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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DANNY PINON, Defendant and Appellant.	B236506 (Los Angeles County Super. Ct. No. KA094051)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven D. Blades, Judge. Affirmed.

James M. Crawford, 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, Senior Assistant Attorney General, Stacy A. Schwartz and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant, Danny Pinon, of one count of short-barreled shotgun or rifle activity in violation of Penal Code section 12020, subdivision (a)(1), one count of possession of a firearm by a felon in violation of Penal Code section 12021, subdivision (a)(1), and one count of possession of a controlled substance in violation of Health & Safety Code section 11377, subdivision (a)(3). Appellant contends that the trial court erred when it denied his motion for self-representation and when it allowed the prosecution to introduce evidence of a second gun—namely, a .22-caliber rifle. As we shall explain, appellant failed to demonstrate sufficient cause to substitute his counsel on the eve of trial, and therefore the court did not err in rejecting his request. In addition, although evidence of a second gun should not have been admitted at trial, appellant has not shown he suffered prejudice as a result of the error. Consequently, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On April 21, 2011, the Los Angeles County Sheriff's Department ("LACSD") searched Lucille Rodriguez's residence in Baldwin Park for the purpose of conducting a parole compliance search for appellant. During the search, Deputy Miguel Ramirez saw appellant step out of the back door of the residence. Ramirez identified himself and asked appellant to stop. Appellant did not stop, and instead continued walking towards a detached garage at the rear of the property. While this was happening, Ramirez saw appellant toss a cigarette box on the ground.

Deputy Oscar Cantu opened the cigarette box, and discovered a small plastic bag that appeared to contain methamphetamine along with a glass pipe. Criminalist Warren Best confirmed the substance contained .12 grams of methamphetamine hydrochloride.

Deputy Steve Busch proceeded to do a pat-down search of appellant and found, in his right front pants pocket, a key to a shed located in the back of the property. Deputy Rick Adams opened the shed and found a short-barreled shotgun inside. Deputy Busch then showed the short-barreled shotgun to the other people at the location—two women and one man. No one claimed ownership of the short-barreled shotgun, and no one said they had a key to the shed. In the detached garage, LACSD Deputies found a second

gun—a .22-caliber rifle equipped with a silencer—hidden inside a coffee table. Another individual may have shared part of the garage with appellant.

On June 17, 2011, a four-count information was filed charging appellant with: (1) short-barreled shotgun or rifle activity (Pen. Code, § 12020, subd. (a)(1)) in Count 1; (2) possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)) in Count 2; (3) possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)(3)) in Count 3; and (4) resisting a peace officer (Pen. Code, § 1248, subd. (a)(1)) in Count 4.[1] The information further alleged as to counts 1 and 2 that the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)).[2]

Appellant entered a not guilty plea to each of the charges and denied the enhancement allegations. The matter proceeded by way of a jury trial, which commenced on August 22, 2011. On the day set for trial, appellant requested to represent himself. After inquiring into the reasons for the motion, the court denied it.

On August 25, 2011, the jury found appellant guilty as charged in counts 1, 2, and 3, but did not reach a verdict as to the gang allegations. Appellant admitted the prior convictions and, at the People's request, the court struck one prior strike conviction. Appellant was sentenced to a total term of nine years and four months in state prison.

Appellant timely filed his appeal.

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[1] Count 4 was later dismissed in furtherance of justice.

[2] Two prior strike convictions (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), three prior felonies (Pen. Code, § 1203, subd. (e)(4)), two prior prison terms (Pen. Code, § 667.4, subd. (b)), and one prior serious felony conviction (Pen. Code, § 667, subd. (a)(1)) were also alleged.

DISCUSSION

I. The Trial Court Did Not Err In Denying Appellant's Motion For Self-Representation

Appellant contends that the trial court erred in denying his motion for self-representation, which he made on the day set for trial, with prospective jurors waiting in the hallway. This contention lacks merit.

A criminal defendant has a constitutional right to counsel at all critical stages of a criminal prosecution. (*Mempa v. Rhay* (1967) 389 U.S. 128, 134-137; *People v. Dunkle* (2005) 36 Cal.4th 861, 930.) The right to counsel may be waived by a criminal defendant who elects to represent himself at trial. (*Faretta v. California* (1975) 422 U.S. 806, 834–835.) "The right of self-representation is absolute, but only if a request to do so is knowingly and voluntarily made and if asserted a reasonable time before trial begins." (*People v. Doolin* (2009) 45 Cal.4th 390, 453.)

