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

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARD JERRY GUTIERREZ,

Defendant and Appellant.

F066974

(Super. Ct. No. F12100303)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. W. Kent Hamlin, Judge.

Rita Barker, 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, Carlos A. Martinez and Kari Ricci Mueller, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Detjen, Acting P.J., Franson, J. and Peña, J.

A jury convicted appellant Gerard Jerry Gutierrez of custodial possession of a weapon, i.e., a sharp instrument (Pen. Code, § 4502, subd. (a)).<sup>1</sup> In a separate proceeding, Gutierrez admitted allegations that he had a prior conviction within the meaning of the three strikes law (§ 667, subds. (b)-(i)).

On March 21, 2013, the court sentenced Gutierrez to a six-year term, the middle term of three years doubled to six years because of Gutierrez's strike conviction, which it imposed consecutive to the term he was already serving.

On appeal, Gutierrez contends: (1) the evidence is insufficient to sustain his conviction for custodial possession of a weapon; and (2) the court failed to exercise its discretion when it imposed a restitution fine. We will find merit to this last contention and remand the matter to the trial court for further proceedings. In all other respects, we will affirm.

### **FACTS**

At the trial in this matter, Correctional Officer Roberto Ramirez testified that on February 29, 2012, he participated in lockdown searches at Pleasant Valley State Prison. During the searches inmates are instructed to exit their cells in their boxers and shower shoes. Gutierrez was an inmate at the prison and the only inmate occupying his cell. When it was time to search his cell, Gutierrez came out in his state-issued blue jeans, a blue shirt, and white tennis shoes. Ramirez told Gutierrez to remove that clothing and come out in boxers and shower shoes. Gutierrez then placed his tennis shoes under his locker and came out in the requested clothing. Officer Ramirez searched the cell. In one of Gutierrez's tennis shoes, he found a six-inch long hard piece of plastic that was sharpened on one end and had U-shaped ridges that could be used to grip it. Officer Ramirez had seen weapons like the piece of plastic in training sessions.

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

Correctional Officer Jose Melendez testified that the plastic object found in Gutierrez's shoe could be used to attack someone and that it had the advantages of being concealable in a shoe and undetectable by metal detectors. It also allowed the inmate to stand, walk, or run with the plastic in his shoe without being cut by it. Melendez described the object as a hard piece of plastic one-eighth of an inch thick that was not flexible and that had a sharp point and two sharpened edges. He had seen plastic objects like that used to hurt people. In Officer Melendez's opinion, the piece of plastic was a weapon.

Gutierrez testified that he did not create the plastic object found in his shoe. According to Gutierrez, when he was moved into the cell a week prior to the plastic object being found there, he noticed that the plastic covering of the mattress in the cell had a portion that had been sewn. Gutierrez pulled open the part that had been sewn and found the plastic object, which was six to eight inches long, inside the mattress. Gutierrez thought the object could hurt someone so he took it out. Gutierrez had seen prison weapons and thought the plastic object was a joke. He thought that although it looked like a weapon, anyone who tried to use it as one would get hurt or killed because the object was not strong enough to penetrate a person's body or cause bodily injury. Gutierrez threw the plastic object in his cell locker and two days later he decided to use it as a door stopper. Even though the plastic object had grooves on one side that could be used to grip it, Gutierrez did not believe the plastic object could be used as a weapon. Gutierrez described the plastic object as a soft, plastic, rubbery object that he used as a bookmark two times. Gutierrez also would place the plastic object in the door track to his cell so that it would make noise when the door was open in the morning and wake him up. Afterwards, he would place it in his locker. He also used the plastic object as a ruler when he was altering his clothing.

The day the object was found in his shoe he had thrown it and some fishing line inside his old shoes because the shoes did not fit anymore due to his feet being swollen and he had ordered new shoes. Gutierrez had the opportunity to dispose of the plastic object in the toilet prior to his cell being searched, but he did not attempt to do so.

During cross-examination, Gutierrez acknowledged that the plastic object could be used to stab someone in the eye. However, he claimed that the inmates' self-imposed code of conduct prohibited stabbing people in the eyes.

## **DISCUSSION**

### ***The Sufficiency of the Evidence Claim***

“For challenges relating to the sufficiency of the evidence, ‘the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]’ [Citation.]” (*People v. Lewis* (2001) 26 Cal.4th 334, 365.)

Section 4502, subdivision (a), as pertinent here, prohibits the possession of “any ... sharp instrument” by a person confined in a penal institution.

In order to convict Gutierrez of violating this code section the prosecutor had to prove that: (1) Gutierrez was confined in a penal institution; (2) Gutierrez possessed or had under his custody or control a sharp instrument; (3) he knew that he possessed or had under his control a sharp instrument; and (4) Gutierrez knew that the object was a sharp instrument that could be used as a stabbing weapon for purposes of offense or defense.

A sharp instrument is 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. Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.” (CALCRIM No. 2745.)

Gutierrez challenges the sufficiency of the evidence to prove only the fourth element. According to Gutierrez, the evidence failed to prove he was aware the plastic object found in his tennis shoe was capable of being used as a stabbing weapon for purposes of offense or defense. There is no merit to this contention because Gutierrez admitted that he was aware that this plastic object could be used to stab someone in the eyes. That such use allegedly was prohibited by an inmate rule against stabbing other inmates in the eyes did not change the fact that it could be used for that purpose or insulate Gutierrez from criminal prosecution for possessing the plastic object.

