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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL MONTES, Defendant and Appellant.	B230950 (Los Angeles County Super. Ct. No. MA049295)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Judgment affirmed in part, reversed in part and remanded to the trial court with directions.

Law Offices of Allmeroth, Garner & Fly, and Jonathan P. Fly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

Samuel Montes appeals from the judgment entered following his conviction by jury on two counts of custodial possession of a weapon, in violation of Penal Code section 4502, subdivision (a).[1] We reverse appellant's conviction on count 2 because his simultaneous possession of two razor blades constituted a single violation of the statute, pursuant to *People v. Rowland* (1999) 75 Cal.App.4th 61 (*Rowland*). We conditionally reverse appellant's conviction on count 1 based on *Pitchess* (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) error. We remand for the trial court to hold a new in camera hearing on appellant's *Pitchess* motion.

FACTUAL AND PROCEDURAL BACKGROUND

On December 29, 2009, appellant was transported from the general reception area to the administrative segregation unit of the Los Angeles County State Prison in Lancaster, California, by Officer Gerardo Valenzuela. Pursuant to prison procedures, appellant was required to remove his clothing and pass through a metal detector before entering the administrative segregation unit. Appellant's clothing was inspected, and he was asked if he had any contraband. He stated that he did not.

Appellant set off the metal detector, which indicated that he possessed contraband in the middle area of his body. Appellant denied having any contraband, but he went through the metal detector two more times and set it off both times. A handheld metal detector wand was used to search him, and it indicated that he had contraband in his rectal area. Officer Valenzuela had seen inmates hide razor blades in their rectal area before and suspected that appellant had done so.

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[1] Further statutory references are to the Penal Code unless otherwise specified.

Appellant was placed in a holding facility for "contraband watch." The cell was searched before appellant was placed inside, the toilet was turned off so it could not be flushed, and plastic bags were placed over all the drains. An officer was assigned to watch appellant to ensure that he did not remove his clothing or try to get rid of the contraband, and when he used the restroom, his waste was searched.

Officer Jeremy Adams was on contraband watch in the administrative segregation unit on January 7, 2010. He was assigned to monitor appellant, and he noticed that appellant seemed very uncomfortable and was holding his abdomen in his sleep.

Appellant asked for permission to urinate, and when he sat on the toilet, he defecated. Officer Adams later searched the fecal matter and found two heads of razor blades wrapped in plastic wrap. Officer Adams reported the incident to his supervisor and booked the razor blades into evidence.

Inmates in the administrative segregation unit are allowed to have razors only while they are in the shower, not in their cells. They are issued one razor each when they are in the shower, and they are required to return the razor after finishing the shower before returning to their cells. Inmates in the general population are given razors and are allowed to keep a razor in their cells, exchanging it for a new one when needed.

Officer Greg Johnson, an investigator with the Department of Corrections, testified that the razors used by inmates in the administrative segregation unit had flimsy handles in order to prevent their use as weapons. He stated that he had seen razor heads detached from the handles in order to make weapons. For example, inmates could melt a razor head onto a toothbrush and wrap it with string in order to make a weapon. The prosecutor introduced into evidence a photograph of a

razor modified in the manner described by Officer Johnson. The photograph was not related to appellant's case, but instead was a photo of a weapon used by an inmate who used it to permanently disfigure another inmate.

Appellant was charged with two counts of custodial possession of a weapon, in violation of section 4502, subdivision (a). It was further alleged that he had suffered a prior strike conviction (§§ 667, subds. (b)-(i), and 1170.12, subds. (a)-(d).) The jury found appellant guilty of both counts, and the trial court found the prior conviction allegation to be true. Appellant was sentenced to a total term of eight years in state prison: the upper term of four years on count 1, doubled to eight years for the strike conviction, plus the midterm of three years on count 2, which the court stayed pursuant to section 654. Appellant filed a timely notice of appeal.

