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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RENE CAYETANO, Defendant and Appellant.	B265137 (Los Angeles County Super. Ct. No. MA065270)

Appeal from a judgment of the Superior Court of the County of Los Angeles, Kathleen Blanchard, Judge. Affirmed and remanded with instructions.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant and appellant Rene Cayetano guilty of knowingly bringing a controlled substance into a jail. On appeal, he contends: there was insufficient evidence to support his conviction; his trial counsel provided ineffective assistance; the trial court abused its discretion by failing to exclude inadmissible evidence and by denying his *Romero*[1] motion; and the prosecutor committed prejudicial misconduct. In addition, defendant claims he was entitled to three additional days of custody credit.

We conclude, with the exception of the custody credit issue, none of defendant's contentions has merit. We therefore affirm the judgment and remand the matter to the trial court with instructions to modify the abstract of judgment to reflect three additional days of custody credit.

FACTUAL BACKGROUND

On February 1, 2015, Los Angeles County Deputy Sheriff Lee Schriever was on patrol with his partner, Deputy Zachary Anderson, in the City of Lancaster. At approximately 1:30 a.m., the deputies responded to a report that someone was spray painting graffiti on a post in a McDonald's drive-through. When they arrived, they observed the suspects' car, a gold Lexus, in the drive-through. After the Lexus drove out of the McDonald's driveway, the deputies initiated a traffic stop in the parking lot. The deputies exited their patrol car and approached the Lexus, which had three occupants, including defendant who was in the back seat. Anderson asked the driver, Larry Granillo, to step out of the car. When Granillo got out of the car, a screwdriver fell

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1 *People v. Superior Court* (*Romero*) 13 Cal.4th 497 (*Romero*).

and hit the asphalt.[2] Anderson then noticed a can of gold spray paint by Granillo's left foot. The deputy detained Granillo

Anderson next detained the back seat passenger, defendant. He conducted a weapons pat down on defendant and recovered a pry bar and a flashlight from defendant's front pants pocket. But Anderson did not search defendant's jacket pockets. When Anderson searched the Lexus, he recovered from the front passenger seat two loose, empty syringes and a package of empty syringes.

After detaining the occupants of the Lexus, Schriever inspected the property for vandalism and observed that someone had sprayed two "Vs" in gold paint on a yellow post near the cashier window of the McDonald's drive-through. He also recovered two $1.00 bills and a syringe with liquid in it[3] at the base of the vandalized post.

Defendant was arrested and transported by Schriever and Anderson to the jail. En route to the facility, Schriever advised defendant that it was a felony to bring any kind of contraband

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[2] Deputy Zachary Ullman also watched as Granillo exited the vehicle. Ullman not only saw the screwdriver fall, but he also observed a white baggie fall off of Granillo's lap. The deputy recovered the baggie.

[3] Schriever was a certified drug recognition expert and was familiar with methods used to ingest methamphetamine. The primary method was smoking the narcotic, but users also injected it in liquid form or snorted it through their noses. The amount of liquid in the recovered syringe was a usable amount. Methamphetamine was generally sold in small Ziploc bags in crystalline form that could be melted down to a liquid form.

into a jail. When the deputy asked defendant if he had any contraband, defendant said he did not.

Anderson booked defendant. At the entrance to the jail, there were warning signs which read: "Warning. You are entering a jail facility and are subject to search at any time. It is a felony, punishable by imprisonment in the state prison to possess or bring on to jail property controlled substances or any device, contrivance, instrument, or paraphernalia intended to be used for unlawful injecting or consuming controlled substances or alcoholic beverages or weapons, or to sell, furnish, administer, or give away or offer to sell, furnish, administer, or give away any controlled substances on a jail facility. Or to enter this facility without permission if you have served time in state prison."

Anderson showed defendant one of those signs and told him to read it. After defendant finished reading the sign, the deputy asked him if he understood it, and defendant replied in the affirmative. When the deputy asked defendant if he had any contraband on his person, defendant said "no."

