Filed 8/20/18 P. v. Leffler CA2/3

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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. CODY WILLIAM LEFFLER, Defendant and Appellant.	B283175 (Los Angeles County Super. Ct. No. VA143145)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael A. Cowell, Judge. Affirmed.

Law Offices of James Koester and James Koester, 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, Margaret E. Maxell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Cody William Leffler of possession of a billy or blackjack, and possession of a short-barreled rifle or shotgun. Leffler contends the trial court's response to one of the jury's questions was erroneous, and requires reversal of his conviction for possessing a billy. We disagree, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

On October 19, 2016, at approximately 3:45 p.m., Los Angeles County Sheriff's Department deputies and detectives executed a search warrant at 9104 Alondra Boulevard in the City of Bellflower, a vacant storefront located in a strip mall. When deputies entered, Leffler was alone on the premises, in the vicinity of a large safe. Evidence indicated Leffler was living at the location and had access to the safe.[1] Inside the safe, detectives discovered a collapsible "ASP" metal baton and an unregistered, sawed-off shotgun. The baton was comprised of three pieces. It could be telescoped out with a flick of the wrist, and collapsed by striking it on a hard surface.

During cross-examination, a detective testified that he had observed Leffler acting as a security guard at various events in the City of Bellflower. However, he had never seen Leffler

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[1] A room in the back of the business contained furniture, a bed, clothing, and a bathroom. A minivan registered to Leffler was parked outside the business. Leffler told the deputies that he had a key to the business's front door. A wallet containing a social security card and credit cards bearing Leffler's name was located on a desk in the room, along with a key to the safe. Another wallet containing Leffler's identification was found in the safe.

carrying a baton. Another detective testified that he did not know whether a security guard was allowed to carry a baton.

The defense presented no evidence.

2. *Procedure*

The jury convicted Leffler of possession of a billy or blackjack (Pen. Code, § 22210)[2] and possession of a short-barreled rifle or shotgun (§ 33210). The trial court suspended imposition of sentence and placed Leffler on formal probation for a period of three years, on condition he serve 180 days in county jail. It imposed a restitution fine, a suspended probation revocation restitution fine, a court operations assessment, and a criminal conviction assessment. Leffler appeals.

DISCUSSION

The trial court did not commit prejudicial instructional error

1. *Additional facts*

The trial court instructed the jury with CALJIC No. 12.40, regarding illegal possession of a billy or blackjack. That instruction stated, in pertinent part: "Every person who possesses any weapon of the kind commonly known as a blackjack, leaded club or billy club is guilty of a violation of Penal Code section 22210, a crime."[3]

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[2] All further undesignated statutory references are to the Penal Code.

[3] The instruction also defined actual and constructive possession, and the court additionally gave CALJIC No. 1.24, to the same effect. Leffler does not dispute that he possessed the collapsible baton and the short-barreled shotgun.

The verdict form provided to the jury for count 1, possession of a billy, used the following language: "We, the Jury in the above-entitled action, find the Defendant, Cody William Leffler, guilty of the crime of Possession of a Billy[,] Blackjack, Etc[.], in violation of Penal Code Section 22210, a felony as charged in Count 1 of the information." (Some capitalization omitted.) During deliberations, the jury sent a note to the trial court, apparently referencing the verdict form language. The note queried: "Does the 'etc.' include a collapsible baton? Can anyone legally carry a collapsible baton?"

Consulting with the parties, the trial court proposed that it would answer yes to the first question, and no to the second. Defense counsel opined that security guards, as well as peace officers, were legally permitted to carry batons. The prosecutor agreed that "[t]here are certain kinds of security guards and there is a section that it falls under," but the prosecutor was unfamiliar with the specifics of the law. Because proceedings were about to conclude for the day, the trial court took the matter under consideration.

The following day, the court observed that under section 22295, subdivision (b), a uniformed security guard was not prohibited from carrying a wooden club or baton under certain circumstances. The court indicated it would so inform the jury. In regard to the jury's first question, the court indicated it would inform the jury that a metal collapsible baton was "included in the et cetera." Defense counsel did not object or request any additional instruction or clarification.