A motion made after a reasonable time has passed is addressed to the sound discretion of the trial court, which should consider such factors as "'the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay that might reasonably be expected to follow the granting of such a motion.'" (*People v. Marshall* (1996) 13 Cal.4th 799, 827 quoting *People v. Windham* (1977) 19 Cal.3d 121, 128.) The "timeliness requirement should not be and, indeed, must not be used as a means of limiting a defendant's *constitutional* right of self-representation. [Citation.] Rather, the purpose of the requirement is 'to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.' [Citation.]" (*People v. Lynch* (2010) 50 Cal.4th 693, 722 abrogated on other grounds by *People v. McKinnon* (2011) 52 Cal.4th 610.)

Appellant's request to exercise his right to self-representation was made on the day set for trial to begin, with the prospective jurors waiting in the hallway. Thus, the trial court was not required to automatically grant it. (See *People v. Lynch, supra,* 50 Cal.4th at p. 722 ["we have held on numerous occasions that *Faretta* motions made on the eve of trial are untimely"]; *People v. Valdez* (2004) 32 Cal.4th 73, [*Faretta* motion

made "moments before jury selection was set to begin" deemed untimely]; *People v. Frierson* (1991) 53 Cal.3d 730, 742 [motion for self-representation made on eve of trial untimely]; *People v. Horton* (1995) 11 Cal.4th 1068, 1110, [self-representation motion made on the date scheduled for trial untimely].) Instead, the court exercises its discretion in deciding whether appellant provided reasonable cause for the late request. (*People v. Marshall*, *supra*, 13 Cal.4th at p. 827; *People v. Windham*, *supra*, 19 Cal.3d at p. 128.)

This case bears a striking resemblance to *People v. Burton* (1989) 48 Cal.3d 843. In *Burton*, the "defendant did not invoke his right to self-representation until after the case had been called for trial, both counsel had answered ready, and the case had been transferred to a trial department for pretrial motions and jury trial. Voir dire began the next day; the jury was impaneled three court days later." (*Id.* at p. 853.) The defendant also had had several prior court appearances in which he could have invoked his right to represent himself and asserted he was not ready to go to trial and needed an unspecified period for preparation. The California Supreme Court affirmed the trial court's denial of defendant's motion, holding it was "clearly directed to the sound discretion of the trial court." (*Ibid*.)

Here, appellant had opportunities to make his motion for self-representation at hearings at which he was present on June 3, June 21 or August 4, 2011. Both the prosecution and defense counsel answered "ready" to proceed to trial on August 18, 2011 and proceeded to do so again the morning of August 22, 2011. Thereafter, on August 22, with the prospective jurors present in the hallway waiting for the trial to begin, appellant for the first time asked that he be allowed to represent himself. When the court inquired as to grounds for the request, the only reason appellant provided was his mistaken belief that his counsel was not going to call Lucille Rodriguez—the homeowner—as a witness at trial. The court responded that in speaking with appellant's counsel earlier that morning his counsel indicated that she did intend to call Rodriguez as a witness.[3] The

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[3] Lucille Rodriguez was ultimately called as a witness in appellant's defense at trial.

court then inquired as to appellant's level of education, and whether he had ever defended himself in a trial. Appellant stated that he was a high school graduate, and that he had not represented himself before. Appellant also told the court that he was not ready to proceed to trial representing himself that day, and that therefore, granting his request would have required a continuance.[4] Prior to denying appellant's request, the court observed that appellant's counsel was a very good lawyer who had tried cases before the court in the past and obtained verdicts of not guilty for her clients in other cases. The court also stated that appellant's counsel was ready to proceed, that jurors were ready and waiting in the hallway to begin the trial and that granting the request would require a continuance of the trial.

In our view, the court did not err in denying appellant's motion for self-representation. The record reflects that the court considered the reasons appellant presented, the adequacy of appellant's appointed counsel, the stage of the proceedings, as well as delay caused in the proceedings if the request were granted.[5] Under these facts, appellant has not convinced us that the lower court's exercise of its discretion constitutes reversible error.

II. The Trial Court's Admission of the .22-Caliber Rifle Was Non-Prejudicial Error

Appellant next assails the admission into evidence of the .22-caliber rifle that deputies found in a coffee table in the garage. He contends first that evidence of the gun

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[4] Before this court, appellant argues he would only have needed a few additional days to prepare his defense. However, he made no such assurances at trial and appeared to have no idea how much time he would need to prepare.

[5] Appellant's attempt to compare this case to *People v. Herrera* (1980) 104 Cal.App.3d 167, where the trial court erred in failing to consider all of the relevant factors in denying a motion for self-representation, is unavailing. Its facts are simply inapposite to those of this case. There, the defendant "had conceived a well considered defense" and was also able to proceed immediately to trial. (*Id*. at p. 174.) By contrast, here appellant did not suggest a well-considered defense in his request, nor was he prepared to proceed to trial that day.

was not relevant under Evidence Code section 1101, subdivision (b) and also challenges the trial court's admission of the gun under Evidence Code section 352, contending the prejudicial impact of admitting the firearm substantially outweighed its probative value. Respondent argues the evidence was admissible under both Evidence Code sections 1101 and 352, and that any error was non-prejudicial.

