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

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH DIAZ,

Defendant and Appellant.

F069369

(Super. Ct. No. DF11168A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. John S. Somers,
Judge.

William A. Malloy, under appointment by the Court of Appeal, for Defendant and
Appellant.

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

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*Before Kane, Acting P.J., Peña, J., and Smith, J.

INTRODUCTION

Appellant Joseph Diaz was serving a sentence of 25 years to life for murder when guards found a weapon in his cell. Diaz was convicted of a violation of Penal Code section 4502, subdivision (a), a felony, possession of a sharp instrument while confined in a penal institution. It also was found true that Diaz had suffered two prior strike convictions: the murder conviction and a conviction for assault on a peace officer. Diaz appeals the conviction. Appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We will affirm.

FACTS AND PROCEDURAL SUMMARY

On September 6, 2013, Diaz was charged with possessing a sharp instrument while confined in a penal institution, a violation of Penal Code section 4502, subdivision (a). It also was alleged that he had suffered a prior conviction in 2011 for first degree murder and in 2005 for assault on a peace officer and that both prior convictions constituted strikes. Diaz waived the right to a trial by jury on the prior conviction allegations.

Testimony at the trial on the substantive charge established that a routine search of cell No. 107 in building No. 5 was conducted on October 22, 2012, by Officer Rick Stinson at Kern Valley State Prison. After stepping into the cell, Stinson looked into the toilet and saw a weapon. Diaz was one of the two inmates assigned to the cell; both were in the recreation yard. Stinson immediately notified his sergeant, Anthony Sotelo, of his find via radio.

Stinson met up with Sotelo in the recreation yard; the front of building No. 5 faces the recreation yard. Sotelo called out for the inmates of cell No. 107 in building No. 5 to report to the front of the building. Diaz and his cell mate, Cardenas, came in response to the sergeant's call. Stinson testified Diaz made a "spontaneous statement" and stated, "If you found the weapon in the toilet it's mine."

Sotelo also testified that, “[b]efore anything, any type of questioning or we could place the inmates in cuffs inmate Diaz stated if you found a weapon in the toilet it’s mine.” Sotelo told Diaz, “I think it’s good that you’re taking personal responsibility.” Sotelo placed Diaz in handcuffs.

Diaz was taken to a holding cell while Stinson inspected and measured the weapon. The weapon was six and one-quarter inches long; one-half inch in diameter; black plastic, melted and rolled; and sharpened to a point at one end. Inmates will use CD cases or any plastic part and melt it using a “stinger.” A “stinger” is created by inserting a paper clip or other small piece of metal into an outlet to spark a flame. After examining the weapon, Stinson placed it in an envelope, sealed the envelope, noted identifying information, and placed the envelope in the evidence locker.

Stinson went to where Diaz was waiting and read him his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. Stinson asked Diaz if he understood his rights; Diaz responded affirmatively. Diaz was asked if he wanted to waive his rights and make a statement; he responded “yes.” According to Stinson, Diaz stated that “the weapon in the toilet was mine and my celly didn’t know anything about it.”

Diaz testified in his own defense. He testified he heard the call over the loudspeaker to report to Sotelo. As he and Cardenas approached Sotelo and Stinson, Diaz overheard Sotelo say that he “just wants one of us.” Diaz stated he knew Cardenas had a release date in about four years. Diaz “decided to say it was—it was my weapon. My celly had nothing to do with it.”

Diaz stated he decided to claim the weapon as his because “they were going to take both of us in the hole.” He didn’t expect any criminal charges to be filed against him by the district attorney because he already was serving a long sentence.

On cross-examination, Diaz was asked, “You admitted it was your weapon, didn’t you?” To which Diaz replied, “It is my weapon.”

The jury convicted Diaz of a violation of Penal Code section 4502, subdivision (a). Following a bench trial, it was found true that Diaz had suffered two prior strike convictions.

On March 13, 2014, Diaz filed a sentencing memorandum arguing that he was not subject to a “three strikes” sentence because the strike allegations were not proven and tried before a jury; he was not personally armed with the weapon; and the People did not allege the Penal Code section 667, subdivision (e)(2)(C), sentencing allegation. He also filed a motion asking that the trial court exercise its discretion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 and strike at least one prior strike conviction. The People filed written opposition to the *Romero* motion.

At the hearing on Diaz’s *Romero* motion, both parties submitted the matter on the pleadings. The trial court articulated Diaz’s lengthy criminal history demonstrating increasingly serious offenses, including the first degree murder, and denied the *Romero* motion.

Immediately after denial of the *Romero* motion, the trial court proceeded to sentencing. Diaz submitted on his sentencing memorandum. The People argued that Diaz should be sentenced as a third-strike defendant to 25 years to life, pursuant to Penal Code section 667, subdivision (e)(2)(C), and noted the People were not required to specifically allege this sentencing provision.

The trial court noted that the prior convictions for first degree murder and assault on a peace officer had been pled and proven. It was not required that Penal Code section 667, subdivision (e)(2)(C)(iv)(IV), be specifically alleged in the accusatory pleading and the homicide be pled and proven a second time in order to impose a three strikes sentence. The trial court denied Diaz’s request to impose a sentence other than a three strikes sentence.

The trial court imposed a sentence of 25 years to life, to be served consecutively to the term Diaz was serving for the first degree murder conviction. Various fines and fees also were imposed.

Diaz filed a timely notice of appeal on May 8, 2014.

DISCUSSION

Appellate counsel filed a *Wende* brief on November 12, 2014. That same day, this court issued its letter inviting Diaz to submit a supplemental brief. No supplemental brief was filed.

The conviction on the substantive offense is supported by substantial evidence, including Diaz's own admissions. The prior conviction enhancements were pled in the accusatory pleading and proven in a bench trial. The disqualifying factors set forth in Penal Code section 667, subdivision (e)(2)(c)(iii), that preclude a defendant from reaping the benefit of the Three Strikes Reform Act, enacted by Proposition 36 in 2012, need not be pled or proven to a trier of fact. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1057-1058.) Consequently, the trial court did not err in imposing a 25-years-to-life sentence for the current conviction. (Pen. Code, § 667, subd. (e)(2)(C)(iv)(IV).) The abstract of judgment accurately reflects the sentence imposed.

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

DISPOSITION

The judgment is affirmed.