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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.

MOHAMAD TAREK AHMAD,

Defendant and Appellant.

B294491

(Los Angeles County
Super. Ct. No. BA465261)

APPEAL from the judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed.

William Paul Melcher, 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, Stephanie A. Miyoshi and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

Mohamad Tarek Ahmad appeals following his convictions by jury of assault on a peace officer (Pen. Code, § 245, subd. (c); count 1)¹ and evading a peace officer (Veh. Code, § 2800.2, subd. (a); count 2). In a bifurcated court proceeding, Ahmad admitted he suffered two prior serious felony convictions, constituting strikes (§§ 667, subds. (a), (b)-(i), 1170.12). The trial court sentenced Ahmad to 14 years and four months in state prison.

On appeal, Ahmad argues that his trial counsel conceded Ahmad's guilt on count 2, and that concession was tantamount to a guilty plea. Ahmad claims he objected to this concession, and the absence of a knowing and intelligent waiver of his constitutional trial rights before what amounted to a guilty plea requires reversal of his conviction on count 2. We reject this claim, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Offense Conduct

On February 3, 2018, two Los Angeles Police Department (LAPD) officers were patrolling in a marked police vehicle in southwest Los Angeles. About 1:30 a.m., they saw Ahmad driving a Toyota Camry. Ahmad was driving on the wrong side of the street and failed to stop for red lights. A woman opened a passenger door of the Camry and screamed for help. The officers activated their emergency lights and sirens to conduct a traffic stop; a pursuit ensued. Officer Tyler Hadden and his partner then joined the pursuit in their own marked police car. Additional patrol vehicles as well as a police helicopter eventually joined in the pursuit.

¹ All unspecified statutory references are to the Penal Code.

Ahmad crashed into a building at Vermont Avenue and 50th Street. As Officer Hadden was getting out of his police car, Ahmad looked behind him, saw police vehicles, and accelerated in reverse. Officer Hadden attempted to get back in his car; the Camry collided with Officer Hadden's car while the officer still had one foot on the ground. The collision forced the car door closed. Ahmad drove away; the pursuit continued through South Central and mid-city Los Angeles, eventually ending in North Hollywood.

The evidence further showed that on a prior occasion in 2010, Ahmad drove a tow truck into a Los Angeles County sheriff deputy's marked patrol car during a traffic stop, after the deputy had activated his overhead lights. Ahmad struck the patrol car twice more with the truck during a later pursuit, when the patrol car's lights and siren were operating.

Ahmad presented no defense evidence.

B. Opening Statement

During opening statement, Ahmad's counsel stated: "So there are two counts, count 1 is the assault on a peace officer. The count 2 is evading. This trial is not going to be about count 2. This trial is going to be about count 1 and the question that we will ask you to answer by the end of the trial is going to be was this intentional or was this accidental? So you are going to hear from some of the officers and you will see a number of video clips and so, I'm going to ask you to focus on the collision that occurred. The collision that occurred took, approximately, 5 to 10 seconds and by the end of this trial you will not have enough evidence to show that this was intentional, but that this was accidental. For that reason, Mr. Ahmad will be not guilty of count 1."

C. Proceedings Following the Close of Evidence

1. *Ahmad's Statements to the Jury and the Court*

As defense counsel foretold, the jury was played videos of the pursuit from two dash-cams, and from an officer's body-cam.

Before the jury instructions and closing argument, Ahmad attempted to address the courtroom. The court admonished him not to speak, but he nevertheless proclaimed "The prosecutor—this is a three strikes case and she's trying to take my life away. This is a three strikes case." The court then sent the jury into the jury room.

After the jury left the courtroom, Ahmad stated: "I'm just saying, your Honor, they have to know once they bring that up and I have to say that this is a three strikes case. I'm fighting for my life over a vehicle accident, I'm just saying. You have to explain that to the jury." The court told Ahmad: "You are not allowed to talk to the jury directly. You know that. You're just trying . . . to create a mistrial." Ahmad complained: "From a traffic accident you're trying to accelerate it on a manslaughter. He could have lost his foot. It's not such a thing. It's a vehicle accident."

The court attempted to get Ahmad to stop talking, but Ahmad asked the court for "permission to instruct [the jury] so they know." The court informed Ahmad: "They're not allowed to know about the possible punishment in a case. You're just trying to do that so they will have sympathy for you and that's inappropriate." Ahmad insisted he did not want sympathy, he just wanted the jury "to know about the law, that instead of charging me for a vehicle accident" the prosecution changed it "to assault on a peace officer." The court told Ahmad: "Your lawyer is doing a good job for you. She'll make those arguments in her

closing argument, but this outburst of yours is unacceptable.” The court later admonished the jury to disregard anything Ahmad had said.

