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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. KEVIN COE, Defendant and Appellant.	B235703 (Los Angeles County Super. Ct. No. BA356480)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Affirmed.

Kevin Coe, in pro. per.

No appearance for Plaintiff and Respondent.

Kevin Coe appeals from the judgment entered following his plea of no contest to two counts of false imprisonment of a hostage (Pen. Code, § 210.5),[1] and one count of misdemeanor assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)), and his admissions that in 1987 he had been convicted of four serious or violent felonies within the meaning of the Three Strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), that in 1987, 1996, 2000 and 2004 he served prison terms for separate felony offenses and, pursuant to section 667.5, subdivision (b), committed a felony or did not remain free of prison custody for a period of five years subsequent to the conclusion of the prior term, and had been convicted of five felonies which, pursuant to section 1203, subdivision (e)(4), precluded the granting of probation. As part of a plea agreement, the trial court struck Coe's admissions to the Three Strikes allegations, then sentenced him to 12 years in prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*.[2]

On May 7, 2009, Sonia Ramirez worked at a store called Oceano L.A., Incorporated. Ramirez had just entered the store and sat down when Coe, followed by a number of police officers, walked in and went into one of the rest rooms located in the office where Ramirez works. After approximately five minutes, Coe walked out of the rest room, immediately walked over to Ramirez and, while standing behind her forcibly used his arms to "grab[] [her] by [her] neck." Ramirez was frightened and in shock.

The police officers who had been following Coe had also entered the office and, after he began to choke Ramirez, they told Coe to let go of her. After about two minutes, Coe let Ramirez go and she walked out of the office. Before leaving the area, Ramirez saw Coe attempt to leave the office by climbing out an interior window, into the store.

Yolanda Reyes was also in the office at the Oceano L.A., Incorporated store on the morning of May 7, 2009. While Reyes was in a corner crouching down next to a desk

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 The facts have been taken from the transcript of the preliminary hearing.

with a window above it, she saw Coe and realized that "he was trying to get out through that area." Coe pushed a chair up against Reyes so that she could "feel . . . the top part of his body . . . pushing her." Coe had Reyes pinned between the chair and a wall for approximately one minute. She was unable "to move in any direction" and the chair was hurting her leg. When Reyes looked up, she saw three police officers. One of the officers told Reyes to cover her face. It was then that she felt the effects of the pepper spray the officers sprayed at Coe.

Hrand Avakemian is a parole agent with the California Department of Corrections. On the morning of May 7, 2009, Avakemian, who was dressed in plain clothes "with a ballistic vest with police identifiers . . . on the front and back[,]" went to an apartment on South Norton Street in East Los Angeles. He was accompanied by four other agents. Avakemian and the others knocked on the door and announced that they were police officers. After approximately five minutes, a woman, Coe's wife, answered the door. When asked if Coe were there, his wife repeatedly said that he was not. However, after a time, "she gave a verbal consent to search the apartment." As he was looking out a window, Avakemian saw Coe "crouching behind a white . . . van . . . south of the apartment building . . . ."

Avakemian left the apartment and chased Coe, who was dressed only in boxer shorts. Coe "climbed into a dumpster and went over a chain-link fence wrapped with barbed wire." Although Avakemian continuously ordered Coe to "stop," he climbed over the fence, then ran off. At that point, Avakemian lost sight of him.

Believing that Coe would run toward Pico Boulevard, Avakemian and his partners headed in that direction. While on Pico, Avakemian saw Coe enter a retail store. Avakemian went to the back of the store to see if there were an exit and found it to be padlocked from the outside. Realizing that there was no way out of the rear of the store, Avakemian went back to the front and went inside.

