution of the fines, fee, and assessments imposed by the court until the court determines she has the ability to pay them.

We conclude the court did not err in admitting the body-worn camera footage into evidence. We further conclude any error in instructing the jury on mutual combat was harmless. However, we agree the mental health diversion statutes apply retroactively to

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[2] The Legislature subsequently amended section 1001.36, effective January 1, 2019, to eliminate diversion eligibility for defendants charged with certain specified offenses, to give the court the discretion to require defendants make a prima facie showing of diversion eligibility, and to give the court the authority to address restitution for victims of diverted offenses. (Stats. 2018, ch. 1005, § 1). All references to section 1001.36 are to this version of the statute.

this case and we reverse the judgment to allow the court an opportunity to conduct a mental health diversion eligibility hearing. In light of the reversal of the judgment, we decline to decide whether the court's imposition of the fines, fee, and assessments violated Wells's due process rights. Instead, Wells may raise this issue with the court at an appropriate time after the court considers the mental health diversion issue.

II

BACKGROUND

A

The victim, a homeless man, was lying down in a park when he heard a popping noise that sounded like a starter's pistol or a cap gun. Wells approached the victim from the direction of the popping noise and shined a bright light in his face.

The victim had a decorative staff, which he considered a prized possession. Worried Wells was getting near the staff, the victim exclaimed, "Oh, [expletive], my staff" and went to grab it. Wells replied, "Oh, yeah, [expletive] your staff," and stepped on it. This led to a brief tussle in which the victim may have pushed or swung at Wells.

After the tussle, the victim gathered his things and moved. He then noticed an unusual hot feeling in his lower back and wetness on his chest and stomach. Believing he had been shot, the victim yelled for someone to call for help.

Paramedics arrived and took the victim, who was near death, to the hospital. He had two stab wounds, one of which penetrated his chest, cut through his diaphragm, damaged his spleen, and caused his belly to fill with blood.

Meanwhile, a responding police officer drove around looking for Wells. When the officer spotted Wells walking in a nearby field, the officer activated his vehicle's lights, got out, and asked her to come over towards him. She ran and the officer chased her. During the chase, she discarded a backpack and slid under the garage door of an apartment building. She ran through the garage and exited onto a street where she discarded another backpack. She continued running until she was apprehended.

The officer retrieved both backpacks. One contained a handgun-style BB gun, CO_2 cartridges, and BB pellets. The other contained a flashlight and a seven-inch knife sheathed and wrapped in a hoodie. Both Wells's and the victim's DNA were on the knife's sheath and handle. The victim's DNA was also on the knife's blade.

B

Wells testified she was shooting her BB gun at some bushes when she decided to lay her blanket down and go to sleep. She shined her flashlight around to see who was in the area. The victim threatened, "I'm going to get you in your sleep," and she confronted him. She then walked away and he threatened her again.

Wells and the victim began arguing. She did not step on his staff. During their argument, the victim swung and hit her in the head. She swung back and "grazed" him.

The two physically struggled and, "at some point, the knife was introduced." Within about 20 seconds, the victim pushed himself away and yelled that he had been shot.

Wells subsequently ran from the police officer because she was afraid of being shot and killed by the officer. She discarded the backpacks because they were heavy.

III

DISCUSSION

A

1

Before trial, Wells indicated she would plead guilty to the resisting an officer charge and stipulate to ownership of the backpacks. Consequently, she moved under Evidence Code sections 350 and 352 to preclude any evidence of "anything that happened after [she] left the scene of the confrontation with [the victim]." However, the prosecutor moved to admit body-worn camera footage of Wells's flight from the police officer. The prosecutor explained the footage of her running away and discarding the backpacks was extremely probative of consciousness of guilt, particularly in light of her self-defense claim.

After viewing the footage, the court excluded most of the it, but permitted the prosecution to admit 60 seconds showing Wells's flight. The court found admitting the remaining footage would be too time consuming.

2

Wells contends we must reverse her conviction for assault with a deadly weapon because the court abused its discretion in admitting the body-worn camera footage of her flight. She asserts the court should have excluded the evidence under Evidence Code section 352 as unduly prejudicial and cumulative.

"A court may exercise its discretion to exclude relevant evidence 'if its probative value is substantially outweighed by the probability that its admission will ... create

substantial danger of undue prejudice.' (Evid. Code, § 352.) ' "A trial court's exercise of discretion in admitting or excluding evidence ... will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 330.) Wells has not made such a showing in this case.

Here, the challenged flight evidence was not unduly prejudicial because it was not time-consuming, inflammatory, confusing, or misleading. (Evid. Code, § 352.) The evidence was 60 seconds in length and limited to footage of Wells running away from a police officer and dropping her backpacks.

