

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND MATTHEW FIERRO,

Defendant and Appellant.

E055731

(Super.Ct.No. RIF1101127)

OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey J. Prevost, Judge.

Affirmed.

Kristine M. Watkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

## I

### INTRODUCTION

A jury convicted defendant Raymond Matthew Fierro of possession of a weapon while in a penal institute (Pen. Code,<sup>1</sup> § 4502, subd. (a)).<sup>2</sup> The trial court sentenced defendant to seven years in prison.

Defendant's primary arguments on appeal are that the prosecution failed to make an election of the factual basis for weapons possession and the court misinstructed the jury based on CALCRIM No. 2745 and by not giving instructions based on CALCRIM No. 3502 [unanimity] and CALJIC No. 1.24 [constructive possession]. Defendant also raises related claims of ineffective assistance of counsel. Finally, defendant criticizes defense counsel at trial for not cross-examining a witness based on his testimony at the preliminary hearing. Defendant's claims of error lack merit. We affirm the judgment.

## II

### STATEMENT OF FACTS

On March 22, 2011, Correctional Officers David Fernandes and Omar Capacete were on duty at the California Rehabilitation Center in Norco. The officers entered Dorm 213 around 3:00 p.m. As they were walking past some bunks toward the bathroom, someone yelled out, "walking," a warning that officers were present. Fernandes saw

---

<sup>1</sup> All statutory references are to the Penal Code unless stated otherwise.

<sup>2</sup> Defendant admitted that he had served a prison term (§ 667.5, subd. (b)) and was convicted of a serious or violent felony. (§§ 667, subds. (c) and (e)(1), and 1170.12, subd. (c)(1).)

defendant leave his bunk and move towards the bathroom. Fernandes ordered defendant to place his hands on top of a locker at the foot of bunk 37 and submit to a search. Instead of complying, defendant ran into the bathroom, withdrew a “metallic-looking object” from his waistband, dropped the item in the toilet, and began flushing. The item did not resemble a tattoo gun. Fernandes deployed his pepper spray while commanding defendant to get down. After defendant was overcome and prone on the floor, Fernandes found “an inmate-manufactured weapon” inside the toilet bowl. The weapon was “a piece of metal stock about approximately seven and one-third inches long with a sharpened point, with the handle made out of a razor handle, with string wrapped around a blue cloth and rubber bands.”

Capacete saw defendant run away from Fernandes. He activated the dorm alarm, which alerts the inmates to lie on the floor. Capacete searched defendant’s bunk. Inside a hole in the mattress, Capacete found a gray handkerchief wrapped around two inmate-manufactured weapons, both “metal stock. One with the blue handle with the rubber band around it and the other one is another metal stock with a circular top used . . . as a holder or as a grip.”

Defendant did not present evidence. Instead, defense counsel argued defendant possessed only a tattoo gun, which is not a weapon as defined by section 4502, and that other inmates had access to defendant’s mattress and could have planted the other two weapons.

### III

#### ELECTION OF THE FACTUAL BASIS FOR THE CHARGE

#### AND CALCRIM NOS. 2745 AND 3502

Defendant contends the prosecutor should have made an election regarding which of the three weapons was the basis for the charge of weapons possession. Defendant also argues that the trial court erroneously instructed the jury based on a modified version of the final two paragraphs of CALCRIM No. 2745:

“The People allege that the defendant possessed, or carried on his person, or had under his custody or control, the following weapons: *1) a SHARP INSTRUMENT located in the bathroom of Dorm 213, 2) a SHARP INSTRUMENT located inside the mattress of Dorm 213, Bunk 32 up, and 3) a SHARP INSTRUMENT located inside the mattress of Dorm 213, Bunk 32 up.* You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed, or carried on his person, or had under his custody or control at least one of these weapons and you all agree on which weapon he possessed or carried on his person, or had under his custody or control.”

Finally, defendant maintains that the jury should have received a unanimity instruction based on CALCRIM No. 3502.