The court then informed the jury: "[L]ate yesterday afternoon you submitted the following question[:] 'Does the et cetera include a collapsible baton.' [¶] Yes, that would be subject

to that statute. [¶] The next question is, 'Can anyone legally carry a collapsible baton?' [¶] And I will indicate this to you; that section 22295(b) of the California Penal Code provides that uniformed security guards regularly employed may carry wooden clubs or batons made of wood."

2. *Discussion*

Leffler contends the trial court prejudicially erred by instructing that "the collapsible baton was a billy or blackjack without further elaboration." He complains that the court's answer relieved the prosecution of proving an element of the offense, and the court should have further instructed the jury to consider the totality of the circumstances regarding his possession of the baton. We discern no error and no prejudice.

A trial court has a sua sponte duty to instruct the jury on the general principles of law relevant to the issues raised by the evidence, including the elements of a charged offense. (*People v. Townsel* (2016) 63 Cal.4th 25, 58; *People v. Mil* (2012) 53 Cal.4th 400, 409; *People v. Baugh* (2018) 20 Cal.App.5th 438, 442 (*Baugh*).) When a jury asks a question after retiring for deliberations, section 1138 requires that the court provide information the jury desires on points of law. (*People v. Boyce* (2014) 59 Cal.4th 672, 699–700; *People v. Hodges* (2013) 213 Cal.App.4th 531, 539.) We independently determine whether the instructions given correctly stated the law, and whether an instruction effectively directed a finding adverse to a defendant by removing an issue from the jury's consideration. (*People v. Baugh*, at p. 442; *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

Section 22210[4] prohibits the possession of "any leaded cane, or any instrument or weapon of the kind commonly known as a billy, blackjack, sandbag, sandclub, sap, or slungshot . . . ."[5] A billy has been described as " 'a bludgeon, as one for carrying in the pocket; a policeman's club.' " (*People v. Mulherin*, *supra*, 140 Cal.App. 212, 216.) Other definitions of "billy" or "billy club" include: a heavy, usually wooden weapon for delivering blows (Webster's 3d New Internat. Dict. (2002) p. 216); a short, stout stick used mainly by police officers to defend themselves when

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[4] The predecessor statute to section 22210 was former section 12020. Effective January 1, 2012, former section 12020 was repealed and the pertinent language was reenacted without substantive change in section 22210. (*Baugh*, *supra*, 20 Cal.App.5th at p. 443, fn. 2; *People v. Davis* (2013) 214 Cal.App.4th 1322, 1325, fn. 1.)

[5] Most of the items prohibited by section 22210 " 'belong to a certain species of weapon' " with similar characteristics, namely, they are " 'short, easily concealed upon the person and so weighted as to constitute effective and silent weapons of attack.' " (*People v. Mayberry* (2008) 160 Cal.App.4th 165, 170.) A "slungshot" is "a striking weapon consisting of a small mass of metal or stone fixed on a flexible handle or strap." (<http://www.Merriam-Webster.com/dictionary/slungshot.html> [as of August 20, 2018]; *People v. Mulherin* (1934) 140 Cal.App. 212, 214.) A "blackjack" is a "hand weapon typically consisting of a piece of leather-enclosed metal with a strap or springy shaft for a handle." (<http://www.Merriam-Webster.com/dictionary/blackjack.html> [as of August 20, 2018]; *People v. Mulherin*, at p. 214.) A "sap" is a club, blackjack, or other object generally used as a bludgeon. (*People v. Mayberry*, at p. 170.) A sandclub or sandbag is a tube of strong, flexible material filled with sand, by which a heavy blow may be struck, and is a form of sap. (*Ibid.*)

necessary, and which may also be known as a baton or truncheon (Vocabulary.com, 2018 (<http://www.vocabulary.com.html> [as of August 20, 2018]); and "a highwayman's club; a bludgeon; . . . a policeman's truncheon" (Oxford English Dict. Online, 2018 (<http://www.oed.com.html> [as of August 20, 2018].)

