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

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY PASHELL,

Defendant and Appellant.

F063289

(Kings Super. Ct. No. 11CM7015)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Steven D. Barnes, Judge.

Michael L. Pinkerton, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Levy, J. and Franson, J.

INTRODUCTION

Appellant/defendant Jimmy Pashell, an inmate at Corcoran State Prison, was convicted after a jury trial of two counts of resisting an executive officer by threats and violence (Pen. Code,¹ § 69), with a great bodily injury enhancement (§ 12022.7, subd. (a)). He admitted a prior strike conviction (§ 667, subds. (b)-(i)) and a prior serious felony conviction (§ 667, subd. (a)). He was sentenced to the second strike term of eight years eight months, to be served consecutively to the term he was already serving.

On appeal, his appellate counsel has filed a brief which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*)). We will affirm.

FACTS

On August 25, 2010, Correctional Officers Jose Acevedo and Jeremy Vogel were on duty at Corcoran State Prison. They were assigned as health care escort officers for an administrative segregation building.

Around 7:00 p.m., Officers Acevedo and Vogel went to cell No. 109, where defendant and Jamar Powell were housed. They intended to escort defendant to a medical appointment. Inmate Powell was ordered to place his hands in the food port so he could be placed in handcuffs. Powell complied and was ordered to stand at the back of the cell. The officers removed defendant from the cell without incident.

Officers Acevedo and Vogel escorted defendant to see a nurse in the same building. Defendant was complaining of a stomach ache. After about 10 minutes, the nurse told the officers that they could escort defendant back to the cell, and he would be seen at a later time.

¹ All further statutory citations are to the Penal Code unless otherwise indicated.

Defendant resists returning to his cell

Officer Acevedo testified defendant became irate because he was in pain and wanted to see a doctor. The officers escorted him back to his cell. Defendant's hands were restrained behind his back. Acevedo walked behind defendant and held both his shoulders; Vogel walked on defendant's left side, about two feet behind him.

When they reached defendant's cell, Officer Lambert placed Inmate Powell, defendant's cellmate, in handcuffs again so they could open the cell door. Powell complied with the instructions and stood at the back of the cell.

Acevedo directed the control booth officer to open the cell door. As they walked up to the cell's entrance, defendant said he did not want to go into the cell, and he wanted to see a doctor. Acevedo told defendant to keep walking, that the nurse said he would be seen at a later time. Defendant became irate and agitated and tried to kick Acevedo with his right leg. Acevedo repeatedly told defendant to calm down. Defendant ignored him and kept resisting Acevedo. Acevedo tried to regain control over defendant. Acevedo pushed down on defendant's upper body and swung defendant to the floor. Acevedo fell on top of defendant.

Officer Lambert closed the cell door to keep Inmate Powell inside. Acevedo gained control of defendant's arms and told him to calm down. Defendant ignored his orders and continued to resist. Defendant's legs were flapping around, and he tried to kick the officers. Lambert placed defendant in leg restraints and brought him under control. The entire incident lasted about three to five minutes.

Officer Vogel's injuries

Officer Vogel had been standing on defendant's left side when defendant started to resist. As Acevedo landed on the floor and struggled to control defendant, he realized that Vogel was also on the floor, and he was holding his head. The officers later realized that Vogel was injured on the side of his head, but Acevedo did not see when Vogel suffered the injury.

Lieutenant Keener testified that he heard the altercation and looked toward the area. He saw Officers Acevedo and Lambert on the floor and on top of an inmate. He also saw Officer Vogel on the floor. Vogel was rolling around, holding his head, and screaming in pain. Keener rushed to help Officer Vogel, who was “writhing in pain.”

Defendant’s boasts to other inmates

Lieutenant Keener testified that after defendant was placed in leg restraints, he was “loudly boasting to his buddies on the tier ... or to anybody that would listen how he kicked the officer in the head.” Officer Vogel was still lying on the floor, rolling back and forth and holding his head.