Anderson and defendant entered the jail and went to the booking area where the deputy searched defendant. The search was a "full search checking for any kind of contraband, weapons, anything that [an arrestee] is not allowed to have in a jail facility." During the search, the deputy recovered methamphetamine "rocks" from defendant's right front jacket pocket. When the deputy removed the methamphetamine, defendant said, "'I didn't know I had dope in my pocket.'"

Anderson gave the methamphetamine to Ullman who finished the booking process. Anderson also gave Ullman what was believed to be methamphetamine in a baggie and a syringe filled with liquid. Ullman processed the items for analysis by the

crime lab.[4] According to Ullman, the 3.18 grams of methamphetamine from the baggie was a usable amount, as were the .27 grams from defendant's pocket and the .14 grams from the syringe.

PROCEDURAL BACKGROUND

A jury found defendant guilty on count 2 of the information,[5] bringing contraband into a jail in violation of Penal Code section 4573, subdivision (a).[6] Defendant admitted he had been convicted of a prior serious or violent felony within the meaning of sections 667, subdivisions (b) through (j) and 1170.12, as well as a prior felony for which a prison term was served within the meaning of section 667.5, subdivision (b). The trial court sentenced defendant to a low term of two years, which was doubled to four years based on the prior strike conviction and, pursuant to section 1385, struck the section 667.5, subdivision (b) one-year enhancement.

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[4] The parties stipulated that the white crystalline substance in the recovered baggie, the liquid in the syringe, and the rocks from defendant's pocket were methamphetamine.

[5] Counts 1 and 3 of the information were charged against codefendant Granillo only.

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

DISCUSSION

A. Sufficiency of Evidence

Defendant contends there was insufficient evidence to support the jury's finding that he knew he had methamphetamine in his pocket when he entered the jail. According to defendant, to establish the knowledge element of the charged crime, the prosecution was required to show more than mere possession.

1. Standard of Review

"When a defendant challenges the sufficiency of the evidence, '"[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' [Citations.] . . . 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]' [Citation.] We ""presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 942-943.)

2. Analysis

In response to the charge of knowingly bringing a

controlled substance into a jail in violation of section 4573,[7] defendant admitted that the rocks in his pocket were methamphetamine and that the amount recovered was a usable amount. Thus, the only issue at trial was whether defendant knew the rocks were in his pocket.

When the deputies detained defendant and his companions, they recovered a syringe containing a usable amount of liquid methamphetamine from the drive-through where the vandalism took place, a baggie filled with a usable amount of crystalline methamphetamine which fell from the driver's lap, and two loose, empty syringes and a package of empty syringes from the front passenger seat. Given that defendant appeared to be involved in some type of narcotics-related activity, a rational juror could have concluded he was aware of drugs in his pocket.

Moreover, defendant was twice told that it was a felony to bring narcotics into the jail. On each occasion, he had opportunity to reflect on whether he possessed narcotics and on each occasion he told officers that he did not have contraband on

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[7] Section 4573 provides, in pertinent part: "(a) [A]ny person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, . . . any county, city and county, or city jail . . . any controlled substance, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code, any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming a controlled substance, is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years. [¶] (b) The prohibitions and sanctions addressed in this section shall be clearly and prominently posted outside of, and at the entrance to, the grounds of all detention facilities under the jurisdiction of, or operated by, the state or any city, county, or city and county."

his person. A rational trier of fact could have relied on this evidence to conclude that defendant mulled over his circumstances, knew he had narcotics in his pocket, and hoped he would be able to successfully bring them into the jail.

We do not reweigh the evidence or make independent credibility determinations. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1129.) Although defendant stated he did not know drugs were in his pocket, there was adequate evidence to support the jury's finding to the contrary.

B. Ineffective Assistance

Defendant argues his trial attorney was ineffective because counsel failed to object to evidence that was not relevant to the issue of whether he knew narcotics were in his pocket. In this regard, he maintains trial counsel should have objected to: the reasons for his arrest, the evidence relating to vandalism, and the syringes and baggie of methamphetamine.