"A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Hartsch* (2010) 49 Cal.4th 472, 497 citing *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) "'The trial court is vested with wide discretion in determining the relevance of evidence,' although a court 'has no discretion to admit irrelevant evidence.'" (*People v. Alexander* (2010) 49 Cal.4th 846 quoting *People v. Babbitt* (1988) 45 Cal.3d 660, 681.)

A. Evidence of the .22-Caliber Rifle Was Inadmissible Under Evidence Code Section 1101

Under Evidence Code section 1101, evidence of a defendant's commission of a crime other than one for which he or she is then being tried is not admissible to show bad character or predisposition to criminality, but may be admitted to prove some material fact at issue, such as motive, identity, intent, or knowledge. (Evid. Code § 1101; *People v. Roldan* (2005) 35 Cal.4th 646, 705 overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th 390.) "The test of admissibility is whether there is some clear connection between the collateral offense and the one charged so that it may logically be inferred if the defendant committed one offense he must be guilty of the other." (*People v. Cramer* (1967) 67 Cal.2d 126, 129-130; accord *People v. Valentine* (1988) 207 Cal.App.3d 697, 703.) As it "specifies no time period for admissibility," evidence of acts committed simultaneously is admissible under Evidence Code section 1101. (*People v. Taylor* (1986) 180 Cal.App.3d 622, 636.)

Although the respondent dedicates much of its briefing to whether prior or subsequent offenses are admissible, the crux of this inquiry is not whether the evidence was admissible in a temporal sense. It clearly is. (See *People v. Taylor*, *supra*, 180 Cal.App.3d at p. 636.) Rather, the issue is whether there is an adequate basis in the record for attributing possession of the .22-caliber rifle to appellant in the first place (i.e., whether there is a clear connection between the collateral offense and the one charged), and if so, whether evidence of the gun was properly admitted solely for the purpose of proving appellant knowingly possessed the short-barreled shotgun.

Despite the fact neither party addressed the issue directly in their briefing, we believe the record lacks sufficient evidence to attribute possession of the .22-caliber rifle to appellant. The rifle was found hidden in a coffee table in the detached garage. There was evidence that appellant lived in the garage and that he may have shared that living space with another individual. The prosecutor also stated that on the day of the search there were three other people in the garage. Below, the prosecution argued that whether another individual shared the space with appellant would go to the weight of the evidence, not its admissibility. We disagree.

To be sure, more than one individual can possess a single gun, but because appellant was not the only person who had access to the location where the rifle was found, and because it was hidden, the fact that it was found in the garage does not prove that appellant possessed the rifle or even knew of its existence for that matter. Thus, the prosecution failed to demonstrate the foundational elements of Evidence Code section 1101, subdivision (b)—that appellant committed a collateral offense of possession of an illegal .22 caliber rifle. [6]

In any event, even if it is assumed that appellant possessed the rifle, such circumstances are not relevant to prove knowledge of the short-barreled shotgun found in a separate location on the property. Appellant compares this case to *People v. Valentine*,

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[6] Possession of this weapon by appellant would have violated the conditions of his parole.

supra, 207 Cal.App.3d 697, a marijuana cultivation case. There, the court noted that "[e]vidence of a collateral independent crime is not admissible unless it tends directly to establish the crime charged by proving a material fact or intent" or knowledge. (*Id.* at p. 702.) Consequently, the court there held evidence of intravenous drug use was improperly admitted because marijuana and intravenous drugs were completely distinct types of drug activity, they were not connected, and the trial court had admitted the intravenous drug use evidence solely to prove propensity. (*Id*. at p. 704.)

Below, the prosecutor argued that appellant's knowledge of the rifle found in the garage would be relevant to prove that he also knew of the short-barreled rifle found in a shed also located on the property. In addition, respondent notes that the jury was expressly instructed not to use possession of the second gun to prove propensity, but rather to use it "for the limited purpose of knowledge."

Possession of multiple guns may be admissible in certain cases, such as to prove intent to sell, but in this instance appellant's supposed knowledge of the .22-caliber rifle has no logical nexus with his possession of the sawed off shotgun in the shed and does nothing more than underscore his propensity to possess illegal guns. The rifle had no probative value over whether he had dominion and control over the shotgun. Furthermore, instructing the jury to use the gun for knowledge does nothing to justify the admission of evidence that does not conform to the rules. Accordingly, it was error to admit it.[7]

B. Admission of the .22-Caliber Rifle Was Harmless Error

Although the trial court erred in admitting evidence of the .22-caliber rifle, its admission was harmless. Under *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error. (*People v. Mena* (2012) 54 Cal.4th 146, 162 citing *Watson*, *supra*, 46 Cal.2d at p. 836.) Prejudice under

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[7] Since we hold that evidence of the .22-caliber rifle was inadmissible under Evidence Code section 1101, subdivision (b), we need not reach appellant's alternative argument that it was improperly admitted under Evidence Code section 352.