In addition, the court's decision to admit the challenged flight evidence was not patently absurd because the evidence was probative of a defendant's consciousness of guilt. (*People v. Anderson* (2018) 5 Cal.5th 372, 392; *People v. Hill* (1967) 67 Cal.2d 105, 120.) The court's decision to admit the evidence also was not arbitrary or capricious because, in reaching its decision, the court considered the parties' arguments, viewed the entirety of the flight footage, and then significantly limited the amount of footage the prosecutor could show to the jury. Accordingly, Wells has not established the court abused its discretion in admitting the evidence.

Given our conclusion, we need not address whether Wells forfeited this contention by failing to properly preserve it and present it for appellate review. We also need not address whether the asserted error was harmless.

B

1

During trial, the court instructed the jury with CALCRIM No. 3471. This instruction informed the jury: "A person who engages in mutual combat or who starts a fight has a right to self-defense only if: [¶] 1. She actually and in good faith tried to stop fighting; [¶] 2. She indicated, by word or by conduct, to her opponent, in a way that a reasonable person would understand, that she wanted to stop fighting and that she had stopped fighting; [¶] AND [¶] 3. She gave her opponent a chance to stop fighting.

"A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose. [¶] If the defendant meets these requirements, she then had a right to self-defense if the opponent continued to fight."

Before the court gave the instruction, Wells filed a written opposition to the instruction. She argued the court should not give the instruction because the instruction was not supported by substantial evidence, was inconsistent with her defense, and would be confusing to the jury. After hearing the parties' arguments, the court denied the motion, finding the instruction was warranted because there was evidence from which a jury could find Wells and the victim "squared off," tacitly agreeing to fight one another.

2

Wells contends we must reverse her conviction for assault with a deadly weapon because the court erred in instructing the jury on mutual combat. She asserts the instruction was not supported by substantial evidence and it undermined her case for self-

defense. We review assertions of instructional error de novo. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584; *People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

"Giving an instruction that is correct as to the law but irrelevant or inapplicable is error." (*People v. Cross* (2008) 45 Cal.4th 58, 67, citing *People v. Rowland* (1992) 4 Cal.4th 238, 282.) Assuming, without deciding, the mutual combat instruction was irrelevant or inapplicable in this case, "giving an irrelevant or inapplicable instruction is generally ' "only a technical error which does not constitute ground for reversal." ' [Citation.]" (*Cross*, at p. 67.)

Moreover, among its instructions to the jury, the court used CALCRIM No. 200 to inform the jury, "Now, you're going to find, some of these instructions may not even apply, depending on your findings about the case. Therefore, do not assume just because I give you a particular instruction, that I'm trying to suggest to you anything about the facts. After you've decided what the facts are, follow the instructions that do apply to the facts as you find them." Because of this instruction, "the jury is presumed to disregard an instruction if the jury finds the evidence does not support its application." (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 278; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381.) Wells has not rebutted this presumption or otherwise established it is reasonably probable the trial result would have been more favorable to her if the court had not given the mutual combat instruction. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

C

1

While this appeal was pending, the Legislature enacted the mental health diversion statutes. These statutes authorize pretrial diversion for defendants with mental disorders. " '[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment ...." (§ 1001.36, subd. (c).) A court may grant pretrial diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if the defendant is treated in the community. (§ 1001.36, subd. (b)(1).)

If the court grants pretrial diversion, "[t]he defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources" for "no longer than two years." (§ 1001.36, subd. (c)(1)(B), (3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

Wells contends the mental health diversion statutes apply retroactively to this case because the statutes have an ameliorative effect on punishment. The People contend these statutes do not apply retroactively because the Legislature did not intend them to apply retroactively. The California Supreme Court is currently reviewing this issue. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 791 (*Frahs*), review granted Dec. 27, 2018, S252220.) Pending further guidance from the Supreme Court, we agree with Wells.

2

As a canon of statutory interpretation, we generally presume laws apply prospectively. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 307 (*Lara*).) However, the Legislature may explicitly or implicitly enact laws that apply retroactively. (*Ibid*.) To determine whether a law applies retroactively, we must determine the Legislature's intent. (*Ibid*.)

" 'When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.' " (*Lara*, *supra*, 4 Cal.5th at p. 307, quoting *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*).) " 'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily

intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' [Citations.]" (*Lara*, at p. 308.)

The *Estrada* rule applies to the mental health diversion statutes because they lessen punishment by giving defendants the possibility of diversion and then dismissal of criminal charges. (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.) In addition, applying the mental health diversion statutes retroactively is consistent with their purpose, which is to promote "[i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35, subd. (a).)

The statutes' definition of pretrial diversion, which indicates they apply at any point in a prosecution from accusation to adjudication (§ 1001.36, subd. (c)), does not compel a different conclusion. "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara*, *supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal." (*Frahs*, *supra*, 27 Cal.App.5th at p. 791; but see *People v. Craine* (2019) 35 Cal.App.5th 744, 760 ["section 1001.36 does not apply retroactively to defendants whose cases have progressed beyond trial, adjudication of guilt, and sentencing"].)

