Filed 12/20/12 P. v. Millwee CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. SCOTT BRADLEY MILLWEE, Defendant and Appellant.	B236683 (Los Angeles County Super. Ct. Nos. KA093815, KA090970)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed as modified.

Michael Allen, 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, James William Bilderback II and Mark E. Weber, Deputy Attorneys General, for Plaintiff and Respondent.

Scott Bradley Millwee appeals from his conviction of assault with a deadly weapon against a peace officer and carrying a concealed dirk or dagger. He argues the trial court erred by not instructing the jury sua sponte on unconsciousness. He also asks us to independently review the in camera hearing on his motion for discovery under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). As a result of his conviction in the present matter, his probation in case No. KA090970 was revoked. Appellant contends the security fee imposed in that case must be reduced from $40 to $30. We find no instructional error or abuse of discretion in denial of the *Pitchess* motion. We agree that the security fee must be reduced to $30 and the abstract of judgment and minute order amended accordingly.

FACTUAL AND PROCEDURAL SUMMARY

A. Case No. KA093815

Appellant, a homeless man, was discovered sleeping in a public park in Pomona by Officer Scott Hess of the Pomona Police Department. Officer Hess was wearing his police uniform, including patches identifying his department, a badge, and a utility belt. When he approached appellant, the officer saw an open 24-ounce can of beer next to him. It is illegal in the City of Pomona to possess an open alcoholic beverage in public. Believing appellant was in violation of that law, Officer Hess attempted to wake him. He explained: "I initially tapped him on his shoulder. He was laying on his back, on the ground. . . . As I gave him a few moments to respond, he wasn't responding. He was wearing a baseball cap and sunglasses . . . as well. To further get his attention, I removed his baseball hat and took off his sunglasses, at which time he still, at that point, wasn't quite responding, either."

Officer Hess knew appellant from a previous encounter. He testified that he leaned over appellant and continued to tap him on the shoulder, calling appellant by name. Appellant opened "his eyes and became alert." When appellant opened his eyes, "he looked right at me . . . he took a moment, what I would call a few moments. And as he opened his eyes, he began laughing, just laughing." The officer explained that

appellant then "said, a couple of times, 'Go ahead, just go ahead.'" He asked appellant to get up because he had violated the law by possessing an open container in public. He asked for appellant's identification. In response, appellant "quickly lifted up the right side of his shirt jacket, as he was still laying on the ground, and removed a large knife, which he had concealed underneath his jacket. He removed the knife from the sheath, pulled it out from his waistband, and extended it out towards me." The knife was about 12 inches from Officer Hess's face and chest. He estimated that 10 seconds elapsed between the time appellant opened his eyes and reached for his waistband. As appellant thrust the knife toward the officer, he said "'What are you going to do now?'" Before he raised his shirt, appellant's clothing had completely concealed the sheath holding the knife.

Officer Hess rolled appellant over onto his knees. As he did so, appellant dropped the knife. Appellant did not comply with the officer's efforts to gain physical control over him. Another officer arrived, and appellant was handcuffed and arrested. Initially, appellant denied that he saw Officer Hess. Subsequently, he admitted that he recognized Officer Hess at the time of the initial contact in this incident. Appellant claimed he pulled out the knife just to show it to the officer.

In an amended information, appellant was charged with exhibiting a deadly weapon to a police officer to resist arrest (Pen. Code, § 417.8);[1] assault with a deadly weapon upon a peace officer (§ 245, subd. (c)), and carrying a concealed dirk or dagger (former § 12020, subd. (a)(4), now § 21310). It also alleged appellant was ineligible for probation because he had two prior felony convictions (§ 1203, subd. (e)(4).)