Leffler's collapsible baton fell within section 22210's ambit. Although the word "baton" is not included in the statutory language, it has long been held that the statute encompasses a variety of bludgeoning instruments. (See *People v. Grubb* (1965) 63 Cal.2d 614, 621 ["the statute embraces instruments other than those specially created or manufactured for criminal purposes; it specifically includes those objects 'of the *kind* commonly known as a billy' "].) For example, in *People v. Mulherin*, *supra*, 140 Cal.App. 212, the defendant was convicted of possession of a blackjack based on his possession of "a large number of" metal washers strung together on rawhide thongs. He contended reversal was required because the weapon was not a blackjack. (*Id.* at p. 213.) Rejecting this argument, the court reasoned that, although the item was more precisely defined as a slungshot, it nonetheless qualified as a kind of blackjack. (*Id.* at p. 214.) The court explained the statutory language was "rather indefinite. It is significant that the legislature did not prohibit possession of a black-jack as such, a slung-shot, as such, a billy, as such, or of a sand-club, a sand-bag, or even metal knuckles, as it might have done, but instead, and very likely with appreciation of the difficulties of nomenclature, forbade ownership of any instrument or weapon 'of the kind', as commonly known. The purpose undoubtedly was to outlaw instruments which are ordinarily used 'for criminal and improper purposes' [citations], and so we have in this act 'a partial inventory of the arsenal of the "public

enemy", the "gangster" ' [citation], and a prohibition against owning anything 'of the kind'." (*Id.* at p. 215; see *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402; *People v. Canales* (1936) 12 Cal.App.2d 215, 217.)

People v. Mercer (1995) 42 Cal.App.4th Supp. 1, concluded that a collapsible baton of the type at issue here was a billy for purposes of the statute. The collapsible baton was " 'used for the same purpose [as a billy] which is a striking motion.' " (*Id.* at p. 5.) With a flick of the wrist, it could be extended and used as a club. (*Ibid.*) The dictionary definitions of billy included, among other things, a club or heavy stick; a truncheon or cudgel; and " 'any staff or baton of authority.' " (*Ibid.*) The collapsible baton, *Mercer* reasoned, "fit[ ] into these definitions." (*Ibid.*) Moreover, former section 12020 provided that law enforcement officers were not prohibited from carrying wooden clubs or batons, nor was it unlawful to supply such batons to officers or certain uniformed security guards. Use of the same "baton" language convinced the court that possession of the collapsible baton was proscribed by former section 12020. (*People v. Mercer*, at p. Supp. 6.; see §§ 22215, 22295.)

Based on the foregoing, it is clear Leffler's collapsible baton likewise qualified as a billy or blackjack for purposes of section 22210. Like the baton in *Mercer*, it could be extended with a flick of the wrist into a striking instrument. Its only apparent purpose was to serve as a bludgeon or cudgel.

Leffler does not dispute that his collapsible baton *could* qualify as a billy within the meaning of the statute, although he argues that most dictionary definitions describe the item as made of wood. However, he complains that the trial court should have left that determination to the jury. Not so. Where there is no

dispute about the item's characteristics and no showing it was used for an innocent purpose, the question of whether an item is a "billy" within the meaning of section 22210 is a question of law for the court, rather than a question of fact for the jury. (*People v. Mayberry*, *supra*, 160 Cal.App.4th at p. 169 & fn. 5.) In *Mayberry*, the defendant was convicted of violating former section 12020 based on his possession of a standard weighted workout glove that contained sand in the palm. The appellate court concluded that such a glove was not a sandclub or sandbag within the meaning of the statute. (*Id.* at p. 167.) The court explained: "At issue are the criteria by which the characteristics that define an item subject to [former] section 12020, subdivision (a)(1), are to be measured. *This may be resolved as a matter of law*," where there is no factual dispute about the item's characteristics. (*Id.* at p. 169 & fn. 5, italics added; see *In re David V.* (2010) 48 Cal.4th 23, 24–25 [bicycle footrest did not, as a matter of law, fall within the statutory definition of metal knuckles]; *People v. Mercer*, *supra*, 42 Cal.App.4th at p. Supp. 4–6.)