#### *A. The Trial Proceedings*

The court and counsel for the parties discussed the jury instructions—CALCRIM Nos. 2745 and 3502—in detail. The prosecutor agreed the jury would need to agree unanimously regarding which specific weapon supported the conviction. He believed the unanimity language in the modified version of CALCRIM No. 2745 was sufficient.

Defense counsel objected to the meaning and grammar of the instruction. Based on *People v. Rowland* (1999) 75 Cal.App.4th 61,<sup>3</sup> the court decided the unanimity language was accurate and should be given as drafted by the prosecutor. The court instructed the jury with CALCRIM No. 2745 as modified.

During closing argument, the prosecutor argued to the jury: “[Defendant] has weapons. He had that one on his person, actually in his waistband and was trying to get rid of it. These other ones were in his mattress, so he didn’t have a chance to get rid of those. But these two right here tell you that that’s the defendant’s weapon. If for some reason you think that he is unlucky and that that’s not his weapon, then you can find him guilty based on these two, but you guys have to agree on that.

“My argument to you is that the most reasonable explanation is that this one was in the possession of the defendant in his waistband. That’s what he was trying to get rid of and that’s the crime that I’m going to ask you to hold him responsible for, accountable for, is possessing that weapon.”

#### *B. Discussion*

When the evidence presented at trial suggests more than one discrete crime, either the prosecutor must elect among the crimes or the court must sua sponte instruct the jury to agree on the same criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132;

---

<sup>3</sup> In *Rowland*, defendant was found guilty of a violation of section 4502, subdivision (a), based on his possession of three sharpened wood shafts. The appellate court agreed that, not only was separate sentencing improper, but defendant could not properly be convicted of more than one count of section 4502, subdivision (a), where he possessed three weapons of the same type at the same time. (*Rowland, supra*, 75 Cal.App.4th at p. 65.)

*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534, citing *People v. Salvato* (1991) 234 Cal.App.3d 872, 877.) The California Supreme Court has approved of the “either/or” rule: “[C]ases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act.” (*Russo*, at p. 1132.) Almost every Court of Appeal decision since *Salvato* has applied the either/or rule. (*Melhado*, at p. 1534.) Additionally, instructing the jury on unanimity adequately protects a defendant’s constitutional right to a unanimous jury verdict. A failure to elect when multiple criminal acts occur is cured by a unanimity instruction.

An election is only required on demand by defendant. (*People v. Salvato, supra*, 234 Cal.App.4th at p. 882.) Defendant admits that he did not ask the prosecutor to make an election but he argues that the discussion regarding CALCRIM Nos. 2745 and 3502 was the functional equivalent of a motion to compel election. We disagree.

The discussion of jury instructions centered on which instruction was the appropriate instruction to be given. Defendant’s failure to demand an election waives any such right on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 434-435.) Even if defendant had requested an election, the prosecutor expressly made an election of criminal acts to the jury during closing argument and the court gave an instruction on unanimity. A prosecutor may make the required election during argument to the jury. (*People v. Melhado, supra*, 60 Cal.App.4th at p. 1539; *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1454-1455.) The election must clearly and unequivocally inform the

jurors “of their duty to render a unanimous decision as to a particular unlawful act.”

(*Melhado*, at p. 1539.)

Here, the prosecutor identified the weapon defendant removed from his waistband as the criminal act supporting the charge. The prosecutor explained to the jury the four elements required to prove for the charged crime: 1) defendant was incarcerated in a penal institute; 2) defendant possessed a weapon in his waistband; 3) defendant knew he possessed the weapon; and 4) defendant knew the sharp instrument could be used as a stabbing weapon for the purposes of offense or defense. The prosecutor did mention the two sharp instruments found in the mattress but he characterized those items as being corroborating evidence. Additionally, the prosecutor did not request a constructive-possession instruction, which would have been required if the prosecution meant to rely on defendant’s possession of the sharp instruments found in his bunk.

Therefore, the prosecutor elected defendant’s possession of the sharp instrument in his waistband as the factual basis for the sole possession charge. Given the prosecutor’s election, the unanimity instruction to agree on which sharp instrument defendant possessed, and the evidence presented at trial, there is no possibility the jury could disagree as to which act gave rise to the charge.

