Filed 8/3/18 P. v. Membrano CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM SOSA MEMBRANO, Defendant and Appellant.	B280891 (Los Angeles County Super. Ct. No. VA140954)

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Torribio, Judge. Modified and affirmed with directions.

Paul Stubb, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

William Sosa Membrano appeals the judgment entered following a jury trial in which he was convicted on counts 2 and 4 of resisting an executive officer (Pen. Code,[1] § 69) and on count 3 of removing a weapon from a peace officer (§ 148, subd. (b)). Following a bench trial on bifurcated allegations, the trial court found that appellant had served two prior prison terms (§ 667.5, subd. (b)) and was out of custody on bail or released on his own recognizance at the time he committed the current offenses (§ 12022.1). The trial court sentenced appellant to a total term of four years in state prison.[2]

Appellant contends the trial court committed prejudicial error in admitting evidence of appellant's two prior felony theft convictions for impeachment. We disagree and affirm the judgment of conviction. However, the parties assert that the trial court erred by imposing a concurrent sentence on count 3 rather than staying it under section 654. We agree and modify the judgment to stay the sentence on count 3. Finally, appellant requests, and respondent does not oppose, appellate review of the hearing on appellant's *Pitchess*[3] motion for abuse of discretion. Having conducted our review of the in camera proceedings, we find no abuse of discretion.

---

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

[2] The trial court imposed the upper term of three years on count 2, concurrent two-year sentences on counts 3 and 4, and one year for one of the prior prison terms. (§ 667.5, subd. (b).) The court also stayed a term of two years for the "on bail" enhancement. (§ 12022.1.)

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

FACTUAL BACKGROUND

About 9:45 p.m. on October 23, 2015, South Gate Police Officer Leland arrested appellant and Dawn Garcia. They were placed in separate holding cells about 20 feet apart at the South Gate jail facility. Appellant was agitated, raising his voice and arguing with the officers in the station. Appellant told Garcia not to cooperate with the police and ignored officers' warnings to stop talking to her. Officers Munoz and Pleak went to appellant's cell to move him to another area of the jail to prevent him from talking with Garcia. Appellant was not handcuffed.

As Officers Munoz and Pleak led appellant down the hallway, he again began raising his voice and became argumentative. Officer Leland joined the other officers as the situation seemed to be escalating. Officers ordered appellant to " 'face the wall' " several times, but appellant kept turning around and resisting efforts to subdue him. Officer Pleak pulled appellant's arm behind his back. As the officer started to walk appellant through an open doorway, appellant grabbed the doorframe, spun around, and threw three punches at Officer Pleak.

An alarm was sounded and other officers joined the effort to restrain appellant. Appellant was taken to the ground, where he continued to struggle, kicking and throwing punches at the officers. As Officer Munoz tried to force appellant's arm behind his back, appellant grabbed the officer's Taser and yanked it off the holster. Appellant dropped the Taser on the floor after Officer Munoz struck him several times, and someone pushed it away out of appellant's reach. Sometime during the struggle Officer Leland felt a strong tug on his Taser and delivered several blows

to appellant's torso, causing appellant to pull his arm away without removing the weapon.

Video of the incident and its aftermath showed Officer Orozco pick up Officer Munoz's Taser from the ground, and the audio recording captured Officer Munoz asking, "Does somebody have my taser?" Officer Leland can also be heard saying that appellant had tried to take his Taser. During the officers' discussion, appellant interjected, "I grabbed your taser?" According to the defense transcript of the recording, appellant then added, "You guys are crazy."

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of Appellant's Two Prior Theft Convictions for Impeachment

A. *Relevant background*

In its case-in-chief, the prosecution played video of the confrontation between appellant and the officers. The audio of the incident was played separately. The prosecution and defense each prepared its own transcript of the audio recording, which contained different interpretations of the conversation between the officers immediately following the struggle. According to both transcripts, appellant interjected, "I grabbed your taser?" during the officers' discussion. But while the prosecution transcript basically ends there,[4] the defense transcript continues:

---

[4] The prosecution's transcript concludes with two additional comments:

"O: Shhshh, hey, just be quiet.

"D [*sic*]: Are you guys gonna start taking him back (2:43)."

"(2:23) [Officer]: He just caught a case from the dta [*sic*].

"(2:24) [Appellant]: I didn't. I grabbed your—

"(2:25) [Officer]: Ok. Be quiet.

"(2:26) [Officer]: Shhhhh.

"(2:26) [Appellant]: You guys are crazy.

"(2:36) [Officer]: I know you had a rough day.

"(2:37) [Officer]: Do not pick a fight with member of us.

"(2:39) [Appellant]: See it's that way.

"(2:42) [Officer]: Are you guys going to start taking him back?

"(2:43) [Officer]: Ya we are."