People v. Canales concluded the trial court in that case did not err by giving an instruction akin to the trial court's answer to the jury's question here. In *Canales*, the defendant was charged with possession of a blackjack or billy based on his possession of two items: a straight, smooth piece of wood, and a club with nails driven into the large end and covered with tape. (*People v. Canales*, *supra*, 12 Cal.App.2d at p. 217.) The trial court instructed the jury: " 'the instruments before you are within the purview of the instruments announced in the code.' " (*Id.* at p. 218.) Rejecting the defendant's argument that this constituted "an instruction to find for the People on the issue whether the clubs were within the statute," *Canales* reasoned that the trial

court "merely told [jurors] that such instruments were within the field or scope of the act, leaving it for the jury to declare whether these particular clubs actually were illegal weapons. It was, however, within the province of the court to determine in the first instance whether they were such weapons as fell within the purview of the statute." (*Ibid.*)

The same was true here. There was no factual dispute regarding the baton's characteristics. (Cf. *People v. Mayberry*, *supra*, 160 Cal.App.4th at p. 169, fn. 5 ["Whether the court may instruct the jury that a given item is an item 'commonly known' as one of the items proscribed by [former] section 12020, subdivision (a)(1), turns on whether the issue may be resolved as a matter of law. Definitional issues may turn on the facts. That may arise if the factual characteristics of the item are in dispute"].) There was no evidence suggesting the baton was anything other than a bludgeon. The record does not reveal any basis upon which a reasonable jury could have found the baton fell outside the statute's ambit. (See *People v. Grubb*, *supra*, 63 Cal.2d at p. 620, fn. 7 [observing that a 14-inch billy club was the type of object "whose likely criminal use clearly appears from the character of the weapon alone"].) The trial court therefore did not commit instructional error by telling the jury that a collapsible baton "would be subject to that statute."

Leffler further urges that the trial court prejudicially erred by failing to inform the jury it had to consider the totality of the circumstances to determine whether he "possessed the baton as an assaultive type bludgeoning instrument within the meaning of the statute." Again, we disagree.

In enacting the predecessor to section 22210, the Legislature sought to outlaw not only the "classic instruments of

violence and their homemade equivalents," but also "possession of the sometimes-useful object when the attendant circumstances, including the time, place, destination of the possessor, the alteration of the object from standard form, and other relevant facts indicated that the possessor would use the object for a dangerous, not harmless, purpose." (*People v. Grubb*, *supra*, 63 Cal.2d at pp. 620–621, fn. omitted.) Thus, "depending on the circumstances, an ordinary object may constitute a weapon if the defendant possesses it as a weapon." (*Baugh*, *supra*, 20 Cal.App.5th at p. 445.) A defendant "may seek to 'justify his possession of an instrument found under suspicious circumstances by proof of his intent to use it in accordance with its ordinary legitimate design[.]' " (*Id.* at p. 444, quoting *People v. Grubb*, *supra*, 63 Cal.2d at p. 621, fn. 9.) Thus, if the object in question "is not a weapon per se, but an instrument with ordinary innocent uses [e.g., a bat or a table leg], the prosecution must prove that the object was possessed *as a weapon*." (*People v. Fannin*, *supra*, 91 Cal.App.4th at p. 1404; *Baugh*, *supra*, 20 Cal.App.5th at p. 444.) On the other hand, when a defendant is charged with possessing an item with no conceivable innocent function, "proof of mere possession is sufficient." (*People v. Fannin*, at p. 1405.) In either case, intent to immediately use the item as a weapon is not an element of the offense. (*Baugh*, at pp. 444–446; *People v. Fannin*, at p. 1404.)

Applying these principles here, we discern no basis for reversal. First, Leffler did not object to the instructions given or to the trial court's answer to the jury's question about whether the collapsible baton fell within the statute's purview. Nor did he request any additional instruction informing the jury it should consider the surrounding circumstances. " 'When the trial court

responds to a question from a deliberating jury with a generally correct and pertinent statement of the law, a party who believes the court's response should be modified or clarified must make a contemporaneous request to that effect; failure to object to the trial court's wording or to request clarification results in forfeiture of the claim on appeal.' " (*People v. Boyce*, *supra*, 59 Cal.4th at p. 699; *People v. Dykes* (2009) 46 Cal.4th 731, 802; see generally *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 471 [failure to object to modification of instruction forfeits claim on appeal]; *People v. Elder* (2017) 11 Cal.App.5th 123, 136 [a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party requested appropriate clarifying or amplifying language].) Leffler argues that the trial court precluded defense counsel from objecting, but this is incorrect. When the trial court and the parties initially discussed the jury's questions, defense counsel opined that persons other than peace officers could possess a billy, and the trial court cut short counsel's comments. However, defense counsel did not discuss or give any indication he was objecting to the trial court's proposed answer to the jury's *first* question, regarding whether the baton was included within the statute's reach.

