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

THE PEOPLE,

Plaintiff and Respondent,

v.

MASON HENRY HOOD,

Defendant and Appellant.

F063172

(Super. Ct. No. BF133924A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua,
Judge.

Richard Jay Moller, 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, Louis M. Vasquez and Rebecca
Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Mason Henry Hood was convicted by a jury of count 1, possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1));¹ count 2, possession of ammunition by a felon (§ 12316, subd. (b)(1)); count 3, driving under the influence (Veh. Code, § 23152, subd. (a)); and count 4, driving a vehicle with a blood alcohol level of 0.08 percent or above (Veh. Code, § 23152, subd. (b)). In a bifurcated proceeding, the trial court found true the allegation that Hood had been convicted of a prior strike (§§ 667, subs. (c)-(j), 1170.12, subs. (a)-(e)), a robbery (§ 211), in May of 2008. After denying Hood's *Romero*² motion, the trial court sentenced Hood in count 1, to the mid-term of two years, doubled pursuant to the Three Strikes law; in count 2, to a concurrent mid-term of two years, doubled pursuant to the Three Strikes law; in count 3 to 30 days concurrent; and in count 4 to 30 days, stayed pursuant to section 654, a total of four years. Hood received 72 days for time served and statutory credit. The court imposed various fines and fees.

On appeal, we reject Hood's contention that the trial court erred in denying his request for a pinpoint instruction and that it abused its discretion when it denied his *Romero* motion to strike his prior strike. Pursuant to Hood's request, we reviewed the sealed portion of the record pertaining to discovery of police personnel records under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) and determine that the trial court did not withhold discoverable information from the defense.

STATEMENT OF THE FACTS

Around midnight on September 10, 2010, police officers Christopher Messick and Robert Woods observed Hood and a passenger leaving a bar in a pickup truck. While trying to exit the parking lot, Hood nearly ran over a couple of trees and bushes and drove off of the curb. Once on the street, Hood merged into the left lane without signaling and cut off another vehicle before stopping in the left turn lane. The officers pulled behind

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

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

Hood and turned on the patrol car's overhead flashing lights. When the left-turn signal light turned green, Hood hesitated before turning. Hood then attempted to pull over and went onto the curb before settling to a stop on the street.

The officers approached the truck and smelled a strong odor of alcohol. Hood had red, watery eyes and thick, slurred speech. When asked, he consented to a search of the vehicle, indicating that there was nothing illegal inside. Messick discovered a 12-gauge shotgun in a leather case on the floorboard directly behind the driver's seat and a bucket of 12-gauge shotgun shells on the bench seat between two duffel bags of hunting gear. The shotgun and ammunition were seized and subsequently booked into evidence.

After being given *Miranda*³ warnings, Hood said that he had been dove hunting earlier that week.⁴ Hood also said that he knew he was not supposed to be in possession of either a firearm or ammunition due to his status as a felon and that he knew the items were in the truck. Hood's blood alcohol level was 0.152 percent.

In Hood's defense, Lauren Kilpatrick testified that she inventoried the truck once it was towed to the towing company. During the inventory, she never saw any duffel bags in the back seat. She did see a gun case on the backseat floorboard, but did not recall seeing a bucket.

The owner of the truck, Rosemary Adkins, testified that Hood had never been in the truck prior to that night; that the shotgun and shells were hers; and that she and her family, but not Hood, had been dove hunting the day before on the family ranch. According to Adkins, she first found out that the truck was taken was when one of her sons, Anton, called to say he was with "some girls." Adkins claimed that she did not leave hunting gear in the truck and that the bucket of shells was usually placed in the

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

⁴ The police report, written by Messick, stated that Hood had said he had been dove hunting earlier in the day. Woods recalled Hood saying that it was earlier in the week.

truck bed, where she found them when she picked up the truck from the towing company after it was inventoried.

Hood testified in his own defense and acknowledged that he had been drinking and driving,⁵ but that he did not know the shotgun and ammunition were in the truck. Hood had walked to a bar and met up with Anton and a friend. When they left the bar, Hood drove Anton's truck and followed Anton, who was in another vehicle with two girls they met. In response to the officers' discovery of the weapons, Hood admitted that he told them he knew he was not supposed to be in possession of a firearm or ammunition because of his status as a felon, but claimed he did not admit to knowing either was present in the truck. He told the officers that "they" had been dove hunting, meaning Anton, who had told him that while they were in the bar.