In the back of the store, Avakemian observed Coe in a bathroom, holding a ladder in front of him. Although the officers were commanding him to stop, Coe came lunging out of the bathroom with the ladder. As Coe moved forward, Avakemian fired his taser

at Coe's abdomen. Coe threw the ladder to one side, toward another officer, Agent Resko, but the taser affected Coe for only two or three seconds. After its effects wore off, Coe grabbed one of the store's employees, Sonia Ramirez, "from behind with his arm." Avakemian "tried to cycle another round with a taser but it was malfunctioning so [he] put it away." Avakemian continued to order Coe to release Ramirez. When Coe failed to do so, an officer told Ramirez to cover her face. Avakemian then "utilized pepper spray [and his] ASP baton[]." Ramirez was able to break free of Coe's grasp and she left the area.

Coe continued to resist the officers and ran toward a wall with a window leading to the front of the store. Avakemian observed "[Yolanda] Reyes kind of crouched down by [a] desk . . . and [Coe] was pinning her against [a] wall" by the window. After Avakemian again used his pepper spray, one of the officers was able to grab Coe and pull him away from Reyes so that she could get out of the corner.

After several minutes, by using pepper spray and their batons, the officers were able to gain control of Coe and take him into custody.

2. *Procedural history*.

Following a preliminary hearing, on December 28, 2009 an information was filed charging Coe with two counts of felony false imprisonment of a hostage in violation of section 210.5 and one count of misdemeanor assault by means likely to produce great bodily injury in violation of section 245, subdivision (a)(1). It was further alleged that Coe had suffered four prior convictions for serious or violent felonies within the meaning of sections1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i), the Three Strikes law, and that, with regard to counts 1 and 2, Coe had suffered four prior convictions for which he served prison terms within the meaning of section 667.5, subdivision (b), and had been convicted of four felonies which precluded a grant of probation pursuant to section 1203, subdivision (e)(4). Coe waived arraignment, pled not guilty to the three counts and denied the special allegations.

On January 28, 2010, Coe made a motion to set aside the information pursuant to section 995. After considering Coe's motion, the People's response and the transcript of

the preliminary hearing, the trial court denied the motion. The court indicated that "clearly the evidence is stronger on count 1 than count 2, but that's not what the standard is. The standard is whether there was sufficient cause for the magistrate and there was sufficient cause . . . as to those counts."

The matter was called for trial on July 30, 2010. After some discussion regarding Coe's clothing, Coe asked to address the court. Apparently, a "deal" had been offered and he had not yet decided whether to take it. Coe stated, "[I]f I didn't take the deal, I was going to exercise my *Faretta* rights . . . ."[3] The trial court responded, "Well, your right to represent yourself, does that mean you're going to represent yourself starting on Monday with picking the jury?" Coe indicated that he would "need time to prepare." The court stated, "No. You don't get that. Now is the time for trial. So you hired [defense counsel], and you can fire [defense counsel]; but we're going to trial now. So it's only – if you're not ready to represent yourself, then you don't get to." The court continued, "I am telling you that after a year and a half of continuing your case, I won't continue the case anymore. . . . Your request to represent yourself is denied."

After the trial court denied his *Faretta* motion, Coe indicated that he wished to be tried by a different judge in another court room. The trial court responded, " . . . But an affidavit against the judge [must have been] filed in the master calendar court at the time the case [was] sent out and not after it [got] there. It's not timely." Coe responded, "That's what I'm saying. This is why I don't want my attorney. Every time I turn the corner, I'm getting knocked down because of her neglect." The trial court then indicated that Coe was "about to get a trial" and asked Coe to "not . . . say anything" when the jurors arrived.

At proceedings held the following Monday, the trial court indicated, "I've discussed the matter with counsel; and if Mr. Coe pleads open to the court in case BA356480 and admits [a] probation violation in SA067325 and waives all of his back time, then I will sentence him to the high term of eight years plus the four one-year

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[3] *Faretta v. California* (1995) 422 U.S. 806.

priors, strike all of the Strikes, give him 12 years at 50 percent. [¶] He has to plead to the misdemeanor, six months concurrent on the misdemeanor; and I will terminate his probation in SA067325. [¶] And it's my understanding that if that happens, that the People would dismiss [a third pending matter,] BA356484." Although the People objected, indicating that their offer, which included a Strike and six months more prison time, was more reasonable, Coe indicated he wished to accept the trial court's offer of an open plea.