DISCUSSION

I. Jury Instruction

Appellant contends the trial court erred by failing to instruct the jury on an essential element of the crime of custodial possession of a weapon, namely, that the razor blades were "not necessary for an inmate to have in the inmate's possession." (*People v. Custodio* (1999) 73 Cal.App.4th 807, 812 (*Custodio*).) We disagree.

Section 4502, subdivision (a) provides in relevant part: "Every person who, while at or confined in any penal institution, while being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, possesses or carries upon his or her person or has under his or her custody or control . . . any dirk or dagger or sharp instrument . . . , is guilty of a felony." In *Custodio*, on which appellant relies, the court rejected the defendant's

assertion that section 4502, subdivision (a) is unconstitutionally vague. (*Custodio*, *supra*, 73 Cal.App.4th at p. 809.) The defendant, an inmate in a penal institution, possessed a plastic ballpoint pen with a sharp piece of metal attached to it. He claimed that the term "sharp instrument," as used in section 4502, subdivision (a), was unconstitutionally vague because it gave law enforcement unfettered discretion to enforce the law if, for example, they were to ignore the possession of a sharpened pencil, which also could be described as a sharp instrument.

The court reasoned that the statute was designed to protect inmates and correctional staff from assault, and that "[i]t applies to instruments that can be used to inflict injury and that are not necessary for an inmate to have in the inmate's possession. [Citation.]" (*Custodio, supra*, 73 Cal.App.4th at p. 812.) Thus, "a person of ordinary intelligence would know what is and what is not prohibited by the statute," and would know that it does not generally apply to a sharpened pencil, "which ordinarily is used for a legitimate and necessary purpose." (*Ibid.*)

Appellant relies on this language in *Custodio* to argue that the trial court erred in failing to instruct the jury that a prisoner can possess an object that is necessary for an inmate to have. According to appellant, because a reasonable juror could conclude that an inmate needs to shave, such a juror could conclude that possession of a razor is necessary.

However, the language on which appellant relies was not intended to describe a necessary element of the crime; it was simply responding to the notion that the statute is unconstitutionally vague. The law is clear that the prosecution need not prove that the inmate's purpose for possessing a sharp instrument was not innocent. If the prosecution proves that the instrument is capable of being used as a weapon, and the inmate knows it, no more need be shown on the point.

"To show a violation of section 4502 the prosecution must prove that the defendant knew the prohibited object was in his or her possession, but need not prove the intent or purpose for which the weapon was possessed. [Citation.] Section 4502 '"absolutely prohibits all prisoners in any state prison, without qualification, from possessing or carrying on their person certain designated deadly weapons. *The intention with which the weapon is carried on the person is not made an element of the offense.* Proof of the possession of the prohibited weapon infers that it is carried in violation of the statute."' [Citation.] Thus, to establish the section 4502 offense, the prosecution need not prove that the inmate carried the weapon for an unlawful purpose." (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 571; see also *People v. Strunk* (1995) 31 Cal.App.4th 265, 272 ["To show a violation of this statute, the prosecution must prove the defendant was confined in a state prison and that he had knowledge of the prohibited object in his possession."].) The purpose of the statute is "to protect inmates and officers from the danger of armed assault. . . . [I]ntended violent use is not an element of proof of possession. [Citation.]" (*People v. Rodriquez* (1975) 50 Cal.App.3d 389, 395 (*Rodriquez*).)

Here, the trial court instructed the jury in relevant part pursuant to CALCRIM No. 2745 that the People had to prove that appellant possessed a sharp instrument and "knew that the object, the sharp instrument, could be used as a stabbing weapon or for purposes of offense or defense."[2] No further instruction

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[2] Appellant did not object to the instruction. The People argue that appellant forfeited the claim by failing to raise it in the trial court. However, "it is well settled that no objection is required to preserve a claim for appellate review that the jury instructions omitted an essential element of the charge. [Citations.]" (*People v. Mil* (2012) 53 Cal.4th 400, 409; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1134 [explaining that the claim that a jury instruction implicates a defendant's substantial rights is

was required on this point. (*Rodriquez, supra*, 50 Cal.App.3d at p. 396 ["[e]vidence of harmless use by jail inmates . . . may be relevant if it bears on the likelihood that an item will cause death or serious bodily injury. Such evidence is defensive, however. It is not necessary for the People to prove the item has no harmless use."].)