Defense counsel sought to introduce the entire recording along with the defense transcript. The court ruled that the entire recording could be played during the prosecution's case, but each side would use its own transcript in examining and cross-examining witnesses. It would then be up to the jury to determine what was actually said on the recording.

The prosecution distributed its transcript to the jury and played the audio during the direct examination of Officer Leland. On cross-examination, defense counsel asked the officer if he heard appellant say, "You guys are crazy," during the officers' discussion about appellant taking Officer Munoz's Taser. Officer Leland responded that he did not hear appellant make that statement. Counsel then handed out the defense transcript to the jury and had the recording played at maximum volume, but did not ask the witness any further questions about appellant's statement. Later during the cross-examination of Officer Munoz, the defense replayed portions of the audio recording. The officer testified that he heard appellant say, "I grabbed your taser?" followed by, "You guys are crazy."

After the recording was played and the officers were cross-examined by the defense as to appellant's denial about taking the Taser, the prosecution sought to introduce evidence of appellant's prior felony convictions for impeachment. The district attorney conceded that the recording had been admitted during the People's case-in-chief, but argued that the statement, "You guys are crazy" by which appellant denied taking the Taser, was not in the prosecution's transcript and came in only through the defense transcript and cross-examination of the People's witnesses.

The trial court found that the defense had presented appellant's exculpatory statement to the jury, and under the rationale of *People v. Jacobs* (2000) 78 Cal.App.4th 1444, 1446 (*Jacobs*), and *People v. Little* (2012) 206 Cal.App.4th 1364, 1374 (*Little*), the court concluded that appellant's prior felony convictions were admissible for impeachment. The court instructed the jury that "the parties have stipulated that Mr. Membrano was convicted of two crimes of theft in 2013." The court also told the jury: "If you find that a witness has been convicted of a felony, you may consider that fact only in evaluating the credibility of the witness's testimony. The fact of a conviction does not necessarily destroy or impair the witness' credibility. It is up to you to decide the weight of that fact and whether the fact makes the witness less believable."

B. *Analysis*

Evidence Code section 1202 allows a party to attack the credibility of a hearsay declarant with any evidence that would have been admissible had the declarant been a witness at the hearing. A prior felony conviction is one way to attack the credibility of a witness (Evid. Code, § 788), and the California Constitution permits the use of a prior felony conviction involving moral turpitude for impeachment in a criminal proceeding (Cal.

Const., art. I, § 28, subd. (f); *People v. Watson* (2008) 43 Cal.4th 652, 685). Taken together, these provisions permit the prosecution to use a defendant's prior felony conviction " 'to attack his credibility when, at his own request, his exculpatory statement to the police is admitted into evidence, but he does not testify at trial.' " (*Little*, *supra*, 206 Cal.App.4th at p. 1374, quoting *Jacobs*, *supra*, 78 Cal.App.4th at p. 1446; see also *People v. Brooks* (2017) 3 Cal.5th 1, 52.) Appellant contends the holdings of *Little* and *Jacobs* have no application here, and the trial court erred in admitting the evidence of his prior convictions in this case. We disagree.

We first reject appellant's attempt to distinguish *Little* and *Jacobs* on the ground that by playing the entire audio recording, it was the prosecution, not the defense, that presented appellant's hearsay declaration to the jury. In so arguing, appellant overlooks the fact that the prosecution initially sought to play only a portion of the recording, while the defense requested, and the court allowed the entire recording to be played. Defense counsel even admitted that had the audio not been played in its entirety by the prosecution, appellant would have introduced it as an important element of the defense.

Moreover, the transcript of the recording presented by the prosecution did not include appellant's exculpatory statement, nor did the prosecution elicit any testimony about the declaration. Instead, it was defense counsel who questioned Officer Leland about whether he heard appellant say, "You guys are crazy," during the officers' discussion about appellant taking Officer Munoz's Taser. And when the witness responded that he did not hear that, defense counsel handed out the defense version of the transcript and had the recording played at maximum volume, thereby presenting appellant's statement directly to the jury.

The defense then emphasized the exculpatory nature of the declaration by replaying portions of the audio recording during the cross-examination of Officer Munoz, and repeatedly referring to appellant's exclamation, "You guys are crazy," immediately after questioning the accusation that he grabbed a Taser.

