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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN JASON THOMPSON,

Defendant and Appellant.

B292607

(Los Angeles County  
Super. Ct. No. MA071760)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Daviann L. Mitchell, Judge. Affirmed.

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Randall Conner, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters,  
Assistant Attorney General, Blythe J. Leszkay and Daniel C.  
Chang, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant and appellant John Jason Thompson of one count of possession of a weapon in a penal institution in violation of Penal Code section 4502, subdivision (a).<sup>1</sup> Thompson admitted that he had suffered three strike convictions under the “Three Strikes” law (§§ 667, subd. (b)–(i), 1170.12), as well as three prison priors. (See § 667.5, subd. (b).) The trial court sentenced him to four years in prison, to be served consecutively to the sentence he was already serving for a prior offense.

Thompson contends that the trial court violated his federal and state constitutional right to due process by instructing the jury that the broomstick pieces he was accused of possessing were “weapon[s] of the kind commonly known as a . . . billy” (§ 4502, subd. (a)), thereby relieving the prosecution of its burden to prove one of the elements of the offense. He also argues that his trial attorney rendered ineffective assistance by failing to object to the instruction. We affirm on the ground that any error was harmless.

## **FACTS AND PROCEEDINGS BELOW**

An information charged Thompson with two counts of possession of a weapon in a penal institution. Count 1 was based on an incident that occurred on August 8, 2016, and count 2, on a separate incident March 27, 2017. Because the jury acquitted Thompson on count 1, and the facts of that incident are not relevant to the issues raised in this appeal, we limit our factual discussion to the events pertaining to count 2.

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<sup>1</sup> Unless otherwise specified, subsequent statutory references are to the Penal Code.

On the morning of March 27, 2017, Aaron Altamirano, a corrections officer at the Los Angeles County California State Prison was standing outside the prison dining hall conducting random pat-down searches of inmates. As Thompson exited the dining room, Altamirano instructed him to stand in front of Altamirano and submit to a search. Thompson responded, "Fuck you. You're not searching me" and continued walking. When Thompson ignored a second instruction to stop, Altamirano and his partner, Fred Nichols, approached him. Nichols told Thompson to turn around and place his hands behind his back. Thompson complied, and Nichols began to handcuff him.

Altamirano heard Nichols shout, "Weapon," at which point the two corrections officers forced Thompson to the ground. Thompson attempted to grab an object inside his left sleeve, and Altamirano held Thompson's right arm to prevent him from doing so. Altamirano felt a hard object inside Thompson's right sleeve and suspected it was a weapon. The two officers removed a wooden stick from inside each of Thompson's sleeves, and Nichols cuffed Thompson's hands behind his back.

Altamirano searched Thompson's cell and found a third wooden stick that matched the first two. He determined that the three sticks were pieces of a single wooden broom of the kind inmates use to clean their cells. Prisoners are not allowed to keep brooms in their cells except when cleaning. The broom pieces were heavy enough to be used as a club, and had points sharp enough to be used for stabbing.

Thompson testified in his own defense. He admitted that he broke a broom and carried the broken sticks under his forearms, but he denied they were sharpened. He also admitted that the sticks could be used as weapons and that he knew he

was not allowed to have them in prison. He claimed that he was under the influence of crystal meth and marijuana, and that he carried the sticks with him because he did not want “[t]he police” to come into his cell and take them.

## **DISCUSSION**

In this case, the trial court read an incorrect instruction to the jury at the beginning of the case, recognized its error, and read a correct version of the instruction to the jury just before deliberations began. Thompson contends that the court violated his right to due process by including a written copy of the incorrect instruction to the jury for use during deliberations. We hold that any error was harmless beyond a reasonable doubt.