1. Standard of Review

"'"A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. [Citations.] 'Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.'" [Citations.] It is defendant's burden to demonstrate the inadequacy of trial counsel. [Citation.] [The California Supreme Court has] summarized defendant's burden as follows: "'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms."

[Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."'" [Citation.] [¶] Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] Defendant's burden is difficult to carry on direct appeal, . . . : "'Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.'" [Citation.]' [Citation.] If the record on appeal "'sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected,'" and the 'claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding' [Citation.]" (*People v. Vines* (2011) 51 Cal.4th 830, 875-876.)

2. Background

During opening statement, the prosecutor made the following comments: "Ladies and Gentlemen, you're here because on February 1st of this year, the defendant and a couple of his buddies got themselves arrested at one of our local McDonald's over on Avenue L and 30th Street West. [¶] They were arrested

for two different charges, vandalism and identity theft. They were found in possession of debit cards belonging to other people, checks; that kind of thing. [¶] Ultimately, you're not going to be called upon to decide whether they are guilty of those charges, you're only going to be examining whether this defendant, when he was arrested, brought into the L.A. County Jail Sheriff's Station, a bag full of methamphetamine."

After opening statement, defendant's counsel took issue with the prosecutor's comments. "[Defense counsel]: I'm going to ask the court to take note of counsel's opening statement. One of his first statements [was] that . . . defendant's buddies . . . got themselves arrested. [¶] . . . [¶] The inference, I think, the jury might have drawn is that [defendant] might have been charged and convicted of other cases. That's the inference I think they could have easily taken. [¶] I think it was improper and I'm going to ask the court to take note of it, because I think it opens the door [and allows] me [to address] that very issue of what [defendant] might have been charged with or not charged with."

After a lengthy colloquy with counsel, the trial court ordered the parties to meet and confer "with regard to what evidence you intend to elicit from the witnesses in this case." Following a recess, the prosecutor and defense counsel reported to the trial court on the results of their meet and confer as follows: "[The Court:] Did the two of you have an opportunity to meet and confer over the break? [¶] [Prosecutor]: Yes. [¶] [Defense counsel]: Yes. [¶] The Court: And is there anything in dispute at this point? [¶] [Defense counsel]: I don't believe so, no. . . . I believe we have a good faith agreement as to the circumstances of the arrest and what will come into evidence. And [the prosecutor] has been very forthcoming about asking me

what I feel comfortable with. And if I have anything else, I'll be contacting him between now and when he presents the evidence. [¶] So I have no concerns at this point. [¶] The Court: Okay. Thank you. . . . [¶] [Prosecutor]: Can we clarify it though; we did have a discussion and I asked - - you know, I'm happy to not ask the deputy what the defendant was arrested for. [¶] [Defense counsel]: There were burglary tools [and they] were the reason for the arrest. It wasn't eventually charged. That's kinda the concern. I'm leaning toward allowing him to say that that was the arrest; so I don't think there will be a problem. [¶] The Court: What about all the other stuff that we talked about earlier? [¶] [Prosecutor]: Lastly, the methamphetamine; I believe [defense counsel] is okay with me asking about all the methamphetamine that was recovered from the car? [¶] [Defense counsel]: But they will be aside from this individual and that individual; rather than collectively saying, 'This was recovered.' That was my concern; that the other crimes of - - and he said he and his buddies got themselves arrested for these charges. Don't worry about it.[] But I think the jury will delineate the different suspects and what was in each person's possession and what was on my client; so I think we'll be okay. [¶] The Court: All right. Let me know if anything changes."

3. Analysis

We are not prepared to hold, on this record, that trial counsel's performance fell below professional norms. Following the prosecutor's opening statement, defendant's counsel raised an issue with the trial court about the admissibility of certain evidence. A lengthy colloquy ensued, followed by a court-ordered meet and confer at which counsel reached an agreement about

what evidence would be introduced into evidence. But the meet and confer between counsel was not transcribed, so the record is silent as to what transpired at the meeting. Thus, we have no way of evaluating defense counsel's performance as it related to the admissibility issue on this record. And, we are not inclined speculate about the discussion between the attorneys and hold that there could have been no satisfactory explanation for defense counsel's decision not to object. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 [when the appellate record sheds no light on defense counsel's failure to act, an appellate claim of ineffective assistance of counsel must be rejected unless there could be no satisfactory reason for counsel's approach].) Defendant's claim of ineffective assistance of counsel must be rejected.

