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

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE RAUL MARTINEZ,

Defendant and Appellant.

H039592

(Santa Clara County

Super. Ct. No. C1234120)

Defendant Joe Raul Martinez appeals following a jury trial during which he was convicted of residential burglary and possession of burglary tools. (Pen. Code, §§ 459, 466.)¹ On appeal, defendant argues that the trial court erred by sustaining the prosecutor's objection during defense counsel's closing argument, and limiting defense counsel's opportunity to present a complete defense. In addition, defendant asserts that the court erred by failing to stay his sentence under section 654, and in ordering him to pay attorney fees.

STATEMENT OF THE FACTS AND CASE

Sara and Jason Bechler lived at 4389 Bloomfield Road in San Jose. On April 10, 2012, they both received phone calls and returned home at around 12:00 p.m. to find police at their house. The Bechlers found that a patio chair had been moved so that

¹ All further statutory references are to the Penal Code.

it was under a window on the back wall of the house. The screen was missing from that window, and the window was pushed down. On the left side of the house, a window to the garage also had a screen pulled out, and that screen was bent and lying on the ground. The screens had previously been secured to the windows.

Tschudy Smith lived next door to the Bechlers at 4379 Bloomfield Drive. Around noon, she was eating lunch in her living room, and called 911 because she saw defendant and another man in the front area of the Bechler home. In the tape recording of the 911 call, Smith said that two Hispanic men were going into the backyard of the Bechler house. The men had come from a black Maxima, which was registered in defendant's name, that was parked on the street. One of the men, later identified as defendant, was wearing a grey hoodie, and the other was wearing a black shirt. Smith saw the two men open the trunk of the Maxima and one of the men put something long in the front pocket of the hoodie. Smith believed that another person was sitting in the car. Smith saw the two men walk to the back of the Bechlers' house. She never saw them come back to the car. Smith later identified defendant as one of the men she saw in front of the Bechlers' house.

Michael Reed lived around the corner at 4415 Hendrix Court, and his backyard adjoined the backyard of the Bechlers' house. Around noon, he was at home and saw two Hispanic men standing in the bushes in his front yard. Reed identified defendant as one of the men he had seen in his yard. Reed saw the men putting something into a backpack that they were holding. Reed then saw a police car drive up and motion the men over. After that, Reed found the backpack in his flowerbed and gave it to the police.

San Jose Police Officers Bindi, Brownlee and Salas responded to the 911 call. Officer Salas talked to Marissa P., who was a 16-year-old girl and was sitting in the Maxima. Marissa was on a cell phone at the time Officer Salas approached her.

Officer Brownlee went around the corner to Hendrix Court, where he saw defendant and 15-year-old Justin P., hiding in the bushes in front of the Reed house. Officer Brownlee found a grey backpack in the bushes, which had a long pair of pliers and a piece of cable inside. Justin P. had a cell phone that showed phone calls at 12:12, 12:13, 12:14, 12:15, 12:17 and 12:20 p.m. The officers confirmed that all of the calls were to the cell phone that Marissa had with her.

Fingerprints that were taken from the window screen and the garage door window matched those of Justin P. There were no fingerprints found at the scene that matched defendant's.

Defendant was charged by information with residential burglary (§ 459) and possession of burglary tools (§ 466). Following trial, defendant was found guilty as charged.

The trial court imposed a sentence of four years in state prison, execution suspended, and placed defendant on probation for five years. As a condition of probation, defendant was ordered to serve one year in the county jail for each conviction, to be served concurrently. In addition, the court ordered defendant to pay a presentence investigation fee of \$450, and a monthly probation supervision fee of \$110. The court also ordered defendant to pay attorney fees in the amount of \$2,500.

DISCUSSION

Defendant asserts that the trial court erred in sustaining the prosecutor's objections to defense counsel's arguments, and in limiting his ability to present a complete defense. Defendant also argues that the court erred in failing to stay his sentence for possession of burglary tools under section 654, in imposing fees and in imposing a probation condition.

Prosecutor's Objection to Defense Counsel's Argument

Defendant argues that the court's action in sustaining the prosecutor's objection as to the standard of proof amounted to a "misdescription of the reasonable doubt standard."

During closing argument, defense counsel stated: "Proof beyond a reasonable doubt. You've heard that a lot. What does it mean? It is proof that leaves you with an abiding conviction that the charge is true. What's an abiding conviction? Abiding, something that lasts. A conviction, something that you believe in. So when you leave the jury room and you have a decision, or even if you don't, you need to feel you are going to hold true and hold fast to that decision tomorrow, or the next days, 10 years from now."

The court sustained the prosecutor's objection to the argument above without providing comment or other explanation to the jury.