And, a tactical reason for counsel's choice not to request an additional instruction informing the jury it should consider the surrounding circumstances readily appears. Prior to trial, the defense successfully moved to exclude evidence of other items found with the sawed-off shotgun and the baton in the safe: another shotgun, a pistol, a leather gun belt, a camouflage tactical vest, a ski mask, two rubber handgun grips, a digital scale, a set of broken nunchucks, a knife, a sword, and a book

entitled "Improvised Weapons of the American Underground." The trial court agreed this evidence was excludable pursuant to Evidence Code section 352, but cautioned that should Leffler attempt to portray his possession of the sawed-off shotgun and billy "in a manner that defeats the inferences that may reasonably be drawn from" the excluded items, the excluded evidence might become admissible. If Leffler had attempted to prove he did not possess the baton as a weapon, this excluded evidence would have been decidedly probative—and highly damning—to show otherwise. Given that the trial court's exclusion of the evidence effectively prevented the prosecution from fully establishing the relevant circumstances, we decline to treat appellant's contention as if it had not been forfeited.

Leffler's contention fails on the merits in any event. There was no evidence supporting an instruction to the jury to consider the surrounding circumstances in this case. The baton was a weapon per se, not an object with an innocent use. Therefore the prosecution had no obligation to prove it was possessed as a weapon. (See *People v. Fannin*, *supra*, 91 Cal.App.4th at p. 1405.) Or, if the baton had some innocent purpose that was not readily apparent, defendant failed to meet his burden to present any evidence of such an innocent use. (See *People v. Grubb*, *supra*, 63 Cal.2d at p. 621 [defendant "may be able to demonstrate an innocent usage of the object but the burden falls upon him to do so"].) There was a dearth of evidence that the baton was useful for any purpose except its typical use as a bludgeon.

Finally, even assuming the trial court committed instructional error, any assumed error was harmless beyond a reasonable doubt. (See *People v. Merritt* (2017) 2 Cal.5th 819,

821–822, 826, 831 [failure to instruct on elements of an offense is subject to harmless error analysis under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18]; *People v. Flood* (1998) 18 Cal.4th 470, 502–503 [instruction that misdescribes or omits an element, raises an improper presumption, or directs a finding or a partial verdict upon a particular element, is generally subject to *Chapman* harmless error review]; *People v. Vanegas* (2004) 115 Cal.App.4th 592, 602.) There is no dispute that the collapsible baton *could* constitute a prohibited item within the meaning of section 22210. Despite Leffler's argument that "defense counsel aggressively contested the character of the collapsible baton as a prohibited instrument," the defense presented no evidence suggesting the item did not qualify as a billy, that is, that it was not a bludgeoning instrument. The baton was found in a safe, along with a sawed-off shotgun, suggesting it was possessed as a weapon. It had no readily apparent innocent use. No evidence whatsoever was introduced to prove Leffler possessed the baton for some purpose other than for use as a weapon. To the contrary, his primary defense was that he used the baton during his work as a security guard. Defense counsel argued that the item was "consistent with what was described by [a detective] as a collapsible baton . . . *that would be used by somebody who does security*." (Italics added.) In short, both the circumstances of the baton's discovery and the nature of the defense suggested that the item was a prohibited billy, and that Leffler possessed it as such. Given the evidence, it is clear beyond a reasonable doubt the jury would not have rendered a verdict more favorable for Leffler had it been instructed to consider the totality of the circumstances, or had the trial court responded differently to the jury's first question.

DISPOSITION

The judgment is affirmed.

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EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.