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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. OSCAR EDWARD VARGAS, Defendant and Appellant.	B269754 (Los Angeles County Super. Ct. No. LA081410)

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin Larry Herscovitz, Judge. Affirmed.

Law Office of Tyrone A. Sandoval, Tyrone A. Sandoval, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney

General, Steven D. Matthews, Supervising Deputy Attorney General, David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Oscar Vargas of carrying a concealed dirk or dagger. (Pen. Code, § 21310[1].) The trial court found that defendant suffered one prior conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)) and served two prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced defendant to five years in state prison.

On appeal, defendant contends that section 21310, the statute that criminalizes carrying a concealed dirk or dagger, and section 16470, the statute that defines "dirk" and "dagger," together are facially overbroad and thus unconstitutional. We affirm.

BACKGROUND

Around 1:30 p.m. on July 20, 2015, defendant entered a 7-Eleven store in Reseda. Defendant purchased a hot dog and went to the condiments island. A woman in a wheelchair and her son

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[1] All statutory references are to the Penal Code unless otherwise noted.

also entered the store, purchased a hot dog, and went to the condiments island. At some point, the woman asked defendant to move so she could access the condiments.

Defendant became angry and aggressive, rushed toward the woman, and called her a "cripple." The store owner called 911. The police arrived, and an officer escorted defendant outside. The officer conducted a pat down search of defendant and found a serrated kitchen knife inside defendant's waistband. The knife was underneath defendant's shirt and fully concealed from the officer's vision.

DISCUSSION

Defendant contends that sections 16470 and 21310, which, together, define and criminalize carrying a concealed dirk or dagger, are facially overbroad and unconstitutional because they violate a "fundamental personal liberty." The apparent fundamental personal liberty defendant contends the statutes violate is the "right to carry concealed on the person items designed and carried for an innocent purpose."

I. Constitutional Principles

"When evaluating a facial challenge to the constitutional validity of a statute, we consider the text of the statute itself, not its application to the particular circumstances of the individual.

(*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, [40 Cal.Rptr.2d 402, 892 P.2d 1145].) If a statute is constitutional in its general and ordinary application, the statute is not facially unconstitutional merely because 'there might be some instances in which application of the law might improperly impinge upon constitutional rights.' (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 347, 66 Cal.Rptr.2d 210, 940 P.2d 797; see *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126, [90 Cal.Rptr.3d 701, 202 P.3d 1089].) [Fn. omitted.] Any overbreadth in a generally constitutional statute can be cured by a case-by-case analysis of the particular fact situation. (See *Guardianship of Ann S., supra,* 45 Cal.4th at p. 1132; *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 311 [86 Cal.Rptr.3d 674].)" (*People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1373-1374.)

II. Dirk and Dagger Statutes and Analysis

Section 21310 provides, "Except as provided in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, any person in this state who carries concealed upon the person any dirk or dagger is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h)

of Section 1170." As relevant here, section 16470[2] defines a "dirk" or "dagger" as "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."

In *People v. Rubalcava* (2000) 23 Cal.4th 322 (*Rubalcava*), our Supreme Court decided whether the dirk and dagger statute[3] required proof of a defendant's specific intent to use a concealed instrument as a stabbing weapon as an element of the offense. (*Id.* at p. 328.) In so doing, the Court considered and rejected the defendant's argument that the dirk and dagger statute was unconstitutionally overbroad if it did not require proof of such specific intent. (*Id.* at p. 331.) Relying on *People v. Aubrey* (1999)

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[2] In full, section 16470 provides: "As used in this part, 'dirk' or 'dagger' means 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. A nonlocking folding knife, a folding knife that is not prohibited by Section 21510, or a pocketknife is capable of ready use as a stabbing weapon that may inflict great bodily injury or death only if the blade of the knife is exposed and locked into position."

[3] When the Supreme Court decided *Rubalcava, supra,* 23 Cal.4th at pages 327-328, the offense of carrying a concealed dirk or dagger and the definition of a "dirk" or "dagger" were contained in a single statute—section 12020. After a subsequent amendment not relevant here, subdivision (a)(24) of section 12020, which defined dirk or dagger, was repealed and reenacted as section 16470. (*People v. Castillolopez* (2016) 63 Cal.4th 322, 328.)

70 Cal.App.4th 1088 (*Aubrey*), and *People v. Oskins* (1999) 69 Cal.App.4th 126 (*Oskins*), the defendant in *Rubalcava, supra,* 23 Cal.4th 322, "argue[d] that the Legislature could not have intended to make a felon out of '[t]he tailor who places a pair of scissors in his jacket[,] . . . the carpenter who puts an awl in his pocket' (*Oskins, supra,* 69 Cal.App.4th at p. 138), 'the auto mechanic who absentmindedly slips a utility knife in his back pocket before going out to lunch[,] . . . the shopper who walks out of a kitchen-supply store with a recently purchased steak knife "concealed" in his or her pocket, . . . the parent who wraps a sharp pointed knife in a paper towel and places it in his coat to carry into a PTA potluck dinner, or . . . the recreational user who tucks his "throwing knives" into a pocket as he heads home after target practice or a game of mumblety-peg' (*Aubrey, supra,* 70 Cal.App.4th at p. 1102)." (*Rubalcava, supra,* 23 Cal.4th at p. 331.)