Thereafter, Officers Acevedo and Lambert escorted defendant to a different section of the building. As they passed other cells, inmates yelled at defendant and asked him what happened. Defendant smiled and yelled back, “ ‘Yeah, I got him,’ ” and “ ‘I got Vogel.’ ” Keener heard defendant boast that he “messed up” an officer and “ ‘F’ed him up.’ ”

Lieutenant Keener helped Officer Vogel to his feet, escorted him to an office, and called the medical staff. Vogel was dazed and incoherent and kept rubbing his head. He did not know where he was.

At trial, Officer Vogel testified that he remembered going to the cell with Officer Acevedo to escort defendant to a medical appointment. Vogel’s last memory was just before they removed defendant, when Inmate Powell was handcuffed through the food port. Vogel testified that his next memory was sitting in the sergeant’s office. Vogel was confused, and he did not know how he got there. Vogel testified that his head was hurting, and he was really dazed. He had a raised lump on the side of his head, and he was taken to the prison hospital. He blacked out again and only remembered being seen by a nurse.

Vogel was later taken to Kaweah Delta Hospital's emergency room in Visalia. He was lightheaded, nauseous, and still in pain. Vogel suffered an injury to the left side of his head. He suffered headaches and stayed home from work for several days.

Defense evidence

Defendant did not testify. Jamar Powell, defendant's cellmate, testified that he was serving time for a carjacking conviction, and he had been previously arrested for possession of a weapon. Powell testified that when the officers brought defendant back from his medical appointment, the cell door opened, and Officer Acevedo slammed defendant to the floor and told him to stop resisting. Acevedo slammed defendant's head against the floor three times. Officer Lambert arrived, got on top of defendant, and closed the cell door. Vogel was 15 to 20 feet away from the cell door, and he was bent over. Powell did not think that Vogel was in any pain. Powell testified that when the officers escorted defendant from the area, defendant was not saying or yelling anything.

The charges and convictions

Defendant was charged with count I, assault by means of force likely to produce great bodily injury on Officer Vogel, while confined in state prison (§ 4501); count II, battery on Officer Vogel, a non-confined person, while confined in state prison (§ 4501.5); and counts III and IV, resisting an executive officer by threats and violence as to, respectively, Officers Acevedo and Vogel. It was further alleged that defendant personally inflicted great bodily injury, and he had had one prior strike conviction, one prior serious felony conviction, and served one prior prison term. Defendant declined a plea offer of seven years nine months.

After a jury trial, defendant was convicted of counts III and IV, resisting an executive officer, and found not guilty of counts I and II. The special allegations were found true. The court granted the prosecution's motion to dismiss the prior prison term enhancement.

Sentencing

Defendant was sentenced to eight years eight months, to run fully consecutive to the term defendant was already serving: as to count IV, eight months (one-third the midterm), doubled to 16 months as the second strike term, plus one year for the great bodily injury enhancement, and five years for the prior serious felony enhancement; and as to count III, a consecutive term of eight months (one-third the midterm), doubled to 16 months as the second strike term. Defendant did not receive any pretrial credits, and the court reserved victim restitution.

The court ordered a \$1,600 restitution fine pursuant to section 1202.4, subdivision (b), and stayed the \$1,600 restitution fine under section 1202.45; an \$80 court security fee (§ 1465.8, subd. (a)(1)) [\$40 per count], and a \$60 criminal conviction assessment (Gov. Code, § 70373, subd. (a)(1)) [\$30 per count].

DISCUSSION

As noted *ante*, defendant's appellate counsel has filed a *Wende* brief with this court. The brief also includes the declaration of appellate counsel indicating that defendant was advised he could file his own brief with this court. By letter on January 26, 2012, we invited defendant to submit additional briefing. To date, he has not done so.

After independent review of the record, we find that no reasonably arguable factual or legal issues exist.

DISPOSITION

The judgment is affirmed.