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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

TENACE DEMOND KNIGHT,

Defendant and Appellant.

F062442

(Super. Ct. No. F10100267)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Timothy Alan Kams, Judge.

Sylvia Whatley Beckham under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Kathleen A. McKenna, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Cornell, J. and Kane, J.

Tenace Demond Knight was convicted of violating Penal Code section 4502, subdivision (a),¹ possession of a weapon in a penal institution. He was sentenced to a term of one year plus 25 years to life because of enhancements pursuant to sections 667.5 and 667, subdivisions (b) through (j).

Knight argues his conviction must be reversed because the jury was improperly instructed. We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The information charged Knight with one count of violating section 4502, subdivision (a). In addition, the information alleged that Knight had numerous prior convictions that constituted “strikes” within the meaning of section 667, subdivisions (b) through (i) and an allegation that he had served a prior prison term within the meaning of section 667.5. The following testimony was presented at trial.

On May 6, 2009, Correctional Officer Michael Phillips was posted in the control booth when he observed inmate Timothy Freeman place his laundry bag on a bench and then return to his cell. A short while later Knight approached the bag and picked it up. Since this is a common method for inmates to pass contraband, Phillips told Knight to place the bag on the floor so that a correctional officer could search it. When the floor staff returned to the area they placed Knight in handcuffs.

Knight was still holding the laundry bag when he was approached by Correctional Officer Mark Ausburn. Knight initially refused to turn the laundry bag over to Ausburn. Instead, Knight turned his back to Ausburn and reached into the bag. Ausburn grabbed Knight, gained control over him, and placed handcuffs on him. Knight was placed in a holding cell.

Ausburn searched Knight’s cell later that morning and located an “inmate-manufactured weapon” on the bottom shelf located in the cell. The item was a piece of

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

metal that appeared to be a nail and was approximately four inches long and sharpened at one end.

Correctional Officer Maria Barajas responded to Phillips's call for assistance. She searched the laundry bag after Knight dropped it on the ground. Inside the bag she found a pair of tennis shoes. Inside the tennis shoes she recovered an envelope. Inside the envelope she discovered two items. Barajas described one of the items as weapon stock without a handle and the other item as a weapon with a handle and sharpened to a point. She considered both to be inmate manufactured weapons.

The laundry bag Barajas searched had a label on it. Two different cells were listed on the label. One of the cells listed on the label was for Knight's cell.

Correctional Lieutenant James Daley described the two weapons retrieved from the laundry bag as two pieces of round metal stock, one with a cloth wrapped around it for a handle and "sharpened to a point." Both items could do serious bodily injury if used as a weapon.

Knight testified he was assigned to the upper bunk in his cell and that he stored his personal property on the upper shelves, which were his assigned shelves. The only exception was his television and his hot pot, which were stored on the lower shelves because he shared those with his cellmate.

On the day in question, Knight ate breakfast and then returned to his cell and retrieved his shower items, which were in his laundry bag. He put his laundry bag in the day room so he could shower later. There were about six to 10 laundry bags in the day room at the time. After socializing, Knight retrieved a laundry bag from the bench. He was then taken to the program office.

Knight also explained his cell door was opened after he was taken to the program office, and anyone could have put the other weapon in his cell during the four hours between the time he was removed and his cell was searched.

On cross examination, Knight admitted the item found in his cell could be used as a weapon. Knight described the two items found in the laundry bag as weapon stock because they did not have points on them.

The jury found Knight guilty of the charged offense. Knight admitted the prior conviction allegations and that he had served a prior prison sentence. Knight was sentenced to a determinate term of one year for the prior prison term enhancement and to an indeterminate term of 25 years to life for the substantive offense.

DISCUSSION

Section 4502, subdivision (a) makes it illegal for a person confined in any penal institution to possess “any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles, any explosive substance, or fixed ammunition, any dirk or dagger or sharp instrument, any pistol, revolver, or other firearm, or any tear gas or tear gas weapon.”

The trial court instructed the jury the People were required to prove beyond a reasonable doubt that Knight was charged “with possessing a weapon, specifically a *stabbing weapon* while in a penal institution. To prove that the Defendant is guilty of this crime, the People must prove that, one, the Defendant was present at or confined in a penal institution; two, the Defendant possessed, carried on his person, or had under his custody or control a *stabbing weapon*; three, the Defendant knew that he had possessed, carried on his person, or had under his custody or control a *stabbing weapon*; and four, the Defendant knew that the object could be used as a *stabbing weapon*.” (Italics added.)

Knight argues the trial court was required to instruct the jury that Knight possessed a “sharp instrument” because a “stabbing weapon” is not an item prohibited by section 4502, subdivision (a). Therefore, according to Knight, the jury was not instructed on all of the elements of the charged crime. This omission precluded the jury from finding all of the elements of the crime true beyond a reasonable doubt. Accordingly, the resulting conviction violated Knight’s constitutional right to due process. (*In re Winship*

(1970) 397 U.S. 358, 364 [prosecution must persuade the jury beyond a reasonable doubt of the facts necessary to establish each element of the crime].)