2. *Closing Argument*

During closing argument, Ahmad’s defense counsel told the jury: “Let me first talk about count 2. On February 3rd, 2018, [LAPD o]fficers . . . were in pursuit of a green Toyota Camry that led them on a chase from Hoover and Vernon in South Los Angeles to Santa Monica Boulevard, . . . and Western Avenue in North Hollywood. Mr. Ahmad is guilty of count 2. So now let’s talk about count 1.”

Defense counsel then argued that the Camry’s collision with the patrol car was an accident, because Ahmad did not know the car was there when he began reversing. She also urged regarding count 1 that “they were all operating under adrenaline and shock,” and Ahmad was not guilty on count 1. Defense counsel also commented: “I want to talk a little bit about the adrenaline and shock as well as with regard to count 2.” She argued Ahmad was operating under the influence of adrenaline, shock, and stress; his reaction after going into reverse therefore was not “willful” for purposes of “element 2” of count 2.²

DISCUSSION

Ahmad argues his counsel’s concession on count 2 was tantamount to a guilty plea to which he never agreed. “A guilty plea . . . is an event of signal significance in a criminal

² The court, using CALCRIM No. 2181, instructed the jury on the elements of count 2. Element No. 2 was: “The defendant, who was also driving a motor vehicle, willfully fled from, or tried to elude, the officer, intending to evade the officer.”

proceeding. . . . Accordingly, counsel lacks authority to consent to a guilty plea on a client's behalf" (*Florida v. Nixon* (2004) 543 U.S. 175, 187 [125 S.Ct. 551, 160 L.Ed.2d 565] (*Nixon*).) "[I]n the event of a guilty plea or other conduct tantamount to a plea, 'the record must demonstrate that the defendant voluntarily and intelligently waived his constitutional trial rights.'" (*People v. Lopez* (2019) 31 Cal.App.5th 55, 63 (*Lopez*).)

In *People v. Cain* (1995) 10 Cal.4th 1, our Supreme Court held "trial counsel's decision not to contest, and even expressly to concede, guilt on one or more charges . . . is not tantamount to a guilty plea" (*Id.* at p. 30.) The United States Supreme Court later agreed with this holding of *Cain*. (See *Nixon, supra*, 543 U.S. 175.) Ahmad argues two more recent cases—*McCoy v. Louisiana* (2018) ___ U.S. ___ [138 S.Ct. 1500, 200 L.Ed.2d 821] (*McCoy*) and *People v. Farwell* (2018) 5 Cal.5th 295 (*Farwell*) found concessions of the type his counsel made tantamount to a guilty plea, and required his explicit consent. As the record here does not contain evidence of such explicit consent, Ahmad argues his conviction on count 2 must be reversed.

In *Farwell*, the parties entered into a stipulation encompassing all elements of one of the charged counts, and the trial court instructed the jury it had to accept those stipulated facts as true. (*Farwell, supra*, 5 Cal.5th at pp. 298-299.) The court did not advise the defendant of the constitutional rights implicated by a guilty plea or the stipulation. Nor did it solicit a personal waiver of those rights. (*Id.* at p. 299.) Our Supreme Court held the stipulation was tantamount to a guilty plea because it "conclusively establish[ed] all of the elements of the misdemeanor[, which] ma[d]e the guilty [plea] a foregone conclusion." (*Id.* at p. 308.) Thus, although there was still a jury,

its role was limited—if the jury followed the court’s instructions, which a jury is presumed to do, it was mandated to find defendant guilty on that count. (*Id.* at p. 300.)

In *McCoy*, the defendant in a death penalty trial explicitly and repeatedly told his counsel not to concede his guilt on murder charges, maintaining he was innocent. (*McCoy, supra*, ___ U.S. at p. ___ [138 S.Ct. at p. 1506].) There was no question counsel knew of the defendant’s “ ‘complet[e] oppos[ition] to [his counsel] telling the jury that [the defendant] was guilty of killing’ ” three people. (*Ibid.*) Even so, during his opening statement and closing argument, in order to maintain credibility with the jury for the penalty phase, counsel told the jury that the defendant was undoubtedly guilty and that he had taken “ ‘[the] burden off of [the prosecutor].’ ” (*Id.* at p. 1507.) The United States Supreme Court held that when a defendant “vociferously insist[s] that he did not engage in the charged acts and adamantly object[s] to any admission of guilt,” defense counsel is prohibited from admitting a defendant’s guilt during the guilt phase of trial. (*Id.* at p. 1505.) “When a client expressly asserts that the objective of ‘his defence’ is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.” (*Id.* at p. 1509; U.S. Const., 6th Amend.)

In *Lopez*, our colleagues in Division Four of this district rejected the very argument made by Ahmad based on *Farwell* and *McCoy*. (*Lopez, supra*, 31 Cal.App.5th 55.) *Lopez* found *Farwell* distinguishable because, as is the case here, “there was no stipulation admitting the elements of the [charges] as an evidentiary matter. Instead, the jury was instructed that the prosecution had to prove guilt on all counts beyond a reasonable

doubt and that statements by counsel were not evidence. Thus, the prosecution was still required to present ‘competent, admissible evidence establishing the essential elements’ of each charge”—something it would not have had to do had the defendant pled guilty. (*Lopez, supra*, at p. 64.)