DISCUSSION

I. PINPOINT INSTRUCTION

Hood submitted a pinpoint instruction on access to a firearm which the trial court refused to give. Hood contends the failure to give this instruction denied him his due process rights to a fair trial. We disagree.

Hood requested a special instruction about access to a firearm and ammunition, which read:

"Mere presence near or access to a firearm and/or ammunition is not evidence sufficient to prove control or possession and thus you must find defendant not guilty unless the prosecution proved beyond a reasonable doubt that defendant had dominion and control over the firearm and/or ammunition."

In rejecting this instruction, the trial court reasoned that case law did not support Hood's proposition and that the evidence did not support such instruction. The trial court

⁵ During trial, the parties stipulated to the elements of count 3, driving under the influence (Veh. Code, § 23152, subd. (a)), and count 4, driving with a blood alcohol level of 0.08 percent or above (Veh. Code, § 23152, subd. (b)).

also found the requested instruction was duplicative of the law covered by CALCRIM Nos. 2511 and 2591 and that counsel could make an argument to the jury of the evidence that “supported an instruction of this nature.”

As given by the trial court, those instructions provided, in relevant part:

“The defendant is charged in Count 1 with unlawfully possessing a firearm in violation of Penal Code section 12021(a)(1). [¶] To prove the defendant guilty of this crime, the People must prove that[:] one, the defendant possessed a firearm; two, the defendant knew that he possessed a firearm; and three, the defendant had previously been convicted of a felony. [¶] ... [¶] Two or more people may possess something at the same time. [¶] A person does not have to actually hold or touch something to possess it. [¶] It is enough if the person has control over it or the right to control it, either personally or through another person.” (CALCRIM No. 2511)

“The defendant is charged in Count 2 with unlawfully possessing ammunition in violation of Penal Code section 12316(b)(1). [¶] To prove that the defendant is guilty of this crime, the People must prove that[:] one, the defendant possessed or had under his custody or control ammunition; two, the defendant knew he possessed or had under his custody or control the ammunition; and three, the defendant had previously been convicted of a felony. [¶] ... [¶] Two or more people may possess something at the same time. [¶] A person does not have to actually hold or touch something to possess it. [¶] It is enough if the person has control over it or the right to control it either personally or through another person.” (CALCRIM No. 2591)

Also given was a defense requested instruction, which read:

“Unintentional possession is such that if you find that the defendant unintentionally possessed the alleged firearm and/or ammunition through misfortune and accident, you may consider the unintentional nature of such possession to determine whether the defendant possessed the required knowledge to commit the crimes charged in Count 1 and/or 2.”

The trial court is required to instruct a jury on the general principles of law that are relevant to the issues raised by the evidence in a given case. (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) In addition, “a defendant has a right to an instruction that pinpoints the

theory of the defense” (*People v. Roldan* (2005) 35 Cal.4th 646, 715, disapproved on different grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

“A pinpoint instruction ‘relate[s] particular facts to a legal issue in the case or ‘pinpoint[s]’ the crux of a defendant’s case, such as mistaken identification or alibi.’ [Citation.]” (*People v. Ward* (2005) 36 Cal.4th 186, 214.) Pinpoint instructions are designed to discuss a theory, not specific evidence. (*People v. Wright* (1988) 45 Cal.3d 1126, 1137.) Pinpoint instructions must be given on request only when there is substantial evidence to support them and are not argumentative or duplicative. (*People v. Bolden* (2002) 29 Cal.4th 515, 558; *People v. Stanley* (2006) 39 Cal.4th 913, 946.) It is inappropriate to select “‘certain material facts, or those which are deemed to be material, and endeavoring to force the court to indicate an opinion favorable to the defendant as to the effect of such facts, by incorporating them into instructions containing a correct principle of law[.]’ ... ‘An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.’ [Citations.]” (*People v. Wright, supra*, at p. 1135.) We review de novo whether the instructions correctly state the law. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, disapproved on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Posey* (2004) 32 Cal.4th 193, 218.)

While we disagree with the trial court that the evidence did not support the instruction requested by Hood, we agree with the trial court that the requested instruction was repetitive of both CALCRIM Nos. 2511 and 2591, as well as the special instruction given. Also, the jury was instructed under CALCRIM No. 220 that the prosecution had to prove defendant’s possession of a firearm and ammunition beyond a reasonable doubt.

