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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. JONATHAN ELBYE, Defendant and Appellant.	B280635 (Los Angeles County Super. Ct. No. BA448638)

APPEAL from the judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed.

David Zarmi, 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, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jonathan Elbye appeals from the judgment entered following his conviction by jury of damaging a prison or jail, with damage in excess of $950. (Pen. Code, § 4600, subd. (a).)[1] We affirm.

FACTUAL SUMMARY

I. PEOPLE'S EVIDENCE.

On June 23, 2016, Los Angeles County Sheriff's Deputy Gerard Alcaraz was employed at the Twin Towers jail. About 3:00 p.m., Alcaraz was conducting a routine check of inmates and cells. During the check, defendant angrily demanded to use the phone. Alcaraz was unable to escort defendant to a phone so he continued walking. Defendant did nothing to indicate that he needed help. At the time, the window in defendant's cell door was intact.

But, no more than 15 minutes later, during the next check, Alcaraz observed the lower window on defendant's cell door had been shattered. Defendant told Alcaraz, "I told you you had one hour, I needed to use the phones now you have to take me out." Defendant did nothing to indicate that he needed help. Defendant did not tell Alcaraz he was suicidal. At trial, Alcaraz identified a video of defendant breaking the cell door window with his foot.

Craig Castanon was a maintenance supervisor and oversaw work orders at the jail. He testified a cell door in defendant's module was a "metal frame with glass" so an inmate was visible from outside the cell. The glass was two-inch-thick specialty glass designed to withstand an impact equivalent to that from

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

about "25 thrusts with [a] sledge hammer." It would cost $1,500 to repair the cell window.

II. DEFENSE EVIDENCE.

A. The Present Offense.

Defendant testified as follows. During the afternoon in question, he separately told two deputies that he felt suicidal and needed help, claiming to have had a towel wrapped around his neck at the time. The deputies told him that they would get help. The third deputy, Alcaraz, "came to the door and I tried to get his attention . . . , he just walked on past, and me being off my medication trying to receive help I kicked the door only trying to get help not trying to break the window or anything like that, it was on an accident." He further admitted that after deputies ignored him, "I did kick the . . . I turned around and tried to kick the middle portion of the door," but that he "turned around so [he] couldn't see where [he was] kicking." He explained, "I wasn't trying to hit the actual glass, I was trying to hit the side of the . . . panel, not the glass panel."

B. The August 2015 Incident.

On cross-examination, defendant testified about a video depicting an August 2015 incident involving defendant in a jail cell. The video showed defendant, at a doorway, turn around and, using his right foot, "slam the bottom of that window." He was asked: "Q And so you know exactly what's going to happen if you turn around and donkey kick a door; right? [¶] A Yes. [¶] Q The glass is going to break; right? [¶] A Yes. [¶] Q And in this video [of the August 2015 incident] you're not getting anyone's attention; right? [¶] A No." He conceded that he "kick[ed] [the] glass while [he was] turned around similar to the

way [he] kicked the glass" as depicted in the video of the present incident.

Defendant presented no additional witnesses.

III. REBUTTAL EVIDENCE.

In rebuttal, Los Angeles County Sheriff's Deputy Elsie Medina testified that on the morning of the incident, at 5:00 a.m., Medina tried to remove defendant from his cell so he could go to court but defendant refused to go. Defendant later came to his cell door and began kicking it to get deputies' attention. Defendant said he was ready to go to court. He then kicked the window, breaking the glass. Medina identified a video of the incident showing defendant "kick the door, pause, face the window and then start[ ] kicking it a few seconds later." Medina indicated that, at some point, defendant "cracked" the window.

ISSUES

Defendant claims the trial court erred by (1) admitting uncharged act evidence, (2) failing to instruct on accident as a defense, and (3) failing to instruct on conflicting evidence.

DISCUSSION

I. THE TRIAL COURT PROPERLY ADMITTED UNCHARGED ACT EVIDENCE.

A. Pertinent Facts.

Prior to trial, the prosecutor moved to introduce uncharged act evidence of the August 2015 incident, pursuant to Evidence Code section 1101, subsection (b) (the prior case). The court indicated it found the evidence highly probative and stated the "information will come in." Defendant, who was self-represented, suggested the prior case had been dismissed. The court rejected the suggestion as being without any basis in the record.

The prosecutor then provided the court with documentary evidence the prior case had not been dismissed. The court asked defendant if he was "objecting to the People's request to admit this under [Evidence Code section] 1101[, subdivision] (b)" and defendant replied yes. The court stated, "Now is your time to lay out your objection." Defendant claimed the documentary evidence was erroneous and the prior case had been dismissed.

The court asked defendant, "Any other basis you're asking the court not to allow to admit that as [Evidence Code section] 1101[, subdivision] (b) evidence?" Defendant replied, "No, your Honor that would be my only basis is that the case was dismissed." Commenting on the similarity of the crimes, and noting the prosecutor was asking to admit the evidence "for purposes of absence of mistake and plan and knowledge," the court stated, "I will permit the People to admit that under [section] 1101[, subdivision] (b)."

During the final charge to the jury, the court, using CALCRIM No. 303, instructed that to prove the present offense, the People had to prove defendant "willfully and intentionally damaged or destroyed jail property." The instruction provided, "Someone acts willfully when he or she does it willingly or on purpose." The court, using CALCRIM No. 375, instructed the jury on the uncharged August 2015 act. The instruction stated, "you may but are not required to consider the evidence for the limited purpose in deciding whether or not the defendant knew his conduct would damage or destroy jail property." The instruction also stated, "Do not consider this evidence for any other purpose except for the limited purpose of defendant's *knowledge and lack of mistake or accident*." (Italics added.) The instruction further told the jury not to conclude from the

uncharged act evidence that defendant had a bad character or was disposed to commit the crime.