Lopez explained courts have repeatedly distinguished between circumstances concerning a concession made during closing argument and a guilty plea or its equivalent. (*Lopez, supra*, 31 Cal.App.5th at p. 65.) The rationale of the requirement that the record demonstrate the defendant voluntarily and intelligently waived his or her constitutional trial rights is to ensure a defendant knows of and voluntarily waives three specified rights surrendered by a guilty plea: the right to a jury trial, the opportunity to cross-examine the witnesses against him or her, and the right against self-incrimination. (*Ibid.*) There is no surrender of these rights “ ‘when the defendant undergoes—and thereby exercises his right to—a jury trial and has the opportunity to cross-examine the witnesses against him and to refuse to incriminate himself.’ ” (*Ibid.*)

Here, as in *Lopez*, Ahmad retained the rights accorded a defendant in a criminal trial despite his counsel’s concession. (*Lopez, supra*, 31 Cal.App.5th at p. 65; accord, *Nixon, supra*, 543 U.S. at p. 188.) Ahmad had a jury trial, had the opportunity to cross-examine the witnesses against him, and refused to incriminate himself. His counsel’s concession of guilt as to count 2 did not take any of these rights away, “did not change the burden of proof, [and] did [not] limit the scope of the jury’s role.” (*Lopez, supra*, at p. 64.) Accordingly, defense counsel’s initial concession during closing argument on count 2 (followed by her

later disputing guilt on that count by arguing a failure of proof on its “willful” element) was not the equivalent of a guilty plea.

Lopez found *McCoy* inapposite on the basis that the defendant in *McCoy* explicitly and repeatedly told counsel not to concede his guilt, maintaining he was innocent. (*Lopez, supra*, 31 Cal.App.5th at pp. 65-66.) While the *McCoy* court emphasized a defendant’s right to set his or her case objectives, it also noted that counsel provides assistance on how best to achieve those objectives, including “mak[ing] decisions such as ‘what arguments to pursue.’” (*McCoy, supra*, ___ U.S. at p. ___ [138 S.Ct. at p. 1508].) Part of counsel’s strategy on attaining the best outcome, if not explicitly opposed by the client, can include conceding guilt as to some charges in order to maintain credibility with the jury to contest other charges. (See, e.g., *People v. Freeman* (1994) 8 Cal.4th 450, 498 [“Recognizing the importance of maintaining credibility before the jury, we have repeatedly rejected claims that counsel was ineffective in conceding various degrees of guilt”].)

Here, there is nothing in the record suggesting Ahmad disagreed with his counsel’s trial strategy of conceding guilt as to count 2. Ahmad never expressly objected to any concession by his counsel of guilt on count 2. Ahmad’s comments during the proceedings after the parties rested but before closing argument asserted that the prosecutor was trying, in count 1, to turn a vehicular accident into an assault upon a peace officer, that this was a three strikes case, and that the court should instruct the jury on these issues. In other words, Ahmad’s complaint pertained to count 1 and the prosecutor’s charging decision on that count—not to count 2 or his defense counsel’s concession.

Nor was the concession ill-informed or gratuitous. Evading a peace officer in violation of Vehicle Code section 2800.2, subdivision (a), charged in count 2, is not a serious or violent felony for purposes of the three strikes law (§§ 667, subd. (e)(2)(C), 667.5, subd. (c), 1170.12, subd. (c)(2)(C), 1192.7, subd. (c)). Thus, Ahmad could have received a three strikes sentence only on count 1, not count 2. The defense strategy to preserve credibility by not contesting count 2 (a count as to which there was video evidence showing Ahmad leading officers in marked cars with their lights and sirens engaged on an extended pursuit from southwestern Los Angeles to North Hollywood), while focusing on the count that posed the greatest sentencing exposure, was a reasonable one.

As *Lopez* explains, there is no authority “allowing extension of *McCoy*’s holding to a situation where the defendant does not expressly disagree with a decision relating to his right to control the objective of his defense.” (*Lopez, supra*, 31 Cal.App.5th at p. 66.) The record before us does not indicate Ahmad disagreed (much less expressly disagreed) with counsel’s defense strategy as to count 2, and *McCoy* is therefore inapplicable. (*Lopez, supra*, at p. 66; see also *People v. Franks* (2019) 35 Cal.App.5th 883, 891 [*McCoy* inapplicable where “nothing in the record indicates that [the defendant] ever made it clear to his counsel (or the court) that the objective of his defense was to maintain innocence, or that he voiced ‘intransigent objection’—or any opposition—to his lawyer’s defense strategy”].)

DISPOSITION

The judgment is affirmed.

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WEINGART, J.*

We concur:

JOHNSON, Acting P. J.

BENDIX, J.

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