Moreover, even if appellant were correct, there was no evidence that it was "necessary" for appellant to possess the razor blades in his anus, or otherwise possess them when he was not in the shower. Officer Johnson testified that, although inmates in the administrative segregation unit are allowed to use razors while in the shower, they are not permitted to possess razors elsewhere.

II. *Pitchess* Claims

In appellant's *Pitchess* motion, he sought "[a]ll complaints from any and all sources relating to acts of aggressive behavior, violence, excessive force, or attempted violence or excessive racial bias, ethnic bias, coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of reasonable suspicion and/or probable cause, perjury, dishonesty, writing of false police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude" as to Officers Rick Harris, O. Z. Hughes, and Adams. The trial court found good cause to review the records of all three officers as to the use of force. However, the court granted review as to acts of dishonesty only as to Officers

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cognizable on appeal even if not raised in the trial court].) We therefore address the merits of appellant's claim.

Harris and Hughes, reasoning that Officer Adams "did not author any [of the] reports."

According to appellant's *Pitchess* motion, the officers assaulted him and caused him injury, causing them to falsify reports against him. The *Pitchess* motion alleged that the officers planted the evidence against him and that he never possessed the razor blades.

An incident report was attached to the *Pitchess* motion. Officer Adams completed Part C - Staff Report, describing his discovery of the razor blades. Officer Hughes reviewed Officer Adams' report and completed another Part C - Staff Report. Officer Harris reviewed Officer Hughes' report and completed Part A - Cover Sheet, Part A1 - Supplement, and Part B2 - Staff.

A. Discovery Regarding Officer Adams

Appellant's first contention is that the trial court abused its discretion in denying his *Pitchess* request for discovery regarding acts of dishonesty by Officer Adams. We agree, and respondent concedes the issue.

Officer Adams is the officer who discovered the razor blades. He is the officer who took the blades into an evidence room, placed them in a bag, and placed them in a locker. He wrote and signed the "Part-C Staff Report" reporting what he discovered. Appellant alleged in his *Pitchess* motion that the officers planted the evidence against him. Respondent accordingly concedes that appellant established good cause to review *Pitchess* material relating to acts of dishonesty by Officer Adams.

"[T]he proper remedy when a trial court has erroneously rejected a showing of good cause for *Pitchess* discovery and has not reviewed the requested records in camera is not outright reversal, but a conditional reversal with directions to review

the requested documents in chambers on remand" and grant any appropriate discovery. (*People v. Gaines* (2009) 46 Cal.4th 172, 180.)

B. Independent Review of *Pitchess* Proceeding

Appellant asks that we review the transcript of the in camera hearing. We have done so, and note that the court failed to administer the oath to the two custodians of record who appeared at the in camera hearing. "[T]he oath requirement embodied in Evidence Code section 710 applies to the custodians of records who testify at *Pitchess* hearings." (*People v. White* (2011) 191 Cal.App.4th 1333, 1339 (*White*).) "[A]dministering the oath to the custodians of records who testify at *Pitchess* hearings is necessary to establish the accuracy and veracity of the custodians' representations regarding the completeness of the record submitted for the court's review. [Citation.]" (*Id.* at p. 1340.)

On remand, the court is directed not only to review in camera any records relating to acts of dishonesty by Officer Adams, but also to conduct another in camera review of the documents already reviewed, and ensure that any witness who testifies at the in camera hearing is under oath. (*White*, *supra*, 191 Cal.App.4th at pp. 1341-1342.)