After waiving his right to a jury trial, his right to confront the witnesses against him, the right to subpoena witnesses and present a defense and the right to remain silent, Coe pled no contest to "the charges in counts 1 and 2, felonies, false imprisonment of a hostage, in violation of section 210.5 . . . ." "To the charge in count 5,[4] a misdemeanor, assault by means of force likely to produce great bodily injury in violation of section 245, subsection (a) subsection (1)[,]" Coe again pled "no contest."

At the same proceedings, the trial court informed Coe that he would have to admit his Strikes. The court explained, "[Y]ou have to admit your strikes, and then I'm going to strike them; but since this is a deal that's coming from the court and not the People, you have to admit the strike convictions. [¶] So do you admit that you were convicted in case number A089598 on February the 24th of 1987 of two counts of robbery, one count of kidnapping, and one count of rape, violation of section 207, 211, and 261.2 . . . ?" Coe responded, "Yes." Coe then admitted having served four separate prison terms within the meaning of section 667.5, subdivision (b) and gave up his right to credit "for any of the time that [he had] served in custody until [that day][.]" Defense counsel joined in the waivers, concurred in the plea and stipulated to "a factual basis based on the police report and preliminary hearing transcript."

The trial court accepted Coe's plea, found that it had been freely and voluntarily made and that he understood the charges against him and the consequences of the plea.

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[4] Counts 3 and 4, which had alleged obstructing or resisting executive officers in the performance of their duties in violation of section 69, had been dismissed at the preliminary hearing.

Based on these factors, the court found Coe guilty of the alleged offenses and found true the allegations of prior convictions and prison terms.

At proceedings held on June 8, 2011, Coe made a motion to withdraw his plea. His counsel indicated that Coe had been diagnosed as bipolar with paranoia schizophrenia and also suffers from COPD, asthma and seizures. In addition, "he pled under a great deal of stress" and he received incompetent advice from defense counsel. After the prosecutor indicated that the trial court was aware of the circumstances which had surrounded the plea, the court denied the motion. The trial court indicated, ". . . [I]t's basically buyer's remorse. And the – I don't think there's been clear and convincing evidence that he was forced to do this, that he didn't know what he was doing. [¶] I mean, if every case where the client said, you know, my lawyer forced me to do it, I want to withdraw my plea, we couldn't get any business done. [¶] So that's the basis for the ruling."

As to counts 1 and 2, the trial court sentenced Coe to the "high term of eight years in the state prison[, the terms to run] concurrent[ly] with each other." The court then imposed an additional year for a each of the four section 667.5, subdivision (b) priors[,] for a total of 12 [years.] A term of six months was imposed for Coe's conviction of count 5, the term to run "concurrent with" the sentences imposed for counts 1 and 2. Although he had waived his back time, Coe was to receive presentence custody credit from the date he entered the plea. Accordingly, he was awarded 310 days actually served and 310 days of conduct credit, for a total of 620 days. Coe was ordered to pay a $200 restitution fine (§ 1202.4, subd. (b)), a stayed $200 parole revocation restitution fine (§ 1202.45), a $40 court security assessment (§ 1465.8, subd. (a)(1)) and a $30 criminal conviction assessment (Gov. Code, § 70373). Then, on its own motion, the trial court struck all four Three Strikes allegations (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)).