It may well have been to counsel's last remark "10 years from now."

Defendant argues on appeal that defense counsel's argument regarding abiding conviction was correct, and the court's sustaining the prosecutor's objection was to communicate to the jury that it was not required to have an abiding conviction to find defendant guilty of a crime.

The essence of defendant's argument is that by sustaining the prosecutor's objection to defense counsel's definition of abiding conviction, the court incorrectly instructed the jury on the standard of proof required for a conviction. As a reviewing court, we must inquire " 'whether there is a reasonable likelihood that the jury applied the challenged instruction in a way' that violated the constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, quoting *Boyd v. California* (1990) 494 U.S. 370, 380.)

Here, the court properly instructed the jury with CALCRIM No. 220 to explain the reasonable doubt standard as follows: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased

against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.”

In addition, the court properly instructed the jury on how to resolve a conflict between an attorney’s argument and the court’s instructions with CALCRIM No. 200 as follows: “You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions. [¶] Pay careful attention to all of these instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it.”

When considered in the context of all of the instructions given in this case and in particular, the reasonable doubt instruction and the conflict instruction cited above, we find that there is no reasonable likelihood that the jury misconstrued or misapplied the reasonable doubt standard of proof.

Defense counsel’s arguments in this case are similar to those in *People v. Pierce* (2009) 172 Cal.App.4th 567 (*Pierce*). In *Pierce*, as in the instant case, the prosecutor disputed defense counsel’s explanation of an abiding conviction as one that is lasting. Defense counsel told the jury that an abiding conviction was “ ‘a permanent sort of a

belief” ” and that a juror could not “ ‘wake up the next day and think . . . I hope that I was right.’ ” (*Id.* at p. 570.) The court sustained the prosecutor’s objection to defense counsel’s explanation. The prosecutor later told the jury that the reasonable doubt instruction did not say “ ‘anything about tomorrow, the future, next week, or even ten minutes after your verdict.’ ” (*Ibid.*) The prosecutor further told the jury that “ ‘when you’re deliberating, when you’ve made your decision, that’s when it counts. There’s no legal requirement of and we’ll come back in a week and make sure you’re all good with this.’ ” (*Id.* at p. 571.)

The defendant in *Pierce* argued that the jury was “misled into thinking that the concept of ‘an abiding conviction’ did not require a sense of ‘permanen[ce]’ of a juror’s belief in the truth of the charge.” (*Pierce, supra*, 172 Cal.App.4th at p. 571.) The court disagreed, finding that there was “no reasonable likelihood” that the jury misconstrued or applied the prosecutor’s remarks relating to “ ‘an abiding conviction.’ ” (*Id.* at p. 572.) The court also noted that “the jury did not ask any questions concerning the instruction on reasonable doubt or the meaning of the concept of an abiding conviction.” (*Id.* at p. 583.)

In the present case, as in *Pierce*, the jury did not ask any questions about the meaning of reasonable doubt or about the term “abiding conviction.” Most importantly, the jury was correctly instructed on reasonable doubt, and we must presume the jury followed the instruction. (See *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36-37.) The court’s action of sustaining the prosecutor’s objection to defense counsel’s argument regarding abiding conviction was not error.

Restriction of Defense Counsel’s Argument

Defendant argues that he was denied his due process right to a fair trial, because the court limited his trial counsel’s ability to provide a complete defense.

A defendant has a constitutional right to “ ‘a meaningful opportunity to present a complete defense.’ ” (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.)

Accordingly, a defendant has a constitutional right to have his counsel present a closing argument to the jury. (*People v. Marshall* (1996) 13 Cal.4th 799, 854.) The trial court, however, has broad discretion in limiting the scope of counsel’s argument to ensure that it “does not stray unduly from the mark.” (*Id.* at p. 855.)

Initially, defendant argues that the court limited his ability to present a defense by restricting his ability to define abiding conviction. As discussed above, we find that the court did not err in sustaining the prosecutor’s objection.

The second basis for defendant’s argument that the court limited his ability to present a defense is that the court sustained another prosecution objection to his argument during closing referring to defendant’s demeanor post arrest. Defense counsel stated the following during closing argument: “You come to Mr. Martinez’s demeanor when he’s detained. So [*sic*] couple of inconsistencies in what the officers say to you. One says, oh, he’s nervous. He’s panicking. The other officer, the one who found the marijuana on him, said that he seemed nonchalant. [¶] Here are a few things you do know. He didn’t run. Officer beckoned him over, he came right there. He was cooperative. You also don’t hear any confession in this case. No confession.” The prosecutor objected, arguing that it was “[i]mproper.” The trial court sustained the objection and instructed the jury to disregard the last argument.