The prosecution accused Thompson of violating section 4502, subdivision (a) by possessing “weapon[s] of the kind commonly known as a . . . billy.” (§ 4502, subd. (a).) In its oral instructions at the beginning of the two-day trial, the court told the jury that broomstick pieces fit the statutory definition, informing jurors that “[b]roomstick handles are instruments or weapons of the kind commonly known as a billy.” The trial proceeded with opening statements and the direct examination of the first witness for the prosecution. Before testimony resumed the following morning, the court held a hearing regarding jury instructions. Thompson’s attorney objected to the instruction defining broomstick handles as a type of billy. He argued that the jury should be allowed to decide whether possession of broomstick pieces was prohibited by the statute. With the agreement of both parties, the court altered the instruction accordingly. Just before closing arguments on the second day of the trial, the court gave the jury the oral

instruction that the parties agreed to, that “[b]roomstick handles *may be* instruments or weapons of the kind commonly known as a billy. A billy is defined as a short stick or club or bludgeon.” (Italics added.) The written jury instructions that appear in the record on appeal include the original version of the instruction among instructions pertaining to the beginning of the trial, and the second version among instructions read at the end of the trial.

We agree with Thompson that the original version of the instruction misstated the law. The trial court should not instruct the jury that an object fits within the statutory definition of a prohibited weapon unless that question “may be resolved as a matter of law.” (*People v. Mayberry* (2008) 160 Cal.App.4th 165, 169, fn. 5.) In all other instances, the prosecution is required to prove that the object is prohibited, as with any other element of an offense. (See *People v. Hayes* (2009) 171 Cal.App.4th 549, 560 [to convict defendant of possession of a sharp instrument, the prosecution was required to prove that the item was in fact sharp].) The statutory definition of a weapon of the type commonly known as a billy “is purposely broad.” (*People v. Canales* (1936) 12 Cal.App.2d 215, 217.) In barring the possession of a general type of weapon rather than a single specific design, the Legislature aimed “to outlaw instruments which are ordinarily used for criminal and unlawful purposes.” (*Ibid.*) Courts have thus interpreted the statute as forbidding the possession of many different kinds of sticks or bludgeons, not merely billy clubs or batons of the type issued to police or correctional officers.<sup>2</sup> In *People v. Davis* (2013) 214 Cal.App.4th

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<sup>2</sup> The cases we cite in this paragraph regarding the definition of the term “billy” address the possession of weapons

1322, 1330, the court rejected the defendant's argument that a billy must be a short or small object. Instead, it suggested that a range of clubs or bludgeons could be within the statute's prohibition. (See *id.* at pp. 1327-1330.) In *People v. Grubb* (1965) 63 Cal.2d 614, our Supreme Court held that a person could possess an object such as a table leg or baseball bat innocently in some circumstances, yet the same object would be prohibited "when the circumstances of possession demonstrate an immediate atmosphere of danger." (*Id.* at p. 621; accord, *People v. King* (2006) 38 Cal.4th 617, 624.) In light of the deliberately broad nature of the statute's definition, the trial court could not determine as a matter of law whether the broomstick pieces were billies.

The parties disagree about whether the trial court adequately corrected the initial error by changing the wording of the instruction. Thompson concedes that the second version of the instruction, that "[b]roomstick handles *may be* instruments or weapons of the kind commonly known as a billy" (italics added), was legally correct. But he argues that the trial court perpetuated the initial error by including the incorrect instruction along with the correct version in the written instructions the jury received prior to deliberations. He argues that the jury might have relied on the incorrect version of the instruction and convicted him on that basis.

The Attorney General responds that the trial transcript suggests that the jury did not actually receive a written copy of the incorrect instruction. The written version of the incorrect

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outside the context of a penal institution. We see no reason, however, why their reasoning does not apply equally to the possession of the same type of weapon in prison.

instruction appears in the record among the instructions read at the beginning of the trial to introduce the jury to the case and to the nature of jury service. The page numbers of these initial instructions run from one to seven. The correct version of the instruction appears in a second set of instructions pertaining to the end of trial. The second set of instructions includes a new set of page numbers, from one to 11. At the end of trial, the court made statements suggesting that the written instructions the jury received included only the second set. The court told the jury, “[y]ou have now been provided a copy of your jury instructions. I’m going to read *the packet* to you” (italics added). The court then read only the instructions in the second set of jury instructions, without referring to the existence of the first set of instructions or suggesting that they were included in the packet the jury received. After the attorneys finished closing arguments, the court invited the jury “to go to page [nine] of the jury instructions” and then read an instruction regarding jury deliberations. The instruction regarding jury deliberations appears at page nine of the second set of instructions, and the court again did not suggest that the jury had also received a different set of instructions with separate page numbers. The Attorney General argues that we should infer that the trial court gave the jury a written copy of only the second set of instructions.

