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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. SABAS CISNEROS, Defendant and Appellant.	C071249 (Super. Ct. No. 07F07014)

In bifurcated proceedings, a jury found defendant Sabas Cisneros guilty of battery by a prisoner on a non-confined person (Pen. Code, § 4501.5)[1] and not guilty by reason of insanity. The trial court sustained two strike allegations (§§ 667, subds. (b)-(i), 1170.12) and referred defendant to the Department of Mental Health for appropriate housing upon completion of his current sentence.

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[1] Undesignated statutory references are to the Penal Code.

On appeal, defendant contends the trial court committed prejudicial error in failing to give a unanimity instruction. He also contends the Proposition 36 limits on the three strikes law applies retroactively to his sentence.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Correctional Officer Brian Mayr was supervising the morning meal for 220-230 inmates of A-tier at Folsom State Prison. Following standard procedure, Officer Mayr opened 40 cells on tier A and yelled "chow" as 80 prisoners left their cells. Officer Mayr was the only correction officer on the tier at the time.

As the inmates left their cells, defendant moved towards Officer Mayr faster than the other inmates. Officer Mayr made eye contact with defendant, who ran directly at him. Attempting to avoid defendant, Officer Mayr moved towards a safety bar on his left and "kind of rolled" away from defendant, but defendant changed his path and kept moving towards Officer Mayr. Officer Mayr testified that defendant's "right hand, right fist, hit me in the neck area and glanced up, and his whole body went up against mine. And then as we rolled off, he just kind of glanced off and ran away."

Defendant's blow struck Officer Mayr in the collarbone, where the microphone for his radio was clipped to the lapel. Officer Mayr felt a solid punch to his collarbone area and then defendant's hand glanced up and hit Mayr in the Adam's apple. Defendant's hand was balled into a fist when he struck Officer Mayr. Officer Mayr did not see anything in defendant's hands.

Officer Mayr ordered defendant to the ground, but defendant continued running, so Officer Mayr followed and pepper sprayed him. Defendant fell to the ground and was

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[2] We dispense with the facts of the sanity phase of the trial as they are unnecessary to resolve this appeal.

restrained by another officer. Officer Mayr sustained redness to his neck and upper chest as a result of the attack, and his radio microphone was broken.

Correctional Officer Alan Trivolis responded to the incident and arrived after defendant was restrained. He noticed part of the main body of a pen wrapped in a cloth from an inmate's torn sheet or a bandage; the other part of the pen's body and the broken off point were found a few feet away. There were no fingerprints on the pen or the cloth.

DISCUSSION

I. Unanimity Instruction

Defendant contends the trial court prejudicially erred by failing to give a unanimity instruction. We disagree.

This court has previously summarized the general rules regarding unanimity instructions:

"A unanimous jury verdict is required in criminal cases. [Citations.] It has long been held that a unanimity instruction must be given where the evidence shows that more than one criminal act was committed which could constitute the charged offense, and the prosecution does not rely on any single act. [Citations.]

"Most recently, the courts have distinguished between a criminal act and a criminal event when discussing the need for a unanimity instruction. In *People v. Russo* [(2001)] 25 Cal.4th 1124, the Supreme Court summarized the rule thusly: '[T]he unanimity instruction is appropriate "when conviction on a single count could be based on two or more discrete criminal events" but not "where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event." [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.' [Citations.]

"Thus, a unanimity instruction is not required where the criminal acts are so closely connected as to form a single transaction or where the offense itself consists of a continuous course of conduct. [Citations.] This is because in both cases, the multiple acts constitute one discrete criminal event. [Citation.]" (*People v. Sanchez* (2001) 94 Cal.App.4th 622, 631.)

The prosecutor argued in opening summation that whether the jury concluded that defendant did or did not use a pen was "neither here nor there," because "[w]hat matters is that [defendant] willfully touched Officer Mayr in a harmful or offensive manner" and "the slightest touching can be enough to commit a battery if it is done in a rude and angry way." The prosecutor explained that willfully means "on purpose. . . . This was not an accident. It wasn't an, oops, I tripped and fell." Defendant went up to Officer Mayr "with a closed fist, hit him, right in the clavicle area, right where that radio was located, so hard that it actually broke a piece of that radio off. And his hand slid up and hit Officer Mayr right underneath the Adam's apple." The prosecutor further argued, "I also don't have to prove that [defendant] used this pen. I know that we've talked a lot about this pen. . . . [¶] . . . [W]e can infer, based on all of the information on the fact that the only person in that area where the pen was found -- [defendant] was the only person who was there. We can infer that the pen was in [defendant's] possession when he hit Officer Mayr. [¶] And what does that show us? That shows us his intent. It shows us the rude and harmful manner. But I don't have to prove that he used that pen because it's enough that [defendant] caused some kind of contact with Officer Mayr."