Furthermore, because it gave a unanimity instruction, the trial court did not err. The trial court provided the jury with a unanimity instruction pursuant to CALCRIM No. 2745, the functional equivalent of CALJIC No. 17.01, requiring the jurors to “all agree on which weapon [defendant] possessed or carried on his person, or had under his custody or control.” Both instructions require the jury to agree unanimously that the

defendant committed the same specific criminal act, which is all that is required of a unanimity instruction. (*People v. Melhado, supra*, 60 Cal.App.4th at p. 1534; *People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.)

Moreover, “[n]either an election nor a unanimity instruction is required when the crime falls within the ‘continuous conduct’ exception.” (*People v. Salvato, supra*, 234 Cal.App.3d at p. 882; *People v. Jenkins* (1994) 29 Cal.App.4th 287, 299.) Here, Fernandes first observed defendant in his bunk area before he went to the bathroom and tried to flush the object taken from his waistband. The two sharp instruments in the mattress were similar. Although defendant claims his bunk was accessible to others while he went to the bathroom, the inference that some other inmate put the sharp objects into his mattress is unreasonable because Capacete testified that, as defendant was heading for the bathroom, the alarm sounded and all the other inmates got down on the ground and stopped moving. Defendant’s possession of the sharp instruments was a single continuing course of conduct that extended throughout defendant’s assertion of control over the sharp instruments. (*People v. Wright* (1968) 268 Cal.App.2d 196, 198.)

Finally, defendant has not shown he was prejudiced by the People not making an election. “[R]efusal will only be prejudicial if an election would have made some significant difference in the trial, whether through the exclusion of evidence, allowing a focused defense, or in some other respect that materially implicates the right to be advised of the charges.” (*People v. Salvato, supra*, 234 Cal.App.3d at p. 882.)

Defendant’s criminal acts of possessing the weapon in his waistband and in his bunk occurred within seconds of each other, and he was given adequate notice of the evidence

by the preliminary hearing. Furthermore, the unanimity instruction was given and, to a large extent, precluded prejudice on the facts of this case. Hence, the jury necessarily resolved which acts constituted the possession of a weapon. For these reasons, even assuming error occurred, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Deletto* (1983) 147 Cal.App.3d 458, 471.)

Based on the foregoing, defendant cannot sustain a related claim for ineffective assistance of counsel. The record shows defense counsel did not demand an election by the prosecution based on an informed decision to rely on the trial court's unanimity instruction, the prosecution's election during closing argument, and the continuing nature of the offenses. A defendant seeking reversal on the basis of ineffective assistance of counsel must prove both counsel's deficient performance and a resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 218.) Defendant cannot establish deficient performance or prejudice based on this record.

#### IV

#### INSTRUCTION REGARDING

#### ACTUAL AND CONSTRUCTIVE POSSESSION

Defendant next argues the trial court erred by not instructing the jury on actual and constructive possession based on CALJIC No. 1.24. In a related claim, defendant argues ineffective assistance of counsel for failing to request that the court give the instruction. We reject these contentions.

“There is no error in a trial court’s failing or refusing to instruct on one matter, unless the remaining instructions, considered as a whole, fail to cover the material issues raised at trial. As long as the trial court has correctly instructed the jury on all matters pertinent to the case, there is no error. The failure to give an instruction on an essential issue, or the giving of erroneous instructions, may be cured if the essential material is covered by other correct instructions properly given. [Citations.]” (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) A reviewing court will not set aside a judgment on the basis of instructional error unless, after an examination of the entire record, the court concludes it is reasonably probable the jury would have reached a result more favorable to the defendant absent the error. (Cal. Const., art. VI, § 13; *Dieguez*, at pp. 277-278.)

CALJIC No. 1.24 provides: “There are two kinds of possession: Actual possession and constructive possession. [¶] Actual possession requires that a person knowingly exercise direct physical control over a thing. [¶] Constructive possession does not require actual possession but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons. [¶] One person may have possession alone, or two or more persons together may share actual or constructive possession.”