Appellant would also distinguish *Little* and *Jacobs* on the ground that his statement was a spontaneous utterance not made in response to a law enforcement inquiry. He further claims that, unlike the statements in *Little* and *Jacobs*, the declaration here was not necessarily exculpatory, but was "res gestae." The spontaneous utterance exception to the hearsay rule and the res gestae doctrine are both irrelevant here. "Res gestae," literally meaning " ' "the thing done" ' " (*People v. Keelin* (1955) 136 Cal.App.2d 860, 868), is a "spontaneous declaration made by a person immediately after an event and before the mind has an opportunity to conjure a falsehood." (Black's Law Dict. (6th ed. 1990) p. 1305, col. 1.) Like a spontaneous utterance, res gestae operates as an exception to the hearsay rule, rendering "acts and declarations which constitute a part of the things done and said admissible in evidence, even though they would otherwise come within the rule excluding hearsay evidence or self-serving declarations." (*Ibid.*)

Whether admitted as a spontaneous utterance or res gestae, however, the legal basis for admitting appellant's statement is irrelevant, and the distinctions appellant draws between this case and *Little* and *Jacobs* are meaningless. Appellant was charged with removing a weapon from a peace officer. Thus, as a contemporaneous declaration of appellant's nonculpability, the statement in response to the accusation was plainly exculpatory. By eliciting testimony about the statement from the officers and presenting the defense version of the

transcript to the jury that included appellant's declaration, the defense sought to prove appellant's innocence by showing that appellant had immediately and unequivocally denied taking a Taser from Officer Munoz. This evidence, which was integral to appellant's defense, squarely placed appellant's credibility in issue, and thereby opened the door for impeachment.

As the court in *Little* explained, "[t]he point of *Jacobs* is that if a defendant is going to put his hearsay declaration into evidence, he cannot preclude the prosecution from testing his credibility." (*Little*, *supra*, 206 Cal.App.4th at p. 1376.) Because appellant's credibility was at issue, the prosecution was entitled to impeach appellant, regardless of the legal basis for admitting his exculpatory statement. (*Little*, *supra*, 206 Cal.App.4th at pp. 1376–1377; *Jacobs*, *supra*, 78 Cal.App.4th at p. 1446.)

Finally, appellant contends the trial court erred in admitting his prior felony convictions because the probative value of the evidence was substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice under Evidence Code section 352. He also claims he was denied a fair trial because he would not have sought admission of the statement had he known it would subject him to impeachment. These claims lack merit.

Appellant's assertion that he would not have sought admission of the declaration "had he known he would be sandbagged with impeachment" directly contradicts defense counsel's admission in response to the trial court's inquiry that he would have introduced the entire audio recording himself if the prosecution had not done so. We further find that the trial court's thorough and contemporaneous limiting instruction avoided any potential for unfair prejudice, and we presume the jury understood and followed the court's instruction. (*People v. Clark*

(2016) 63 Cal.4th 522, 573 [recognizing the "usual presumption that a jury will follow limiting instructions"]; *People v. Boyette* (2002) 29 Cal.4th 381, 453.) In short, we find no abuse of discretion in the trial court's admission of the limited evidence of appellant's prior felony convictions for impeachment in this case.

II. The Sentence on Count 3 Should Be Stayed

Appellant was convicted both of resisting Officer Munoz (§ 69) in count 2 and of removing Officer Munoz's weapon (§ 148, subd. (b)) in count 3. The trial court imposed the upper term of three years on count 2, and a concurrent middle term of two years on count 3. The parties contend that the trial court erred by imposing a concurrent sentence for count 3 instead of staying it under section 654. We agree.

"Section 654 precludes multiple punishments for a single act or indivisible course of conduct." (*People v. Hester* (2000) 22 Cal.4th 290, 294.) " 'Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor. 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.' " (*People v. Britt* (2004) 32 Cal.4th 944, 951–952; *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1262.) The prohibition against multiple punishments under section 654 applies equally to concurrent and consecutive sentences. (*People v. Lawrence* (2000) 24 Cal.4th 219, 226 ["section 654 does not allow *any* multiple punishment," regardless of whether multiple convictions are sentenced concurrently or consecutively].)

Here, appellant's convictions for resisting in count 2 and for taking a weapon in count 3 involved the same victim: Officer Munoz. There is no evidence that appellant harbored any secondary objective in taking Officer Munoz's Taser during the course of the struggle with him. Finally, the trial court made no

express or implied finding that the two offenses involved multiple intents or objectives. Under these circumstances, the sentence on count 3 must be stayed under section 654.

III. The *Pitchess* Hearing

The trial court granted appellant's *Pitchess* motion relating to any reported instances of excessive use of force contained in the personnel records of Officers Munoz, Leland, and Pleak and conducted an in camera hearing to determine which, if any of the records were discoverable. The trial court found no discoverable material. Appellant has requested that this court independently review the sealed records of the *Pitchess* hearing to assess whether the trial court should have ordered any material turned over to the defense.

We have reviewed the sealed transcript of the proceedings and conclude that the trial court did not abuse its discretion in concluding the officers' records contained no discoverable documents. (*People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Landry* (2016) 2 Cal.5th 52, 73–74.)

DISPOSITION

The judgment is modified to stay the sentence on count 3. The trial court is ordered to correct the minute order and to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment to reflect the modification. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.