C. Five-Year Limitation on *Pitchess* Discovery

Appellant contends that the five-year limitation on disclosure of *Pitchess* material violates his constitutional rights. His argument has been foreclosed by the California Supreme Court's decision in *City of Los Angeles v. Superior Court* (*Brandon*) (2002) 29 Cal.4th 1 (*Brandon*), in which the court addressed the interplay between *Pitchess* and *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

The statutory scheme codifying the *Pitchess* procedures "does not require disclosure of complaints of police officer misconduct that occurred more than five years before the crime with which the defendant is charged." (*Brandon*, *supra*, 29 Cal.4th at p. 10 [discussing Evid. Code, § 1045].) *Brandon* rejected the defendant's argument that this time limitation was contrary to the *Brady* requirement to disclose material evidence favorable to the defense and violated his due process rights. (*Id.* at pp. 10-11.)

"Brandon explained that the '"'*Pitchess* process' operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information."' [Citations.] [¶] In other words, the statutory *Pitchess* procedures implement *Brady* rather than undercut it, because a defendant who cannot meet the less stringent *Pitchess* standard cannot establish *Brady* materiality. 'Our state statutory scheme allowing defense discovery of certain officer personnel records creates both a broader and lower threshold for disclosure than does the high court's decision in *Brady*, *supra*, 373 U.S. 83. Unlike *Brady*, California's *Pitchess* discovery scheme entitles a defendant to information that will "facilitate the ascertainment of the facts" at trial [citation], that is, "all information pertinent to the defense" [citation].' (*Brandon, supra*, 29 Cal.4th at p. 14.) To obtain disclosure '[u]nder *Pitchess*, a defendant need only show that the information sought is material "to the subject matter involved in the pending litigation." [Citation.] *Because Brady's constitutional materiality standard is narrower than the Pitchess requirements, any citizen complaint that meets Brady's test of materiality necessarily meets the relevance standard for disclosure under Pitchess.* [Citation.]' (*Brandon, supra*, at p. 10, italics added.) Thus, if a defendant meets the good cause requirement for *Pitchess* discovery, any *Brady* material in an officer's file will necessarily be included." (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1474.)

Although *Brandon* held that the five-year limitation did not violate the defendant's constitutional rights, the court further held that the statutory time limitation was not "an absolute bar to disclosure." (*Brandon*, *supra*, 29 Cal.4th at p. 13.) The court relied on *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 to conclude that "a trial court that in response to a criminal defendant's discovery motion undertakes an in-chambers review of confidential documents can, if the documents contain information whose use at trial could be dispositive on either guilt or punishment, order their disclosure." (*Brandon*, *supra*, 29 Cal.4th at p. 15.) The court noted, however, that "[w]e do not suggest that trial courts must routinely review information that is contained in peace officer personnel files and is more than five years old to ascertain whether *Brady*, *supra*, 373 U.S. 83, requires its disclosure." (*Id.* at p. 15, fn. 3.)

Pursuant to *Brandon*, the trial court has discretion to order the disclosure of documents that contain information material to the issue of guilt or punishment, but need not do so routinely. On remand, therefore, if the trial court finds confidential documents over five years old that meet the *Brady* standard, it can order their disclosure.

III. Introduction of Photograph

Prior to trial, defense counsel objected to the introduction of a photograph depicting prison razor blades that had been melted onto plastic handles and tied with string. The court reasoned that the photograph was relevant to "the elements of the charges that are pending against [appellant], including the knowledge factor that is required," and therefore found that "any undue prejudice does not substantially outweigh the probative value." The court instructed the prosecutor to

"make it very clear . . . that that manufactured weapon is not related to this case, but it depicts how a razor blade can be used."

At trial, Officer Johnson testified that the razor blades attributed to appellant were normally attached to a "flimsy" handle to prevent their use as weapons. He further testified that the razor blades can be melted onto a toothbrush to use a slicing mechanism, and the photograph at issue was introduced. Officer Johnson testified that the photograph was not related to this case, but that the weapon in the photograph was used to cut another inmate, causing permanent disfigurement.