A defendant’s possession of an illegal object may be either actual or constructive. (*People v. Cordova* (1979) 97 Cal.App.3d 665, 670.) Actual or constructive possession includes the right to exercise dominion and control over an item or the right to exercise dominion and control over the place where it is found. Possession may be shared with

others; exclusive possession is not necessary. (*People v. Rushing* (1989) 209 Cal.App.3d 618, 622.) Actual possession occurs when the defendant exercises direct physical dominion and control over the item. (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1608-1609, disapproved on another point in *People v. Palmer* (2001) 24 Cal.4th 856, 861, 867.) “Constructive possession exists where a defendant maintains some control or right to control [the item] that is in the actual possession of another.” (*People v. Morante* (1999) 20 Cal.4th 403, 417.)

CALCRIM No. 2745 correctly informed the jury that one of the elements of possession of a weapon in a penal institution is “[t]he defendant possessed, carried on his person, or had under his custody or control a SHARP INSTRUMENT.” The instruction also provided that the jury must find “[t]he defendant knew that he possessed, carried on his person, or had under his custody or control the SHARP INSTRUMENT.” CALCRIM No. 2745, as modified, was sufficiently similar to the language set forth in CALJIC No. 1.24. The jury could not have failed to understand that defendant possessed an object he physically had on his person or hidden in his mattress. A trial court has no sua sponte duty to amplify or clarify instructions where the terms used in the instructions given are commonly understood. (*People v. Richie* (1994) 28 Cal.App.4th 1347, 1360.) As such, no further instruction on possession was necessary. For these same reasons, defendant has failed to show that defense counsel was ineffective or that defendant suffered prejudice.

## INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant claims that trial counsel rendered ineffective assistance of counsel by not impeaching Fernandes's trial testimony about his description of the sharp instrument in defendant's waistband. If the record on appeal ""sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected," and the "claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Here the conduct of defense counsel is subject to a satisfactory explanation.

At the preliminary hearing, Fernandes testified that he saw defendant remove an object from his waistband and try to flush it down the toilet. Defense counsel asked Fernandes if he could describe the object and Fernandes said, "No." Defense counsel then asked Fernandes, "So you did not notice anything metallic?" Fernandes responded, "No." At trial, Fernandes testified on direct examination that he saw defendant pull "a metallic-looking object" out of his waistband. On cross-examination, Fernandes testified, "I saw metallic, yes."

Again defendant has not shown that defense counsel's actions were the result of deficient performance. Defendant's claim that defense counsel was ineffective for failing to review the preliminary hearing transcript is speculative. There is no evidence in the

appellate record that defense counsel did not review the preliminary hearing transcript or any other materials.

In any case, although defense counsel might have impeached Fernandes by referring to his earlier testimony, the decision to forgo impeachment was not evidently negligent. The evidence plainly showed that Fernandes saw defendant remove the weapon from his waistband and drop it in the toilet bowl. Defense counsel asked, “And you never saw in Mr. Fierro’s hands an inmate-manufactured weapon, correct?” Fernandes responded he had not. Defense counsel effectively elicited an admission that the officer did not see an inmate-manufactured weapon in defendant’s hand. In light of the admission, defense counsel could have decided not to emphasize a relatively minor inconsistency.

Finally, there is no reasonable probability that counsel’s decision affected the verdict. Fernandes never wavered from his testimony that he saw defendant pull an object out of his waistband, run to the toilet, and throw it in. A metal object was immediately found in the toilet. Given the strong evidence of defendant’s guilt, counsel’s alleged errors were not “so serious as to deprive the defendant of a fair trial.” (*Strickland v. Washington, supra*, 466 U.S. at p. 687.) Defendant has failed to show that counsel was ineffective or he suffered any prejudice as a result of counsel’s performance.

VI

DISPOSITION

We reject defendant's claims regarding election, instructional error, and ineffective assistance of counsel. We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON  
J.

We concur:

HOLLENHORST  
Acting P. J.

KING  
J.