The defense argued there was no evidence that defendant used a pen against Officer Mayr, as Officer Mayr did not see a pen, the pen tip was found behind a fence about 10 feet away from where the incident took place, there was no ink on Officer Mayr, and there were no fingerprints on the pen. Counsel said he was not denying that defendant touched Officer Mayr. Counsel argued that defendant accidentally ran into Officer Mayr, which was not a crime as the touching was not done willfully or in an

offensive manner. Since defendant and Officer Mayr had no significant prior contacts, counsel argued it was reasonable to find that defendant accidentally ran into him.

On rebuttal, the prosecutor said the evidence showed defendant used the pen, but whether he did or did not was "really neither here nor there." He argued "it doesn't matter," that the pen was a "distraction" and that it had nothing to do with the elements of the offense. The forcible punch was not an accident. Running at Officer Mayr, making eye contact with him, and punching him showed willfulness.

On appeal, defendant argues that the jury could have found him guilty under three different scenarios: (1) defendant ran into Officer Mayr so their bodies touched; (2) defendant punched Officer Mayr in the neck/collarbone area with his fist glancing up to the Adam's apple; and (3) a stab to the chest area with the pen that broke Officer Mayr's radio microphone. Claiming that he presented multiple defenses to these different theories of guilt, defendant asserts the trial court had a sua sponte duty to give a unanimity instruction.

Defendant is wrong; the evidence showed no more than a single battery on Officer Mayr. Defendant struck Officer Mayr one time, in the neck/collarbone area with a closed fist. There was a question as to whether defendant had the pen in his fist when he delivered the blow. The defense argued defendant did not have the pen, and the prosecutor argued the evidence supported an inference that the pen was defendant's, but whether defendant had the pen was irrelevant as he was guilty in either case. Since there was only a single blow, a rational juror could not find that defendant did not punch Officer Mayr but nonetheless hit him with the pen. The pen was no more than circumstantial evidence of defendant's intent to harm Officer Mayr.

Citing *People v. Ervine* (2009) 47 Cal.4th 745 and *People v. Stankewitz* (1990) 51 Cal.3d 72, defendant points out that it is not enough that the alleged acts are so closely connected as to form one transaction. He notes that a unanimity instruction is required when, in addition to the acts being closely connected, the " 'defendant offers *essentially*

the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.' " (*Ervine*, at p. 788, quoting *Stankewitz*, at p. 100, italics added.)

Here, there was but a single defense to this case -- that defendant did not strike Officer Mayr, but merely accidentally ran into him. Consequently, his contact with Officer Mayr was not willful.[3] The evidence did not show, and the prosecutor did not argue, that defendant committed a battery by running into Officer Mayr. As for defendant's contention that he did not use the pen was a separate defense for purposes of the unanimity instruction, we disagree. Defendant's contention that he did not use the pen was "*essentially* the same defense" to the battery -- any contact on his part was accidental. And there was no reasonable basis for the jury to distinguish between the single punch and the use of the pen as part of that punch. Nor was there a reasonable basis for the jury to view the claim he did not have the pen in his hand when the single blow was delivered as different from the defense that could exculpate him from the crime -- that his contact with Officer Mayr was accidental.

Since there was no more than a single blow and a single defense to that contact, the trial court was under no duty to give a unanimity instruction.

II. Proposition 36

Defendant contends Proposition 36 retroactively applies to his sentence.

Defendant's crime is neither a violent nor a serious felony. (§§ 1192.7, subd. (c), 667.5, subd. (c).) He was sentenced on April 20, 2012. On November 6, 2012, the voters passed Proposition 36, which limits three strikes sentences to where the current crime is a

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[3] Section 4501.5 states in pertinent part: "Every person confined in a state prison of this state who commits a battery upon the person of any individual who is not himself a person confined therein shall be guilty of a felony[.]" Battery is elsewhere defined as "any willful and unlawful use of force or violence upon the person of another." (§ 242.)

serious or violent felony or where the prosecution had pled and proven a disqualifying factor. (See §§ 1170.12, subd. (c), 667, subd. (c); *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168 (*Yearwood*).) In all other cases, a defendant will now be sentenced as a second strike offender. (*Yearwood*, at p. 168.) Had defendant been sentenced after Proposition 36, he would not be subject to a 25-year-to-life sentence under the three strikes law.[4]

Defendant argues that Proposition 36 must be applied to him retroactively. We disagree for the reasons discussed in *Yearwood*, *supra*, 213 Cal.App.4th at page 168.

DISPOSITION

The judgment is affirmed.

MURRAY, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.

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[4] Although defendant was committed to the custody of the Department of Mental Health, his three strikes sentence is still relevant, as he may be committed to a mental hospital for no more than the maximum term of confinement for his offense (§ 1026.5, subd. (a)(1)), and defendant must serve the remainder of his sentence in prison if he establishes his sanity before the end of his term (§ 1026.2, subd. (m)).