We need not resolve this question because even if the trial court did give the jury a written copy of the incorrect instruction, that error was harmless. A jury instruction that relieves the prosecution of the burden of proving an element of an offense beyond a reasonable doubt violates the defendant’s Fourteenth Amendment right to due process. (*People v. Kobrin* (1995) 11 Cal.4th 416, 423.) “Conflicting instructions or instructions

that misdescribe an element of an offense are harmless ‘only if “it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” [Citation.] “To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.” ’ ” (*People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217.)

Even under that strict standard, the alleged error in the instructions did not prejudice Thompson. The prejudicial potential of an erroneous instruction turns in part on how the parties rely on the instruction in argument. Thus, in *People v. Hayes, supra*, 171 Cal.App.4th 549, the court held that an erroneous instruction regarding the definition of a type of weapon was prejudicial in part because the instruction was “the centerpiece of the prosecutor’s closing argument.” (*Id.* at p. 561.) By contrast, when the parties emphasize the correct interpretation of the law in their closing arguments, “any theoretical possibility of confusion [is] diminished.” (*People v. Garceau* (1993) 6 Cal.4th 140, 189.) In this case, the prosecution did not rely on the incorrect instruction during closing arguments. Instead, the prosecutor said accurately that “[t]he instructions define [billy] for you as [a] club, [a] bludgeon, a stick, which [the broomstick handle] clearly is.” The prosecutor thus argued that it was up to the jury to decide whether the broomstick handle met the definition of a billy. Thompson’s attorney, for his part, stressed the importance of the correct instruction. He argued that the jurors “have to decide beyond a reasonable doubt whether those [broomstick pieces] were billies or weapons that were like bludgeon weapons.”



The instruction was also harmless because Thompson in his testimony essentially conceded the truth of all of the elements of the offense.<sup>3</sup> He admitted that he broke a prison broomstick into pieces, that he kept the pieces, and that he knew the pieces could be used as weapons. This was not a situation in which the jury could reasonably infer that Thompson possessed the items for an innocent purpose, and that they were therefore not prohibited by the statute. (See *People v. Grubb*, *supra*, 63 Cal.2d at p. 621.)

Thompson also argues that the jury could have reasonably inferred that the broomstick pieces, as displayed in a photo shown to the jury, were too small to be “of the kind commonly known as a . . . billy.” (§ 4502, subd. (a).) But as we have seen, the statute’s definition is deliberately broad, and we know of no minimum size or weight requirement. Indeed, the primary physical limitation we can discern from the case law is that the object must be capable of use as a club to strike the victim. (See, e.g., *People v. Grubb*, *supra*, 63 Cal.2d at p. 621; *People v. Canales*, *supra*, 12 Cal.App.2d at pp. 217-218.) We are aware of nothing in the record that casts doubt on whether the broomstick pieces met that requirement. Altamirano testified that “the brooms are pretty thick,” and that the broomstick pieces he found in Thompson’s possession were heavy enough to be used to hit someone. Thompson himself agreed that “[y]ou could use [the sticks] as billy clubs.”

Thompson’s claim of ineffective assistance of counsel fails for the same reason: He cannot demonstrate prejudice. In order

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<sup>3</sup> Thompson testified after the trial court agreed to correct the jury instruction regarding whether broomstick pieces were necessarily billies.

to succeed on a claim of ineffective assistance of counsel, a defendant must show not only that his attorney failed to represent him adequately, but also “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Even if we assume for the sake of argument that the jury received the erroneous written instruction, and that Thompson’s attorney was deficient in failing to notice and object, there is no reasonable probability that that failure affected the outcome of the case.

**DISPOSITION**

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

WEINGART, J.\*

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