The Supreme Court ultimately held in *Rubalcava*, 23 Cal.4th at page 331 that the dirk and dagger statute did not require proof of specific intent and explicitly rejected the defendant's constitutional overbreadth argument, explaining that "[a]lthough the potentially broad reach of section 12020 in the absence of a specific intent element is troubling, these concerns do not render the statute unconstitutional." In so doing, the Supreme Court disapproved *Aubrey, supra,* 70 Cal.App.4th 1088

and *Oskins, supra,* 69 Cal.App.4th 126 to the extent they were inconsistent with its holding. (*Rubalcava*, *supra,* 23 Cal.4th at p. 334, fn. 8.) The Supreme Court noted, "A statute is only overbroad if it 'prohibits a "'substantial amount of constitutionally protected conduct."' [Citation.]" (*Id.* at p. 333.) It then rejected the defendant's assertion that the omission of a specific intent requirement in the dirk and dagger statute would result in a substantial infringement of rights guaranteed by the First and Fourth Amendments, observing that the defendant cited only "general examples of the statute's overbreadth"—apparently referring to the defendant's reliance on examples hypothesized in *Aubrey, supra,* 70 Cal.App.4th 1088 and *Oskins, supra,* 69 Cal.App.4th 126. The Supreme Court thus concluded that the defendant "describes *no* instances where the statute actually infringes on constitutionally protected conduct, and we can think of none. Even though section 12020 may seem overbroad as a matter of common sense, we will not find it *unconstitutionally* overbroad without some concrete impairment of constitutionally protected conduct." (*Rubalcava, supra,* 23 Cal.4th at p. 333.)

Here, defendant acknowledges that the asserted constitutional right "to carry concealed on the person items designed and carried for an innocent purpose" is not an "explicitly stated" or guaranteed right under the United States or California

constitutions, but he argues the right is "rooted in the right to travel (as it relates to the carrying of items from place to place) and the right to privacy (as it relates to the concealment of items carried on the person)." Relying on *Aubrey, supra,* 70 Cal.App.4th 1088 and *Oskins, supra,* 69 Cal.App.4th 126, defendant asserts that courts have identified examples of how the dirk and dagger statutes criminalize the right to carry concealed items that are designed and carried for an innocent purpose. He then argues that the Supreme Court in *Rubalcava, supra,* 23 Cal.4th 322 failed to "consider the fundamental personal rights implicated by the statute and therefore wrongly decided that the statute's reach does not infringe upon constitutionally-protected activity."

We disagree with defendant's interpretation of the Supreme Court's analysis in *Rubalcava*. As demonstrated by its express reference to *Aubrey, supra,* 70 Cal.App.4th 1088 and *Oskins, supra,* 69 Cal.App.4th 126 (*Rubalcava, supra,* 23 Cal.4th at p. 331), the consideration of a person's right to carry concealed items that are designed and carried for an innocent purpose was an essential part of the Supreme Court's overbreadth analysis in *Rubalcava*. Furthermore, insofar as defendant contends the Supreme Court's analysis was lacking in that it did not address the statute's purported overbreadth in terms of its claimed effect on the right to travel or right to privacy, or that *Rubalcava* was

simply wrong, defendant's request that we find contrary to the Supreme Court's clear holding is beyond our purview. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["[A]ll tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. . . . It is not their function to attempt to overrule decisions of a higher court"].)

Finally, we note that, in support of his argument that the Supreme Court wrongly decided the constitutional overbreadth issue in *Rubalcava, supra,* 23 Cal.4th 322, defendant argues that the dirk and dagger statutes should be rewritten to pass constitutional muster by incorporating the suggestions set forth in Justice Werdegar's concurring opinion in *Rubalcava.* Defendant's contention misses the crucial point that Justice Werdegar agreed with the majority opinion that the current statutory prohibition on carrying a concealed dirk or dagger might be "overbroad as a matter of common sense," but that "the defect is not a constitutional one." (*Id.* at p. 336, conc. opn. of Werdegar, J.)

Accordingly, we reject defendant's invitation to uproot firmly established Supreme Court precedent by finding sections 21310 and 16470 unconstitutionally overbroad.[4]

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[4] Because we reject defendant's overbreadth claim, we do not address the People's contention that the overbreadth doctrine

DISPOSITION

The judgment is affirmed.

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KIN, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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does not apply outside of the freedoms protected by the First Amendment. (Compare *Schall v. Martin* (1984) 467 U.S. 253, 268, fn. 18 ["[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad"] with *Tobe v. City of Santa Ana, supra,* 9 Cal.4th at p. 1095, fn. 15 [noting that limitation of overbreadth claims to First Amendment violations "is not invariably observed"].)

* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.