The jury retired to deliberate and reached a guilty verdict in 26 minutes.

B. Analysis.

Defendant claims the trial court erred by failing to exclude, as irrelevant and excludable under Evidence Code section 352, the uncharged act evidence of the August 2015 incident. Defendant forfeited the claims by failing to object on those grounds in the trial court. (Cf. *People v. Alexander* (2010) 49 Cal.4th 846, 905; *People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7; Evid. Code, § 353, subd. (a).) Here, as previously discussed, the defendant was specifically asked by the court if he wished to object to this evidence on any grounds other than his belief that the criminal case reflecting that incident had been dismissed. He said no. This court, therefore, will not consider defendant's claims to the extent that they are based on grounds not raised below.

II. THE TRIAL COURT DID NOT PREJUDICIALLY ERR BY REFUSING TO GIVE AN ACCIDENT INSTRUCTION.

Defendant asked the trial court to instruct the jury with CALCRIM No. 3404[2] regarding accident. The prosecutor objected on the ground that section 4600, subdivision (a), is a general

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[2] CALCRIM No. 3404, states, "The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of _____ <*insert crime[s]*> unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent." (Boldface omitted.)

intent crime, and, because defendant admitted he kicked the door intentionally, there was no ground on which to give the instruction. The court found it had no sua sponte duty to give CALCRIM No. 3404.

Defendant now claims the trial court prejudicially erred by refusing to instruct the jury with CALCRIM No. 3404. We will assume, without deciding, that the instruction was applicable. Even so, defendant was not prejudiced by the trial court's failure to give it, whether we review any error under the standards of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) or *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).[3]

First, the jury was instructed that to prove defendant violated section 4600, the People had to prove he "willfully and intentionally damaged or destroyed jail property. [¶] Someone acts willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else or gain any advantage." Therefore, the notion of "accident" in CALCRIM No. 3404 was subsumed in the instruction given to the jury.

Second, there was overwhelming evidence defendant "willfully and intentionally" destroyed or injured any jail within the meaning of section 4600, subdivision (a). He admitted he kicked the door, although he denied intending to break the window: "I kicked the door only trying to get help not trying to break the window or anything like that, it was on an accident."

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[3] Defendant cites *United States v. Escobar De Bright* (9th Cir. 1984) 742 F.2d 1196, to support his argument that any instructional error is reversible per se. We are not obligated to follow federal appellate court authority. (Cf. *People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1587.)

The jury watched a video of this incident and it showed defendant "donkey kicking" his cell door window. The jury also watched a video of the prior August 2015 incident in which defendant engaged in the same behavior. Also, the window that defendant claimed to have "accidentally" broken was designed to withstand blows equivalent to 25 thrusts with a sledgehammer; yet, it did not withstand defendant's "accidental" blows. Given this evidence, the jury understandably rejected defendant's argument that he broke the window unintentionally in a spirited attempt to get help. In light of the above, the instructional error was harmless under any conceivable standard. (Cf. *Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman*, *supra*, 386 U.S. at p. 24.) None of defendant's arguments compels a contrary conclusion.

III. THE COURT DID NOT PREJUDICIALLY ERR BY FAILING TO GIVE CALCRIM NO. 302.

The trial court did not give CALCRIM No. 302,[4] pertaining to conflicting evidence. Defendant claims this was error. There is no need to decide the issue.

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[4] CALCRIM No. 302, states, "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. *What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point*." (Italics added, boldface omitted.)

In *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–885 and footnote 8, our Supreme Court held the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 302's predecessor, CALJIC No. 2.22, as modified by the court. We therefore assume without deciding the trial court's failure here to instruct the jury sua sponte with CALCRIM No. 302 was error.

However, *People v. Snead* (1993) 20 Cal.App.4th 1088, 1097, concluded a trial court's error in failing to instruct with CALJIC No. 2.22 was harmless because, based on all the instructions that were given, there was no reasonable likelihood the omission caused any juror misunderstanding. (Accord, *People v. Virgil* (2011) 51 Cal.4th 1210, 1262.)

Here, the trial court instructed the jury with the CALCRIM equivalents of the CALJIC instructions given in *Snead*.[5] They included CALCRIM No. 226, which stated, "Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not." Moreover, while the People called three witnesses to the defendant's one, the prosecutor did not argue to the jury that it should make its determination based on the number of witnesses, nor did the prosecutor argue that more witnesses supported than opposed conviction.

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[5] The trial court here instructed the jury with CALCRIM Nos. 220 (reasonable doubt), 222 (evidence), 223 (direct and circumstantial evidence), 224 (circumstantial evidence), 226 (witnesses), and 301 (single witness's testimony).

Defendant argues the alleged instructional error was prejudicial because Alcaraz denied he heard defendant indicate he was suicidal or request medical attention. Defendant also argues the alleged error was prejudicial because, contrary to Alcaraz's testimony, he did not make statements about wanting to use the telephones and did not make "other statements." However, these are simply instances of conflicting testimony between one People's witness and one defense witness, i.e., instances to which an instruction prohibiting the counting of witnesses is not pertinent. Therefore, due to the overwhelming evidence of guilt in this case, the alleged instructional error was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

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DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.