Appellant testified in his own defense. After becoming homeless in 2010, he had been attacked and injured multiple times. He said he awoke in the park to see someone dressed in black pulling his arm. He could not see who it was because the sun was in his eyes. He had been in a "dead sleep." He testified that he was "knocked out" and in "La-

---

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

La Land" because he was exhausted. When he realized someone was pulling his arm, he was scared and shocked. He said he did not remember pulling out the knife and putting it across his chest. He remembered coming face-to-face with a gun, and said "that's when all my senses kicked in." He looked up, blinked, and saw a badge. According to appellant, he looked down, saw the knife in his hand, and thought that this looked horrible. He said that he then took it out and showed it to the officer, put it on the ground, and put his hands in the air. He estimated that 12 seconds passed between awakening and being thrown to the ground by Officer Hess. He claimed to have complied with the officer's commands.

Appellant was convicted of assault with a deadly weapon upon a peace officer and of carrying a concealed dirk or dagger. The jury was unable to reach a verdict on the brandishing count, which was dismissed. Appellant was sentenced to the middle term of four years for the assault. The court stayed a two-year sentence on the concealed weapon charge.

B. Case No. KA090970

In the probation violation case, No. KA090970, the trial court revoked appellant's probation and imposed the midterm sentence of two years in prison, to be served concurrent with the sentence in case No. KA093815. He was ordered to pay a $40 court security fee under section 1465.8, subdivision (a)(1) and other fees and fines.

Appellant filed timely appeals in both cases, which were consolidated for appeal.

DISCUSSION

I

Appellant argues the trial court erred in failing, sua sponte, to instruct the jury on the defense of unconsciousness in case No. KA093815. He contends there was substantial evidence that he was unconscious when he drew the knife and pulled it across his chest.

A. Procedural Background

After the prosecution case-in-chief, but before appellant testified in his own defense, jury instructions were discussed out of the presence of the jury. Defense counsel requested instructions on self-defense and unconsciousness. The court asked for the basis of the unconsciousness instruction, then indicated that it would wait to hear appellant's testimony. After appellant testified, defense counsel withdrew his request for the unconsciousness instruction, observing that he knew "it is somewhat contained in the instructions themselves." He reiterated that, based on appellant's testimony, he was withdrawing the request for the unconsciousness instruction. The jury was not given CALCRIM No. 3425, or any other instruction on unconsciousness.

During deliberations, the jury requested a readback of testimony by appellant and Officer Hess regarding the time sequence of the events at the park. After deliberating further, the jury asked about the instruction on element 6 of the assault count. That element required the prosecution to prove that "When the defendant acted, he knew, or reasonably should have known, that the person assaulted was a peace officer who was performing his duties." The jury's question was whether "the evidence prior to the defendants act apply to #6 or is the phrase in #6 only referring to the defendants act only at the time of the act, and please define in detail definition of 'reasonably should have known' and also 'knew.'" It was agreed that the court would reinstruct in terms of CALCRIM No. 200, which told the jury to rely on the instructions for definition of legal terms and on ordinary meanings for words and phrases not specifically defined. In addition, the parties agreed a further instruction was required on mistake of fact as a defense to the counts other than the concealed weapon charge. The court also agreed to give the instruction on self-defense. Counsel were given two minutes each for supplemental argument. The jury was given CALCRIM No. 3406, as modified, on mistake of fact and CALCRIM No. 3470 on self-defense. Counsel gave additional arguments regarding these issues.

B. Legal Analysis

CALCRIM No. 3425 provides: "The defendant is not guilty of _____<*insert crime[s]*> if (he/she) acted while legally unconscious. Someone is legally unconscious when he or she is not conscious of his or her actions. [Someone may be unconscious even though able to move.] [¶] Unconsciousness may be caused by (a blackout[,]/ [or] an epileptic seizure[,]/ [or[involuntary intoxication[,]/ [or] sleepwalking[,]/ or _____<*insert a similar condition*>). [¶] The People must prove beyond a reasonable doubt that the defendant was conscious when (he/she) acted. If there is proof beyond a reasonable doubt that the defendant acted as if (he/she) were conscious, you should conclude that (he/she) was conscious. If, however, based on all the evidence, you have a reasonable doubt that (he/she) was conscious, you must find (him/her) not guilty."