Moreover, defense counsel’s theory of the case and his closing arguments fully explained the defense position that Hood did not know either the firearm or the ammunition was in the vehicle, which he claimed to have borrowed for the first time that evening.

Under the circumstances, we conclude that the trial court did not err in refusing to give the proposed pinpoint instruction. Assuming *arguendo* that the trial court erred in failing to give the instruction, we review the failure to give a requested pinpoint instruction under *People v. Watson* (1956) 46 Cal.2d 818, 836,⁶ and therefore focus on whether it is reasonably probable the defendant would have obtained a more favorable result had the instruction been given. (See *People v. Hughes* (2002) 27 Cal.4th 287, 363; *People v. Wharton* (1991) 53 Cal.3d 522, 571.)

Where the prosecution's case is strong, where defense counsel's jury argument pinpoints the defense, and where the instructions given sufficiently cover the topic, the failure to give an instruction has been considered harmless. (E.g., *People v. Hughes*, *supra*, 27 Cal.4th at p. 363; *People v. Earp* (1999) 20 Cal.4th 826, 887.) Here, the evidence that Hood possessed the firearm and ammunition was overwhelming, as both were in the vehicle when he was stopped and he admitted to the officers that he knew they were there and that he was not supposed to be in possession of them. Defense counsel adequately argued Hood's theory of defense, calling both witnesses to refute the officers' claims and summarizing the defense theory that Hood was unaware of the firearm and ammunition in closing. And, finally, the given instructions sufficiently covered the topic. Any failure to give the pinpoint instruction was therefore harmless. (*People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837.)

II. PITCHESS MOTION

⁶ Hood asserts that the erroneous failure to give a pinpoint instruction violated his federal constitutional rights and constitutes *per se* reversible error. In support, he cites *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, where the Ninth Circuit held that the refusal to instruct on a defense was reversible *per se*. (*Id.* at pp. 1201-1202.) Hood cites no California case adopting the Ninth Circuit approach, and decisions of lower federal courts on federal matters, while persuasive, are not binding on this court. (See *People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1587.)

Prior to trial, Hood filed a *Pitchess* motion. In it, he sought discovery of police personnel records of Officer Messick regarding any citizen complaints relating to dishonesty, falsifying offense reports and other information, false testimony, and fabrication of reports and charges. The city filed an opposition, but conceded that Hood had made a sufficient showing to justify an in-camera hearing of citizen complaints made against Messick for “dishonesty as to false reporting only.” The trial court heard testimony and reviewed the files in camera. The trial court then ruled that “there are discoverable matters that need to be disclosed” (full capitalization omitted) and issued a protective order.

Hood now requests that we conduct an independent review of the sealed record on the *Pitchess* proceedings to determine whether the trial court released all information to which he might be entitled under Evidence Code section 1045, subdivision (b). (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220.)

In *Pitchess, supra*, 11 Cal.3d 531, the California Supreme Court held that a criminal defendant is entitled to discovery of officer personnel records if the information contained in the records is relevant to the defendant’s ability to defend against the charge. Later enacted legislation implementing the court’s rule permitting discovery (Pen. Code, §§ 832.5, 832.7, 832.8; Evid. Code, §§ 1043-1047) balanced the accused’s need for disclosure of relevant information against a law enforcement officer’s legitimate expectation of privacy in his or her personnel records. The Legislature concluded that a defendant, by written motion, may obtain information contained in a police officer’s personnel records if it is material to the facts of the case. (Evid. Code, § 1043, subd. (b)(3).) When presented with such a motion, the court rules as to whether there is good cause for disclosure. (Evid. Code, §§ 1043, 1045.) If the court orders disclosure, the custodian of the officer’s records brings to court all the potentially relevant personnel records and, in camera, the court determines whether any of the records are to be disclosed to the defense. “A trial court’s ruling on a motion for access to law

enforcement personnel records is subject to review for abuse of discretion.” (*People v. Hughes, supra*, 27 Cal.4th at p. 330; see also *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086, citing *People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

We ordered the trial court to provide us with the sealed documents it reviewed in conducting its *Pitchess* analysis. Having obtained those documents, we note first that the trial court complied with the procedural requirements of a *Pitchess* hearing. There was a court reporter present, and the custodian of records was sworn prior to testifying. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228, 1229, fn. 4; *People v. White* (2011) 191 Cal.App.4th 1333, 1339-1340.) The custodian of records complied with the requirement to bring all the records and submit them for the court to review and determine which documents were relevant. (*People v. Wycoff* (2008) 164 Cal.App.4th 410, 414-415.)

