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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN CADE,

Defendant and Appellant.

B276959

(Los Angeles County
Super. Ct. No. SA092671)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elden Fox, Judge. Affirmed.

Christian C. Buckley for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Appellant Kevin Cade appeals from a judgment entered following his conviction by jury trial for second degree robbery. (Pen. Code, § 212.5, subd. (c).) Following our independent examination of the entire record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), we conclude no arguable issues exist. Accordingly, we affirm.

PROCEDURAL AND FACTUAL HISTORY

1. PROCEDURAL HISTORY

At appellant's request, he represented himself during trial and sentencing.

Before trial, appellant filed, but subsequently withdrew, a *Pitchess*¹ motion. Appellant also filed a motion to suppress his out-of-court identification, on the ground that he was identified after an unlawful arrest. The motion was denied following a hearing including testimony by the arresting officer, Los Angeles Police Officer Ron Bone. The trial court concluded that the police had probable cause to detain appellant and thus any subsequent identification or recovery of evidence was lawful. Appellant's nonstatutory motion to dismiss and statutory Penal Code section 995 motion were denied, with the court finding that the preliminary hearing transcript "provide[d] sufficient legally authorized evidence to warrant the magistrate's finding on binding the matter over for trial."

When the court denied appellant's request that transcripts be provided for each pretrial appearance, appellant made an oral motion to disqualify the trial judge pursuant to Code of Civil Procedure section 170.1. The court indicated appellant needed to file a written motion. The record does not reflect that appellant filed one.

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

During voir dire, the court did not excuse any jurors for cause, and appellant did not raise any objections to the prosecutor's peremptory challenges to jurors.

The jury found appellant guilty of second degree robbery. Appellant filed a motion for a new trial alleging, among other errors, failures of the police to disclose exculpatory evidence, failure by the court to appoint standby counsel, failure to provide transcripts of pretrial and trial proceedings, and bias by the court and the prosecutor against appellant. The court denied the motion. The court suspended imposition of his sentence, placed appellant on formal probation for three years, and ordered that he serve 139 days in local custody with presentence credit.

2. THE PEOPLE'S EVIDENCE

At trial, the alleged victim, Thomas Correll, did not testify. Although Correll was subpoenaed by appellant, he was not able to be located. The prosecution introduced into evidence a surveillance video of an April 6, 2016 incident between appellant and Correll at Del Taco, which video was played for the jury. The prosecution also called an eyewitness, Isabella Quintero, who identified appellant and the victim on the surveillance video. She testified that appellant and the victim were escorted out of Del Taco by employees because they were fighting over a dark blue bag. She also testified that appellant pushed or struck Correll and took a bag from him.

Officer Bone testified that he responded to the scene of the incident and spoke with Correll, who described the suspect and a blue Adidas duffel bag. Officer Bone then apprehended appellant, who matched the suspect's description and who possessed a blue bag. Officer Bone also authenticated dash-camera footage that showed appellant looking through a blue

bag. Officer Bone testified that Correll subsequently identified the blue Adidas bag as the one that appellant had taken from him.

Based on appellant's objection that the surveillance video from Del Taco did not capture the interactions between him and Correll prior to the incident, the People obtained during the trial additional surveillance footage from Del Taco which included footage of appellant and Correll, respectively, entering the restaurant some time before the incident between them. The video, which was played for the jury after being authenticated, showed Correll entering Del Taco with the blue Adidas bag some time after appellant had entered the restaurant.

3. THE DEFENSE EVIDENCE

Appellant called Los Angeles Police Detective Jason Archie as a witness. Appellant questioned him about an April 7, 2016 "follow-up investigation report" summarizing the incident leading to the charged offense. Appellant had Archie orally read the report twice and Archie confirmed that the report did not indicate the number of times appellant had punched Correll.

Appellant also indicated that he intended to call Detective Kevin Raines, one of the officers who responded to the scene of the crime, but Detective Raines was not present in court and appellant did not show proof that he had been subpoenaed. Appellant made an offer of proof regarding the testimony of Detective Raines, indicating that this detective had testified at the preliminary hearing that a witness told him appellant had ridden off on a bicycle. Appellant asserted this proposed testimony was inconsistent with other prosecution evidence. The court responded that this proposed testimony would be inadmissible hearsay. Appellant also indicated he intended to

elicit from Detective Raines that the Del Taco employees called the police because of the conduct of Correll, not appellant. Finally, appellant intended to question Detective Raines about his efforts to obtain the surveillance video.