The statutes' legislative history also does not compel a different conclusion. The statutes were part of an omnibus bill addressing more than a dozen diverse healthcare-related concerns. One of the concerns pertained to criminal defendants with mental disorders that prevent them from being competent to stand trial. (See Stats. 2018, ch. 34, §§ 25–27 [amending §§ 1370, 1370.01, 1372].) Another of the concerns pertained to criminal defendants with certain mental disorders that played a significant role in their crimes. (See Stats. 2018, ch. 34, § 24 [adding §§ 1001.35 & 1001.36].) The bill's handling of these two concerns intersected in at least one key respect: the bill added a provision authorizing a court, after finding a defendant mentally incompetent to stand trial and before transporting the defendant for treatment to restore competency, to grant the defendant diversion under section 1001.36 if the defendant is otherwise eligible for such diversion. (§ 1370, subd. (a)(1)(B)(iv)–(v).) In other words, a defendant found mentally incompetent to stand trial need not be restored to competency before being considered a candidate for diversion under section 1001.36.

This aspect of the bill evidences an intent to streamline mental health treatment for criminal defendants who are both mentally incompetent to stand trial and eligible for mental health diversion. Indeed, this intent is reflected in a legislative committee report, which described the bill's actions as including the implementation of "a mental health diversion program with a focus on reducing the number of Incompetent to Stand Trial referrals to the Department of State Hospitals." (Assem. Com. on Budget, Conc. in Sen. Amends. to Assem. Bill No. 1810 (2017-2018 Reg. Sess.) as amended June 12, 2018, p. 7.) This aspect of the bill does not address the retroactivity of the statute and,

therefore, does not evidence an intent for the mental health statutes to be solely a pretrial mental health diversion measure. As previously explained, the fact the statute is designed to ordinarily operate pretrial does not preclude it from applying retroactively. (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, citing, e.g., *Lara*, *supra*, 4 Cal.5th 299.)

Our conclusion is bolstered by the fact the California Supreme Court decided *Lara* before the Legislature enacted the mental health diversion statutes and the Legislature is deemed to have been aware of the decision. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 897.) Had the Legislature intended for the courts to treat the mental health diversion statutes in a different manner, we would expect the Legislature to have expressed this intent clearly and directly, not obscurely and indirectly. (See *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049 [to counter the *Estrada* rule, the Legislature must "demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it"].) Consequently, we conclude the mental health diversion statutes apply retroactively to this case.

3

This conclusion does not, however, end our inquiry. Effective January 1, 2019, section 1001.36 provides, "At any stage of the proceedings, the court *may* require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie

showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate." (§ 1001.36, subd. (b)(3), italics added.) Based on this provision, the People contend remanding the case to allow the court to exercise its discretion is unnecessary because Wells has not established she can make the requisite prima facie showing.

We find this contention unpersuasive for two reasons. First, the prima facie showing provision is discretionary, not mandatory. Second, the purpose of the provision is to determine whether a defendant is potentially eligible for diversion. (See Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) as amended August 23, 2018, p. 2 [the prima facie showing provision "[a]uthorizes a court to request a prima facie hearing where a defendant must show they are potentially eligible for diversion"].)

In this case, the record indicates Wells is severely mentally ill and requires medication to manage her mental illness. Indeed, the court specifically commented on Wells's mental illness during the sentencing hearing and lamented it did not have the discretion to craft a sentence that would assure Wells received mental health treatment. All the court was able to do was recommend Wells be housed in a facility capable of providing her psychiatric treatment.

Of course, at this juncture, the record cannot answer whether the court will be satisfied Wells's mental illness was a significant factor in the commission of her crimes, whether a qualified mental health expert will believe she will respond to treatment, and whether the court will be satisfied treating her in the community will not pose an

unreasonable risk of danger to public safety. (See § 1001.36, subd. (b)(1)(B), (C), & (F).) Wells has not yet had an opportunity to develop the requisite expert evidence and the court has not yet had an opportunity to consider whether she would be an appropriate candidate for mental health diversion. By reversing the judgment and remanding the matter for a mental health diversion eligibility hearing, which we conclude is the most appropriate course, both Wells and the court will have these opportunities.

D

Finally, Wells contends the court's imposition of the fines, fee, and assessments violated the due process clauses of the federal and state Constitutions and we must stay execution of them until the court determines she has the present ability to pay them. In light of the reversal of the judgment, we decline to decide this issue. Instead, Wells may raise this issue with the court at an appropriate time after the court considers the mental health diversion issue.

IV

DISPOSITION

The judgment is reversed. The cause is remanded to the superior court with directions to conduct a mental health diversion eligibility hearing under section 1001.36. If the court determines Wells qualifies for diversion, then the court may grant diversion. If Wells successfully completes diversion, then the court shall dismiss the charges against her.

If the court determines Wells is ineligible for diversion, or Wells does not successfully complete diversion, then the court shall reinstate Wells's conviction,

conduct further sentencing proceedings as appropriate, and forward a certified copy of the resulting abstract of judgment to the appropriate corrections agency.

McCONNELL, P. J.

WE CONCUR:

AARON, J.

IRION, J.