We find no error in the trial court's ruling. The prosecution had to prove that the razor blades possessed by appellant could be used as stabbing weapons and that appellant knew that fact. The photograph tended to prove that razor blades of the type possessed by appellant could be used as a weapon in prison, and thus was admissible to prove an element of the offense.

In any event, any error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Heard* (2003) 31 Cal.4th 946, 978.) "'Under the *Watson* standard, the erroneous admission of a photograph warrants reversal of a conviction only if the appellate court concludes that it is reasonably probable the jury would have reached a different result had the photograph been excluded. [Citation.]' [Citation.]" (*Ibid.*) Given the undisputed evidence that defendant possessed two razor blades secreted in his rectum, it is not reasonably probable that absent the photograph the jury would have reached a different result.

IV. Multiple Convictions

Appellant contends that the trial court erred in convicting him of multiple violations of section 4502, subdivision (a). Respondent concedes that appellant's

possession of two sharp instruments constituted only a single violation of the statute.

At the sentencing hearing, the trial court acknowledged that appellant could be convicted of only one count of violating section 4502, subdivision (a), pursuant to *Rowland*, *supra*, 75 Cal.App.4th 61. Nonetheless, the court upheld both convictions and imposed a three-year term on count 2, which the court ordered stayed pursuant to section 654.

In *Rowland*, the defendant was found guilty of three counts of unlawful possession of a weapon while in state prison, in violation of section 4502, subdivision (a), based on his possession of three sharpened wood shafts. On appeal, the court "initially questioned whether section 654 bars multiple punishment for defendant's conviction on two of the three counts of possessing a weapon while in prison in light of the fact he was found to be in simultaneous possession of all three weapons." (*Rowland*, *supra*, 75 Cal.App.4th at p. 64.) The defendant further argued that, not only was separate sentencing improper, but "he could not properly be convicted of more than one count of section 4502, subdivision (a), where he possessed three weapons of the same type at the same time." (*Ibid.*) The court agreed. The court first reasoned that "section 4502, subdivision (a), provides that, 'Every person who, while at or confined in any penal institution . . . possesses . . . *any* dirk or dagger or sharp instrument . . . is guilty of a felony . . . .' (Italics added.) The use of the word 'any' in this statute . . . persuades us defendant is subject to only one conviction for his simultaneous possession of three sharp wooden sticks in prison. [Citation.]" (*Id.* at p. 65.) The court also relied on legislative intent in concluding that the defendant was improperly convicted of three counts instead of only one. (*Id.* at pp. 65-67.) The

court therefore reversed two of the convictions and remanded for resentencing. (*Id.* at p. 67.)

Pursuant to *Rowland*, the trial court erred in upholding both convictions and merely staying the sentence on count 2. We therefore reverse appellant's conviction on count 2.

V. Cumulative Prejudice

Appellant contends that the alleged errors resulted in prejudice and deprived him of a fair trial. "'[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citation.]" (*People v. Bautista* (2008) 163 Cal.App.4th 762, 785.) Although we find error here, "we would not say the whole of the trial court's errors outweighed the sum of their parts [citation], a result more favorable to [appellant] would have been reached in the absence of the errors [citation], or [appellant] suffered a miscarriage of justice [citation]." (*People v. Najera* (2006) 138 Cal.App.4th 212, 228-229.)

DISPOSITION

The conviction on count 2 is reversed. As to count 1, the judgment is conditionally reversed and remanded. The trial court is directed to conduct a new *Pitchess* hearing at which it shall: (1) conduct a review of the materials already reviewed in camera (as to which, in the prior in camera review, the custodians of records were not sworn); (2) conduct an in camera review of any records relating to alleged acts of dishonesty by Officer Adams (which records were not previously reviewed); (3) ensure that the custodians of record who testify at the in camera hearing are placed under oath; and (4) order discovery of any discoverable

information. If there is no additional discoverable information, or if there is discoverable information but appellant cannot demonstrate prejudice, the court shall reinstate the judgment, prepare an amended abstract of judgment reflecting the reversal of count 2, and send a certified copy to the Department of Corrections and Rehabilitation.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.