Appellant indicated he also wished to call David Berger and Shariz Khalid, deputy district attorneys originally assigned to the case. Appellant indicated his intention to question them about their possession of the surveillance video from Del Taco and about their plea bargain offers. The court sustained its own objection to them being called as witnesses on the ground that the intended topics for questioning were irrelevant. Appellant also indicated he wished to call District Attorney Jackie Lacey as a witness, to confirm if it was correct that Berger was on vacation, but the court responded that Lacey did not schedule the district attorneys' vacations and the court questioned the relevance of her testimony. Appellant ultimately did not seek to call Lacey. Similarly, although initially appellant indicated he wished to call Del Taco employee Elizabeth Mateo, whom he had subpoenaed, ultimately he rested without calling her as a witness.

DISCUSSION

After review of the record, appellant's court-appointed appellate counsel filed an opening brief asking this court to review the record independently pursuant to *Wende, supra*, 25 Cal.3d 436.

On March 8, 2017, we advised appellant that he had 30 days within which to submit any contentions or issues that he wished us to consider. Upon appellant's request, we granted him additional time to file a supplemental brief. On June 7, 2017, appellant filed a supplemental brief, raising alleged errors at

trial, including: (1) the trial court's refusal to allow him to call witnesses; (2) the court's failure to appoint standby counsel; (3) the court's denial of appellant's motion to disqualify the trial judge; (4) the court's denial of his *Pitchess* motion; (5) the court's denial of his motion to suppress; and (6) the denial of his right to be tried by a jury of his peers. Further, appellant contends that the trial court was biased against him because of his pro. per. status. Appellant also raises a number of other issues that do not relate to his 2016 conviction. We do not address those issues because we have no jurisdiction to consider them.

As to the court's alleged refusal to permit appellant to call witnesses in his defense, our review of the record demonstrates that the trial court ruled that appellant would not be able to call two witnesses -- Deputy District Attorneys David Berger and Shariz Khalid -- because the intended subjects of their testimony were irrelevant. The trial court did not abuse its discretion in deeming that the subjects of these attorneys' efforts to obtain the Del Taco video and reach a negotiated disposition with appellant were irrelevant. As for the other witnesses that appellant wished to call, appellant either failed to subpoena them or chose to rest his case without calling them.

We also find no abuse of discretion in the court's failure to appoint standby counsel to assist appellant, who insisted on representing himself. "[A] defendant who elects to represent himself or herself has no constitutional right to advisory or standby counsel or any other form of 'hybrid' representation." (*People v. Garcia* (2000) 78 Cal.App.4th 1422, 1430; see *People v. Moore* (2011) 51 Cal.4th 1104, 1119.) Although the Superior Court of Los Angeles County Local Rules require appointment of "standby counsel" when a defendant is charged with a felony and is

granted pro. per. status (Super. Ct. L.A. County, Local Rules, rule 8.43(a)), that “standby counsel does not act as advisory counsel nor provide the defendant with legal advice.” (Rule 8.43(b).) Standby counsel is appointed solely for the purpose of being able to “take over the trial in the event that the defendant’s *pro per* status is revoked or relinquished.” (*Ibid.*) Although such standby counsel was not appointed in this case, at no point did appellant state he wished to relinquish his right to represent himself; therefore, appellant suffered no prejudice as a result of not having standby counsel appointed for the duration of his trial.

As to appellant’s claim that the trial court erroneously denied his motion to disqualify Judge Fox under Code of Civil Procedure section 170.1, the trial court correctly told appellant that an oral motion is not sufficient, and he needed to file a written motion. (See *id.*, § 170.3, subd. (c)(1) [“If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a *written* verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge”].) (Italics added.) Appellant failed to file such a written motion. Moreover, appellant’s remedy for a judge’s failure to recuse himself was by way of a timely writ petition, not an appeal. (See *id.*, § 170.3, subd. (d).)

Appellant also contends the trial court erred in failing to grant his *Pitchess* motion. However, the record plainly reflects that appellant voluntarily withdrew his *Pitchess* motion when he was informed that he needed to serve the police agency 21 days in advance of the hearing.

We further find no abuse of discretion in the court's ruling denying appellant's motion to suppress his out-of-court identification, because the trial court reasonably concluded that the police had probable cause to detain appellant, and thus any subsequent identification of him was lawful.

Appellant's complaint that the jury contained no African-Americans or veterans also is not well-taken. No jurors were dismissed for cause, and appellant failed to make any objections to the prosecutor's peremptory challenges. Accordingly, he cannot complain on appeal about the makeup of the jury panel.

Finally, having reviewed the record in full, we find no support for appellant's claim that the trial court exhibited bias towards him.

We have examined the entire record and are satisfied that no arguable issues exist, and that appellant has, by virtue of counsel's compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate review of the judgment entered against him in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 112-113.)

DISPOSITION

The judgment is affirmed.

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STONE, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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