C. Abuse of Discretion in Failing to Exclude Irrelevant Evidence

Defendant contends the trial court "concluded" during the colloquy discussed above that "the reasons for appellant's arrest as well as much of the other evidence the prosecutor wanted to elicit [were] irrelevant to the charged crime." According to defendant, based on the trial court's conclusion, it should have excluded the irrelevant evidence sua sponte, and its failure to do so was an abuse of discretion.

Defendant's argument is based on a mischaracterization of the record. During the colloquy about admissibility discussed above, the trial court made it clear that it was unfamiliar with the facts of the case, stating "I know nothing about your case;" "so let's . . . begin with the premise that I got this trial sent to me from another courtroom; I know nothing about it;" "I'm going to

say this one last time . . . . I don't know anything about your case . . . . [¶] So if you want to convince me that something is relevant, perhaps you should keep in mind, the fact that I know nothing about the facts of your case . . . ."

Although the trial court did, during the lengthy colloquy that preceded the meet and confer, make observations about the relevance of certain evidence, those remarks cannot be construed as formal rulings, as they were clearly tentative and prefaced by the trial court's advisement that it was completely unfamiliar with the facts of the case. Indeed, the fact that the trial court ordered the parties to meet and confer on the admissibility issues confirms that any of the trial court's comments on the evidence during the preceding colloquy were tentative and that a formal ruling would be made only *after* the meet and confer, and only in the event the parties could not reach agreement. Because the parties reached an agreement on the admissibility issues, there was no disputed evidentiary issue upon which the trial court could have ruled. Under these circumstances, there was no abuse of discretion.

D. Prosecutorial Misconduct

Defendant maintains the prosecutor committed prejudicial misconduct during opening statement, the ensuing colloquy with the trial court, and closing argument. The Attorney General contends defendant forfeited this challenge by failing to object in the trial court to the claimed instances of misconduct.

We agree that the issue has been forfeited. "'"A defendant [who raises a prosecutorial misconduct challenge] must timely object and request a curative instruction or admonishment."' [Citation.] A defendant's 'failure to object and request an

admonition waives a misconduct claim on appeal unless an objection would have been futile or an admonition ineffective.' [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 367.) By failing to object in the trial court to the misconduct claimed on appeal, defendant forfeited his claim of prosecutorial misconduct.

In the alternative, defendant argues that his trial counsel's failure to object to the claimed instances of misconduct constituted ineffective assistance of counsel. According to defendant, the prosecutor committed misconduct during: (i) opening statement when he referred to the reasons for defendant's arrest, the details of those crimes, and the fact that defendant was found in possession of a bag of methamphetamine; (ii) the colloquy following opening statement when he told the trial court that the evidence would show that during the traffic stop in the parking lot, a loaded syringe fell from the lap of one of defendant's companions; and (iii) during closing argument when he purportedly argued facts not in evidence and presented facts not supported by the evidence and which were not fair comment on the evidence.

The claimed misconduct during opening statement and the colloquy that followed involved the issue of admissibility of evidence that was ultimately resolved through the meet and confer process. As noted, because the meet and confer was not transcribed, we have no basis upon which to evaluate defense counsel's performance as it related to the admissibility issue. We can only speculate as to what was discussed and agreed upon. The record therefore sheds no light on why defendant's counsel did not move to strike the prosecutor's comments during opening statement or why he did not correct the prosecutor's allegedly misleading statements during the colloquy that followed. We

therefore reject defendant's claim of ineffective assistance of counsel to the extent it is based on comments made during opening statement and the colloquy.