Defendant contends that he was denied his right to present a defense because the trial court undermined his ability to argue reasonable doubt. Specifically, defendant argues that the trial court took away his ability to point out that there was no confession in this case, which defendant argues was a key fact that was favorable to him. Defendant further asserts that by sustaining the prosecutor’s objection, the court was implying to the jury that defendant had, in fact, confessed.

The court's ruling in this case was based in part on an in limine ruling preventing the admission of any statements by defendant. When defendant was approached by police, he told them that he did not remember the name of the street he was on, he did not know anything about burglaries, and that he was just in the area to smoke marijuana. The prosecutor moved in limine to exclude these statements at trial, and the court granted the request. In sustaining the prosecutor's objection to defense counsel's argument that there was no confession in this case, the court noted out of the presence of the jury that "there had been a specific ruling in limine that the statement of the defendant would be excluded, so I have already ruled that anything he said whether it be deemed a confession or not [not] be admissible."

The court did not abuse its discretion in sustaining the prosecutor's objection. While defendant's statements to police that he did not know what street he was on and that he was only there to smoke marijuana cannot be deemed a confession per se, they are statements that given the circumstances, are highly implausible explanations of defendant's behavior. If presented to the jury, the statements could lead to a strong inference of defendant's guilt. The in limine ruling excluding the statements supports the trial court's ruling on the objection. The court's determination that counsel's statement that there was no confession in this case was objectionable, and should not be presented to the jury was a proper exercise of the court's discretion.

Moreover, sustaining the objection to defense counsel's argument did not limit defendant's ability to present a complete defense. Defendant argued reasonable doubt in closing. There was ample means to present this argument, including the fact that there were no latent fingerprints belonging to defendant on the garage window or the bathroom window screen, and that neither of the witnesses saw defendant going through the Bechlers' side-yard gate or in their backyard. Defendant was given "a meaningful

opportunity to present a complete defense,’ ” and his constitutional rights were not violated. (*Crane v. Kentucky, supra*, 476 U.S.at p. 690.)

Cumulative Error

Defendant argues that the cumulative effect of all the claimed errors deprived him of his constitutional right to a fair trial.

“ ‘[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.’ [Citation.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) Since we have found none of defendant’s claims of error meritorious and/or prejudicial, a cumulative error argument cannot be sustained. No serious errors occurred, which whether viewed individually or in combination, could possibly have affected the jury’s verdicts. (*People v. Martinez* (2003) 31 Cal.4th 673, 704.)

Stay of Sentence Pursuant to Section 654

Defendant argues that the trial court erred by failing to stay his sentence for possession of burglary tools pursuant to section 654.

Section 654 is intended to ensure that punishment is commensurate with a defendant’s criminal culpability. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) It expressly prohibits multiple sentences where a single act violates more than one statute. (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196.) It also prohibits multiple punishment where the defendant commits more than one act in violation of different statutes when the acts comprise an indivisible course of conduct having a single intent and objective. “If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331.)

“ ‘The initial inquiry in any section 654 application is to ascertain the defendant’s objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.] Whether the defendant maintained multiple criminal objectives is determined from all the circumstances and is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is any substantial evidence to support it.” (*People v. Porter* (1987) 194 Cal.App.3d 34, 38.) “ ‘However, when there is no dispute as to the facts, the applicability of Penal Code section 654 is a question of law.’ (*People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 816.)” (*People v. Stringham* (1988) 206 Cal.App.3d 184, 202.)

Here, defendant’s sentence for possession of burglary tools should have been stayed pursuant to section 654, because both the burglary and the possession of burglary tools were part of an indivisible course of conduct with the single objective of burglarizing the Bechler’s house. Defendant’s possession of the pliers, by itself was not unlawful. Rather, the possession amounted to a violation of section 466 when defendant harbored the contemporaneous intent to use them to commit a burglary. (*People v. Kelly* (2007) 154 Cal.App.4th 961, 968, fn. omitted [§ 466 applies to objects “that the evidence shows are possessed with the intent to be used for burglary”]). The record demonstrates at the time he possessed the pliers, defendant had the intent to burglarize the Bechler house, and did so. There was no evidence that defendant intended to burglarize any other home at the time. The sentence for possession of burglary tools should have been stayed in this case.

Imposition of Attorney Fees

Defendant argues that the court erred in ordering him to pay \$2,500 in attorney fees for the services of the public defender, because he did not have the present ability to pay the fees.

Section 987.8 provides that “[i]n any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof.” (§ 987.8, subd. (b).) “If the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county” (§ 987.8, subd. (e)(5).)

“ ‘Ability to pay’ means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant’s present financial position. [¶] (B) The defendant’s reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant’s reasonably discernible future financial position. . . . [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant’s financial capability to reimburse the county for the costs of the legal assistance provided to the defendant.” (§ 987.8, subd. (g)(2).)