We reject Knight's argument for several reasons. First, we conclude the issue has been forfeited because Knight did not object to the instruction in the trial court. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1134, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) The record reveals that there appeared to be little disagreement about the instructions. The trial court held an instruction conference that was not reported, and no objections were lodged by either party after the conference. Neither party argued that the items Knight was charged with possessing were not included within the statute. It is apparent, therefore, that the parties agreed the items were weapons within the meaning of the statute and may very well have agreed on the wording of the instruction.

Knight contends the issue is cognizable on appeal, despite his failure to object, because his substantial rights were affected by the instruction. (§ 1259.) If the instruction omitted an element of the crime, then Knight's substantial rights would have been affected. As we shall explain, there is no merit to this assertion because the jury was instructed with each element of the crime, which is the second reason to reject Knight's argument.

The trial court relied on CALCRIM No. 2745 (possession or manufacture of weapon in penal institution) to instruct the jury with the elements of the charged offense. The instruction includes all of the elements of the crime, but requires the trial court to insert in the instruction the type of weapon allegedly possessed by the defendant. Knight is arguing, in essence, that the trial court was required to include only those weapons listed in the statute, and it erred when it failed to do so.

Section 4502, subdivision (a) applies to instruments that can be used to inflict injury and that are not necessary for an inmate to have in the inmate's possession. (*People v. Custodio* (1999) 73 Cal.App.4th 807, 812 (*Custodio*).) Included within the

statute are several groups of items, e.g., explosive substances, firearms, tear gas, or tear gas weapons.

The items in this case fall within the group whose parameters are defined as a dirk, dagger, or sharp instrument. Knight focuses only in the phrase “sharp instrument” in making his argument. However, the record is clear that this case was prosecuted as possession of a dirk or dagger.

A dirk or dagger is defined as “a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death.” (§ 16470.) Thus, the trial court instructed the jury using words taken directly from the definition of “dirk” or “dagger.” While the entire definition was not used in the instruction, the portion used adequately described for the jury a type of weapon specifically included in section 4502, thereby ensuring the jury was instructed with each element of the cause of action.

As an alternative, the trial court could have instructed the jury with the relevant portion of the definition of a dirk or dagger. For example, the trial court could have instructed the jury that the second element of the crime required it to find that *the defendant possessed, carried on his person, or had under his custody or control an instrument that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death.*” In some cases, this more complete definition may be required, such as a case where an issue is whether the item possessed by the defendant could be considered a dirk or dagger.

But this is not that case. We have reviewed photographs of the items seized, and the items clearly fall within the definition of a dirk or dagger. Each was several inches long, was capable of ready use as a stabbing weapon, and easily could inflict great bodily injury or death if used to stab another inmate. Moreover, Daley testified that the two items recovered from the laundry bag could cause serious bodily injury if used as a weapon.

A more complete instruction was not necessary because Knight never suggested the items seized did not fall within the group of items prohibited by statute. Knight's counsel informed the jury in opening argument that the issue in the case was whether Knight knew there were weapons in the bag and in his cell. This theory was continued in closing argument when defense counsel began by informing the jury that the "real issue" was whether the People had proved beyond a reasonable doubt that Knight knew the seized items were in the bag and that the other item was in his cell.

The cases cited by Knight do not require a different conclusion. In *Custodio* the issue was whether the term "sharp instrument" was constitutionally vague. Since this case was prosecuted as one for possession of a dirk or dagger, *Custodio* provides no support for Knight's argument.

People v. Hayes (2009) 171 Cal.App.4th 549 (*Hayes*) is the case on which Knight places primary reliance. Hayes was prosecuted for possession of a sharp instrument. The jury was instructed the People must prove the defendant possessed a sharp instrument. The trial court then defined a sharp instrument as one "that can be used to inflict injury and that is not necessary for the inmate to have in his possession." (Italics omitted.) (*Id.* at p. 555.) The defense argued throughout the case that the item seized from Hayes was not a sharp instrument. The prosecutor argued that the jury must reject the commonsense definition of "sharp" and rely exclusively on the jury instruction to determine if Hayes violated the statute. The appellate court concluded the instruction was erroneous because it permitted the jury "to find defendant guilty even if they did not believe the item was 'sharp' as that term is commonly used. The instruction removed from the jury's consideration an element of the offense: that the weapon be 'sharp.'" (*Hayes*, at p. 560.)

We agree with *Hayes*, but the case does not assist Knight because his case was not prosecuted as one for possession of a sharp instrument.

Finally, even if we were to assume the trial court erred by not instructing the jury with a more complete definition of a dirk or dagger, Knight cannot establish any

prejudice as a result of the error. “An instruction that omits or removes an element of an offense from consideration by the jury may be harmless if the error is harmless beyond a reasonable doubt. [Citation.]” (*Hayes, supra*, 171 Cal.Ap.4th at p. 560.)

We explained above Knight’s theory of defense in this case. His counsel described the issue as whether the People could prove beyond a reasonable doubt that Knight knew the seized items were in the bag and his cell. Neither party suggested the seized items did not fall within the categories listed in section 4502, subdivision (a). Moreover, our examination of the pictures of the seized items confirms that the seized items clearly fall within the definition of a dirk or dagger. Accordingly, even if the trial court had given an exhaustive definition of a dirk or dagger, there is no possibility that Knight would have achieved a better result.

DISPOSITION

The judgment is affirmed.