Moreover, to the extent defendant's claim of ineffective assistance is based on his trial counsel's failure to object to the alleged misconduct during closing argument, the record again sheds no light on why counsel failed to act. Under the authorities cited above, we must presume defense counsel's failure to object to the claimed misconduct during argument was within the wide range of reasonable professional assistance and defer to his tactical decisions. (See, e.g., *People v. Mendoza Tello, supra,* 5 Cal.4th at p. 266.) Indeed, counsel may have elected not to object in order to avoid drawing additional attention to the prosecutor's comments. (See *People v. Fernandez* (2013) 216 Cal.App.4th 540, 565 [recognizing a reasonable trial strategy to refrain from objecting to prosecutor's remarks in closing argument because counsel did want the remarks emphasized to the jury].) Because the record does not affirmatively disclose that defense counsel had no rational tactical purpose for his failure to act, we must reject this ineffective assistance claim on direct appeal.

E. Motion to Strike Prior Conviction

Defendant argues the trial court abused its discretion when it denied his motion to strike his prior serious felony conviction. According to defendant, his prior conviction was remote in time and his criminal record since that conviction did not show an increase in the level of seriousness or violence of his crimes.

1. Background

Prior to sentencing, defendant moved to strike his prior strike conviction under *Romero*. The trial court denied the motion reasoning as follows: "The prior strike is alleged from 2006. The defendant, if I recall correctly, was sentenced to 5-years in the state prison at that time. Since being paroled, he has suffered a number of different contacts with law enforcement; not just in this case, but he has got another pending forgery case from November of 2014 and a drug case from August of 2014. [¶] Given his criminal history in intervening time since the strike [conviction], which is recent, this court cannot deem him somebody who falls outside the spirit of the [Three]-[S]trikes-law. So the [*Romero*] motion is respectfully denied."

2. Standard of Review

"[A] a trial court's failure to dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 should be reviewed for abuse of discretion." (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "'[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citations.] Second, a "'decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.] Taken together,

these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at p. 377.)

3. Analysis

The trial court did not abuse its discretion in denying the *Romero* motion. Defendant admitted that in 2006 he was convicted of carjacking (§ 215, subd. (a)). Following that conviction, defendant committed a drug offense[8] in August 2014 and, when his motion was made, there was a November 2014 forgery charge pending against him. The trial court considered that record in light of the present offense and concluded that defendant did not fall outside the spirit of the Three Strikes law. Given defendant's record since his prior carjacking conviction, the trial court's conclusion was not irrational or arbitrary.

Nevertheless, defendant urges us to independently review his criminal history and conclude that he does fall outside the spirit of the Three Strikes law because the subsequent drug conviction and the pending forgery charge were not violent or serious offenses. But, under the governing abuse of discretion standard, we review the trial court's ruling only to determine whether it was so irrational or arbitrary that no reasonable person could agree with it. Because the trial court's ruling was based on defendant's criminal activity that occurred after the 2006 carjacking offense, and that pre-dated the current offense by less than one year, it was well within the bounds of reason.

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[8] Defendant was found in possession of marijuana, methamphetamine, and a pipe.

F. Custody Credits

Defendant asserts he is entitled to three additional days of presentence custody credit. According to defendant, the trial court miscalculated his actual custody credit by one day and, based on that mistake, miscalculated his conduct credit by two days. The Attorney General agrees with defendant.

Defendant was awarded 137 days of actual custody credit and 136 days of conduct credit, for a total of 273 days of presentence custody credit. Defendant was arrested on February 1, 2015, and sentenced on June 18, 2015. He was therefore entitled to 138 days of actual custody credit, not the 137 days awarded by the trial court. Under section 4019, he was entitled to 138 days of conduct credit, instead of the 136 days awarded by the trial court.

Based on the foregoing, we conclude that defendant is entitled to 276 days of presentence custody credit comprised of 138 days of actual custody credit and 138 days of conduct credit. The abstract of judgment must be modified accordingly.

DISPOSITION

The matter is remanded to the trial court with instructions to modify the abstract of judgment to reflect that defendant was entitled to an award of 138 days of actual custody credit and 138 days of conduct credit, for a total award of 276 days of presentence custody credit. The trial court shall forward a copy of the modified abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KUMAR, J.*

We concur:

TURNER, P. J.

BAKER, J.

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