We have also reviewed the sealed documents and find no reversible error with regard to nondisclosure of those records. (*People v. Hughes, supra*, 27 Cal.4th at p. 330.)

III. ROMERO MOTION

Finally, Hood contends that the trial court abused its discretion by refusing to strike his prior serious felony conviction pursuant to *Romero*. We disagree.

In *Romero*, the Supreme Court held that a trial court has discretion to dismiss three-strike prior felony conviction allegations under section 1385. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) The touchstone of the analysis is “‘whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.’ [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

“[A] trial court’s refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion.” (*People v. Carmony, supra*, 33 Cal.4th at p. 375.) “[A] trial court does not abuse its discretion unless its

decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.)

“Because the circumstances must be ‘extraordinary ... by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable person could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*People v. Carmony, supra*, 33 Cal.4th at p. 378.)

Hood complains that the trial court abused its discretion by failing to consider all relevant circumstances in denying his *Romero* motion. We reject this contention. There is nothing in the record to indicate the trial court failed to consider and balance the factors outlined above. Moreover, there is a “‘strong presumption’ [citation] that the trial judge properly exercised his discretion in refusing to strike a prior conviction allegation.” (*In re Large* (2007) 41 Cal.4th 538, 551.) “On appeal the basic rule is that it will be assumed that the trial court impliedly found every fact, necessary to support its ruling, to be true. [Citations.]” (*People v. Castaneda* (1969) 1 Cal.App.3d 477, 484.)

Here, prior to the sentencing hearing, Hood filed a *Romero* motion, wherein he pointed out the court’s discretion, the relevant law regarding the factors the court must consider in dismissing a strike, circumstances of the present and prior conviction, the circumstances relevant to him, and why he believed he should be deemed outside the spirit of the three strikes law. He particularly noted his young age (21) at the time of the current crime, which he alleged involved no “physical or psychological harm to the community” and his young age at the time of his prior offense (18), a violation of section 211, for which he claimed he was only minimally involved. He alleged that between his first and current offenses, he “only picked [up] one minor misdemeanor charge of [section] 415(1),” for which he was placed on misdemeanor probation. Hood claimed he

did not fall within the spirit of the three strikes law because he was a caretaker for his 15-year-old brother and he was close to completing both his felony and misdemeanor probations; he was a good employee;⁷ and, although he was under the influence at the time of the current offense, he was attempting to maintain sobriety. At the hearing on the *Romero* motion, defense counsel reiterated the assertions made in the written motion, arguing that, although Hood had suffered a prior strike in 2008, he had “made strides for turning his life around,” working and raising his 15-year-old brother, who was doing well in school. Counsel also argued that, while Hood was convicted of possession of a firearm, there was no indication that he was attempting to commit a crime with the firearm.

At the hearing, the trial court noted that it had read and considered Hood’s *Romero* motion and the People’s opposition to the motion. In denying the motion, the trial court stated, in part:

“[W]hat is significant to the court is the brief nature in which the 211 was charged and ultimately resolved. According to today’s date, that 211 occurred roughly 3 years ago but ... closer to 2 years from the date of the incident in this case, being September 10. [¶] Based on the nature of the circumstances ... in which the robbery was resolved, it does not appear to the court that the defendant is outside the spirit of the 3-strikes law. I make that determination based on the time frame in which these occurred as well as the nature of the defendant in this case.”

We cannot conclude the trial court abused its discretion in declining to strike Hood’s prior strike conviction, and we reject Hood’s claim to the contrary. The relevant considerations support the trial court’s ruling, and there is nothing in the record to show that the court declined to exercise its discretion on improper reasons or that it failed to

⁷ During the trial, Hood’s employer testified in Hood’s defense that Hood was a good worker, honest and trustworthy.

consider and balance the relevant factors, including Hood's personal and criminal background.

DISPOSITION

The judgment is affirmed.

Franson, J.

WE CONCUR:

Levy, Acting P.J.

Poochigian, J.