Watson "must necessarily be based upon reasonable probabilities rather than upon mere possibilities." (*Ibid*.)

Evidence of prior misconduct could surely result in reversible error in a close case. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 540.) But the evidence of guilt in this case was strong. Appellant had a key to the shed where the shotgun was found, and no one else on the property said they had a key to that shed. Appellant's defense consisted merely of testimony that he was never given a key, but this testimony was contradicted by the fact that he had the key in his possession when searched. The logical conclusion that a juror would reach is that appellant had control over the shotgun found inside it. Thus, it is not reasonably probable that the exclusion of evidence relating to the second gun would have resulted in an acquittal on the gun charges under *Watson*.

III. Appellant's Federal Constitutional Claim Lacks Merit

Appellant's final contention is that the admission of evidence regarding the .22-caliber rifle infringed his federal constitutional right to a fair trial and to present a defense because he was not advised of the prosecution's intent to present it until after the trial was underway and was therefore unable to subpoena the occupants of the house regarding the rifle. For its part, respondent argues that appellant failed to raise this specific objection below and therefore forfeited any appellate claims thereon. Alternatively, respondent argues the claim lacks merit, and even if appellant's constitutional rights were violated, that he suffered no prejudice.

We consider claims based on the federal constitution, even where they were not raised below, when "either (1) the appellate claim is of a kind that required no objection to preserve it, or (2) the claim invokes no facts or legal standards different from those before the trial court, but merely asserts that an error had the additional legal consequence of violating the Constitution." (*People v. Virgil* (2011) 51 Cal.4th 1210, 1234, fn. 4 citing *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

Here, appellant objected at trial to the admission of the rifle evidence as violating Evidence Code section 1101, subdivision (b) and Evidence Code section 352. Appellant's counsel below also complained that she did not have sufficient notice prior to

trial that the prosecution intended to introduce evidence of the rifle. Before this court, appellant argues that admission of the rifle evidence had the additional consequence of violating his federal right to a fair trial and the right to present a defense. As such, appellant's federal constitutional arguments are not forfeited on appeal. (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1234; *People v. Partida* (2005) 37 Cal.4th 428, 433-439.)

Appellant cites *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593 to support his contention that his right to present a defense was violated; however, this misses the mark. *Burrell-Hart* involved the exclusion of certain defense evidence, not the admission of prosecution evidence. Appellant cites no case law, nor did our independent research uncover any case, that stands for the proposition that the admission of other crimes into evidence by the prosecution violates the right to present a defense.

Nevertheless, appellant argues that "surprise prosecution evidence" has the same "practical effect" as the exclusion of defense evidence. Even assuming the practical effect might, in theory, be the same, this is not such a case where the evidence came as a surprise. Here, the police report under which appellant was charged mentioned both guns as well as the names of the other people who were in the garage at the time of the search. Appellant cannot say he lacked notice of the rifle. In addition, the fact that the prosecution intended to seek admission of evidence of the second gun was discussed by the parties prior to opening statements. Thereafter, the prosecution sought admission of the evidence of the gun during its case in chief. To the extent that appellant felt unprepared to defend himself in light of the fact that the prosecution intended to present this evidence, appellant could have, but did not, request a continuance to subpoena the other occupants of the house and garage to testify concerning the rifle. Given the foregoing, we cannot agree that appellant's federal constitutional right to a fair trial or to present a defense was violated because he did not have an opportunity to prepare his defense as it related to the admission of the rifle.

Moreover, even assuming appellant's federal constitutional rights were violated he suffered no prejudice. "If an error violates a defendant's federal constitutional rights, reversal is required unless the error was harmless beyond a reasonable doubt." (*People v.*

Hernandez (2011) 51 Cal.4th 733, 745 citing *Chapman v. California* (1967) 386 U.S. 18, 24.) As noted earlier, appellant was found with a key to the shed when searched by police, and no one else on the property said they had a key. Appellant's defense consisted of nothing more than personal testimony denying possession of a key to the shed. The logical conclusion a juror would make is that appellant, having the only key to the shed, had dominion and control over the shotgun housed inside it. The facts of this case and the record before us make clear that any error in admitting the .22-caliber rifle was harmless beyond a reasonable doubt. It follows that appellant suffered no prejudice.

DISPOSITION

The judgment is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**