Gutierrez contends that this admission is not dispositive because although it shows that at the time of trial he was aware the plastic object could be used as a stabbing instrument, there was no evidence that he was aware of this when the plastic object was found in his possession. Gutierrez is wrong.

It is patently obvious that a sturdy, one-eighth inch thick plastic object, approximately six inches long, with a sharp point and two sharp edges, could be used as a stabbing (or slashing) weapon to inflict great bodily injury on a particularly vulnerable part of a person's body like the eyes. Further, Gutierrez did not testify that he came to a sudden realization on the witness stand that the plastic object could be used as a stabbing instrument. Instead, he attempted to minimize the damning effect of his admission by claiming that stabbing another inmate in the eyes was against the inmates' unwritten code of conduct. The jury could reasonably find from these circumstances that Gutierrez's awareness that the plastic object could be used as a stabbing instrument was coextensive with his possession of the object. Thus, we reject Gutierrez's sufficiency of the evidence claim.

### ***The Restitution Fines***

When appellant committed the underlying offense section 1202.4, in pertinent part provided:

“(a) [¶] ... [¶] (3) The court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay both of the following:

“(A) A restitution fine in accordance with subdivision (b). [¶] ... [¶]

“(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.

“(1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but *shall not be less than two hundred forty dollars (\$240)* starting January 1, 2012, ... and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony, ...

“(2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.

“(c) The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. A defendant’s inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine *in excess of the minimum fine pursuant to paragraph (1) of subdivision (b)*....

“(d) In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant’s inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime.... Consideration of a defendant’s inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be

required. A separate hearing for the fine shall not be required.” (Former § 1202.4, italics added.)

During his sentencing hearing, defense counsel asked the court for some “leniency in terms of suspending or staying the fines or restitution” the court ordered Gutierrez to pay. The court responded,

“All right. Well, pursuant to 1202.4(c) the Court would have to find compelling and extraordinary reasons to not impose the fine and a defendant’s inability to pay is not considered a compelling or extraordinary reason that may only be considered in increasing the amount in excess of the minimum fine. [¶] I can consider his ability to pay the seriousness and gravity of the offense and circumstances of his commission and any economic gain derived by him as a result of anyone else suffered losses, so I think in this case it’s truly a victimless crime in the sense that the weapon was never used, although obviously the danger was the possession of the weapon in that environment. *So what I will impose is the mandatory minimum fine of \$1,680* based on the fact that there is no victim of the crime, there are no specific losses in this case, there’s economic gain apparently derived by the defendant as a result of this particular crime though this other issue with the fishing line is obviously a concern. And he is already paying significant restitution fines in his – in his primary commitment offense. I will suspend half of that. So it’s 840 under 1202.4, and that’s to be collected from his books while he’s housed at CDC. I’ll impose and suspend a \$1,680 parole revocation fine under 1202.45, that will be imposed and suspended unless parole is later granted and revoked. So there’s no aspect of the [\$]1,680 in 1202.45 but I am suspending half of the 1202.4 fine....” (Italics added.)

When the court asked Gutierrez whether he had any questions regarding the court’s orders or his appeal rights, the following colloquy occurred:

“[GUTIERREZ]: No, but I do want to request a hearing on my ability to pay any restitution.

“THE COURT: Right. Well, ability to pay is not a basis on which the Court can impose less than the mandatory minimum. I imposed *the mandatory minimum* then suspended half of it based on the fact that I found some other factors that were appropriately considered. So I believe you’ve had your hearing and I believe I fairly considered your request to reduce the fine, and I, in fact, have done so to half of *the mandatory statutory minimum....*” (Italics added.)

Gutierrez contends the trial court misunderstood its discretion when it imposed a restitution fine and that this requires the matter to be remanded for reconsideration of the amount of restitution fine to be imposed. Respondent contends that the record does not show that the court misunderstood its discretion and that Gutierrez forfeited this issue by his failure to object.

““[A] ruling otherwise within the trial court’s power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law. [Citations.]” [Citation.] “Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal. [Citations.]” [Citation.]’ [Citation.]” (*In re Sean W.* (2005) 127 Cal.App.4th 1177, 1181.)

Commencing January 1, 2013, the minimum restitution fine increased to \$280. (§ 1202.4, subd. (b)(1); Stats. 2012, ch. 873, § 1.5.) However, because the court was required to apply the law of restitution applicable at the time Gutierrez committed his offense in 2012 (*People v. Souza* (2012) 54 Cal.4th 90, 143), the minimum restitution fine the court could impose was \$240. The court’s comments indicate that it erroneously believed that \$1,680 was the minimum restitution fine it could impose because the court referred to this amount three times as the mandatory minimum fine. Additionally, the court erroneously believed that it did not have to conduct a hearing on Gutierrez’s ability to pay because it was imposing what it believed was the minimum fine, i.e., a fine of \$1,680. Gutierrez did not specifically object to the court’s erroneous statement that \$1,680 was the minimum fine it was required to impose. However, by asking for a restitution hearing, which request the court denied, he in effect objected to the court’s imposition of a \$1,680 restitution fine without having conducted such a hearing. Accordingly, we will remand the matter to the trial court so that it may properly exercise its discretion in imposing a restitution fine. In doing so, we note that we are not aware of

any authority that allows the trial court to stay a portion of the restitution fine it imposes pursuant to section 1202.4.

**DISPOSITION**

The court's restitution fine order is vacated and the matter is remanded to the trial court with directions to exercise its discretion in determining the amount of Gutierrez's restitution fine. In all other respects, the judgment is affirmed.