On August 26, 2011, Coe filed a timely notice of appeal. The "notice" indicates that "[t]his appeal challenges the validity of the plea or admission" and requests a certificate of probable cause. That same day, the court, indicating it had read and considered the request for a certificate of probable cause, granted it.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed April 10, 2012, the clerk of this court advised Coe to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. On April 17, 2012, Coe filed a document "enclosing some grounds of appeal, contentions and arguments." Coe's primary argument, and the one on which all of the others turn, is that his trial counsel was ineffective. Among other contentions, he asserts that, since the assault charge was alleged as a misdemeanor, his counsel should have argued that the charges alleging false imprisonment should also have been charged as misdemeanors, that his counsel failed to procure evidence of video surveillance of the store's office, that his counsel should have realized that the evidence against him had been "tampered" with, that his counsel failed to argue his psychiatric disabilities and their effect on his behavior and that counsel failed to argue how the use of the tazer affected Coe's ability to function.

"In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211; see *Strickland v. Washington* (1984) 466 U.S. 668, 694.) If the defendant makes an insufficient showing with regard to either component, the claim must fail. (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

With regard to the two counts of false imprisonment of a hostage, the evidence at the preliminary hearing indicated that a group of police officers was required to use a tazer, pepper spray and their batons in order to get Coe to release Ramirez and Reyes. The assault occurred when Coe threw a ladder at a police officer. Given the difference in the seriousness of the crimes, defense counsel would have been hard pressed to argue that the counts alleging false imprisonment amounted to mere misdemeanors.

With regard to counsel's failure to obtain video surveillance of the office, there is no evidence that such a tape existed. It was mentioned by neither the store employees nor the police officers. Counsel cannot be faulted for failing to obtain evidence which does not exist.

Coe indicates his section 995 motion to dismiss was denied with "bias." A review of the record indicates otherwise. Section 995 provides in relevant part: "[T]he indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion, in either of the following cases: [¶] . . . [¶] (2) If it is an information: [¶] (A) That before the filing thereof the defendant had not been legally committed by a magistrate: [¶] (B) That the defendant had been committed without reasonable or probable cause." Here, the information was filed following a preliminary hearing after which a magistrate found that there had been "sufficient evidence presented that the offenses in counts 1, 2, and 5, two violations of . . . section 210.5 and one violation of . . . section 245[, subdivision] (a)(1) ha[d] been committed[.]" The court, however, felt that the offense in count 5 did not give rise to felony conduct. It therefore reduced that charge to a misdemeanor. In view of the court's comments, it cannot be said that it was biased when it heard Coe's section 995 motion.

Coe indicates that Sonia Ramirez "was sent out of the country not 30 d[a]ys after [the preliminary hearing]" and that, accordingly, the district attorney had coerced her to testify. A review of the record fails to reveal that Ramirez was sent out of the country and a review of her testimony, particularly when it is compared with that of Avakemian, fails to indicate that it was in any way coerced.

Coe indicates the evidence against him was "tampered" with. Nothing in the record indicates this to be true.

Coe appears to be arguing that the trial court disregarded his mental instability. However, throughout the preliminary hearing, the preparation for trial and the plea negotiations, Coe appeared to be coherent and aware of the proceedings. It was only when he made his motion to withdraw his plea that Coe revealed that he has been diagnosed as bipolar with paranoia schizophrenia and suffers from COPD and seizures. Even then, he blamed the fact that he entered the plea, not only on his mental illness, but on the fact that he was acting "under a great deal of stress" and had received incompetent advice from his counsel. Under these circumstances, the trial court properly determined that Coe's mental illness had little or nothing to do with his decision to enter the plea.

Finally, Coe argues that the effects of the tazer, "which disabled [his] functions," were improperly disregarded. However, the testimony at the preliminary hearing indicated that the tazer was malfunctioning and had little or no effect on Coe. Coe was acting of his own accord, not as the result of having been shot with a tazer.

It should be noted that Coe suffered no prejudice as a result of his trial counsel's actions in this matter. Although he had been charged with four Three Strikes felonies which, if found true, would have subjected him to a sentence of 25 years to life, the trial court, after "discuss[ing] the matter with counsel[,]" agreed to strike all of the Three Strikes priors and sentence Coe to a total term of "12 years in prison at 50 percent."

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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CROSKEY, J.

We concur:

KLEIN, P. J.

ALDRICH, J.