A finding that a defendant has the present ability to pay cannot be upheld on appeal unless it is supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347 (*Nilsen*).

Here, while the court made a finding that defendant was “able to pay” attorney fees, the finding is not supported by substantial evidence. The only information the court had when making the order was defendant’s answer of “uh-huh,” when the court asked him if he was working. However, at the time defendant answered this question in court, he was in custody, having been remanded following the jury’s verdict of guilt two months prior. Therefore, defendant could not have been working at the time the court made the order. In addition, when the court asked defendant if he had a job waiting for him when he was released from custody, defendant said that he was not sure. The trial court followed up with the question of whether defendant had “an ability to work,” to which defendant responded that he did.

The trial court’s inquiry of defendant, and defendant’s responses, are not sufficient to support a finding that defendant had the ability to pay the fees. Defendant was not working at the time of the order, because he was in custody. Moreover, the fact that defendant had the ability to work, does not demonstrate a “reasonably discernible future financial position,” that would make defendant able to pay the fees. Finally, there was no information in the record regarding how much money defendant had available to him, or his assets, if any, that could be used to pay the fees.

The order of attorney fees in this case is not supported by substantial evidence, and will be stricken. (See, e.g., *Nilsen, supra*, 199 Cal.App.3d at p. 347.)

Imposition of Presentence Fees and Probation Fees

Defendant argues that the court’s imposition of presentence investigation fees not to exceed \$450, and monthly probation supervision fees not to exceed \$110, must be stricken, because there was not a sufficient showing that defendant had the ability to pay the fees.

Penal Code section 1203.1b authorizes the trial court to order a defendant “to pay all or a portion of the reasonable cost” of “any probation supervision” and “any

presentence investigation.” (Pen. Code, § 1203.1b, subds. (a), (b).) Before ordering a defendant to pay such costs, however, the court must follow the procedures articulated in section 1203.1b.

Section 1203.1b mandates the following procedures: “The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant’s ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant’s ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver.” (§ 1203.1b, subd. (a).) Section 1203.1b further mandates: “When the defendant fails to waive the right . . . to a determination by the court of his or her ability to pay and the payment amount, the probation officer shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made. The court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative.” (§ 1203.1b, subd. (b).)

Section 1203.1b defines “ability to pay” as follows: “The term ‘ability to pay’ means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of conducting the presentence investigation . . . and probation supervision . . . and shall include, but shall not be limited to, the defendant’s: [¶] (1) Present financial position. [¶] (2) Reasonably discernible future financial position. In no event shall the court consider a period of more than one year from the date of the hearing for purposes of

determining reasonably discernible future financial position. [¶] (3) Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing. [¶] (4) Any other factor or factors that may bear upon the defendant's financial capability to reimburse the county for the costs." (§ 1203.1b, subd. (e)(1)-(4).)

For the purpose of presentence investigation fees and probation supervision fees, the court must consider factors demonstrating defendant's ability to pay the fees for a period of one year from the date of the hearing. (§ 1203.1b, subd. (e)(2).) This is in contrast to the provision for attorney fees, which allows the court to consider the ability to pay for a period of only six months. (§ 987.8, subd. (g)(2)(B).)

There is not substantial evidence to support the court's finding that defendant had the ability to pay the fees ordered or would have the ability to pay within the year following the order. As stated above with regard to the attorney fees order, the information available to the court at the hearing regarding defendant's financial position was very limited at best, and did not demonstrate an ability to pay fees. The hearing demonstrated only that defendant had the ability to work. The probation report noted that defendant had a job earning \$10.25 per hour after his arrest, up until his remand into custody, and had a shared apartment that cost him \$925 per month in rent. As stated above, there was no information about other sources of money or assets that could be used to pay the fees.

Because there is not substantial evidence to support the court's finding that defendant had the ability to pay the presentence investigation and probation supervision fees, they will be stricken.

Probation Condition

The court imposed the following condition regarding alcohol: "You shall not knowingly go to any place where alcohol is being used or alcohol is the primary item of sale." Defendant argued in his opening brief that this probation condition was overbroad,

because it infringed on his constitutional right to freedom of association, employment and travel. However, in defendant's reply brief, he notes that the issue is now moot, because his probation was revoked, and he was sentenced to prison.

DISPOSITION

The order requiring that defendant pay attorney fees, presentence investigation fees and probation supervision fees is stricken. The sentence imposed for defendant's conviction for possession of burglary tools (§ 466) is stayed pursuant to section 654. As modified, the judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

MÁRQUEZ, J.

GROVER, J.

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