Appellant argues the trial court had a sua sponte duty to instruct on the defense of unconsciousness.[2] "'In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case.' [Citation.] That duty extends to '"instructions on the defendant's theory of the case, including instructions 'as to defenses "'that the defendant is relying on . . . , or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'"'" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824.) But '"when a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, a defendant is not presenting a special defense invoking *sua sponte* instructional duties. While a court may well have a duty to give a 'pinpoint' instruction relating such evidence to the elements of the offense and to the jury's duty to acquit if the evidence produces a reasonable doubt, such 'pinpoint' instructions are not required to be given *sua sponte* and must be given only upon request."' (*People v. Saille* (1991) 54 Cal.3d 1103, 1117.)" (*People v. Anderson* (2011) 51 Cal.4th 989, 996–997.) We

---

[2] In anticipation of respondent's brief, appellant also argues that the doctrine of invited error does not preclude him from raising this issue on appeal. Since respondent does not argue invited error, we do not address the issue.

review a claim the court failed to properly instruct on the applicable principles of law de novo. (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 850.)

"'Unconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge. [Citations.] To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist "where the subject physically acts but is not, at the time, conscious of acting." [Citation.]' (*People v. Halvorsen* (2007) 42 Cal.4th 379, 417; see Pen. Code, § 26, class Four ['[p]ersons who committed the act charged without being conscious thereof' are not criminally responsible for that act].)" (*People v. Mathson* (2012) 210 Cal.App.4th 1297, 1312.) In *People v. Halvorsen*, *supra*, 42 Cal.4th 379, the Supreme Court held that instructions on the defense of unconsciousness were properly refused where the defendant's testimony established that he was aware of his actions in the course of shooting four men in three separate incidents. (*Id*. at p. 418.)

The Supreme Court explained that assault is a general intent crime and does not require a specific intent to cause injury. (*People v. Williams* (2001) 26 Cal.4th 779, 782, 788 (*Williams*).) It is an objective test. (*Ibid.*) "[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known." (*Id*. at p. 788.)

We agree with respondent that the evidence was not sufficient to warrant an instruction on the defense of unconsciousness. Appellant testified that he was asleep in the park and woke to find someone dressed in black pulling his arm. He did not recognize that person as a peace officer because the sun was in his eyes. He was "in fear." Appellant explained: "I didn't know what the presence was. All I know is, there is just someone having control of me, without my permission." He said he did not remember what happened. Then he testified that it happened "so fast." Appellant said: "From what the officer says, I pulled out the knife and put it across my chest in a defensive, like, shock position, not knowing if I was going to be attacked or what the result of this person controlling my body, while I was asleep. I don't know what is going

to happen. I am just shocked." He dropped the knife as soon as he realized it was a police officer pulling his arm.

Later in his testimony, appellant said that pulling the knife "was more of just an automatic response. . . . Just having it [the knife] on my person, it was not an intention to attack. It was just, I am awake. I see someone is grabbing me. I jump. He is pulling me up. I am pulling away. And I see that it is an officer, and at that time, I take the weapon or knife, whatever it is, out of my hand and drop it on the ground and put my hands up." When asked if he pulled the knife out of the sheaf and across his chest on auto pilot, appellant said, "From what I remember."

From this, it is reasonable to conclude that appellant was aware he was being accosted by an unidentified person, and acted in response to that knowledge by pulling a knife out and pointing it toward the assailant. A reasonable person would realize that a battery would directly, naturally and probably result from this conduct, proving assault on Officer Hess. (*Williams*, *supra*, 26 Cal.4th at p. 788.) This evidence does not support an instruction on unconsciousness. The trial court had no sua sponte duty to give the instruction.

II

Appellant has requested that we independently review materials produced in response to his pretrial motion for personnel records of the arresting officer, Scott Hess. Pursuant to *Brady v. Maryland* (1963) 373 U.S. 83 and *Pitchess*, *supra*, 11 Cal.3d 531, he sought complaints against the officer involving aggressive behavior, violence, excessive or attempted excessive force, bias, coercion, violation of rights, fabrication, perjury, dishonesty, writing false police reports, planting evidence, false internal reports, or any other evidence of misconduct amounting to moral turpitude. He sought evidence of any discipline imposed upon the officer as a result of a complaint and materials regarding any board of rights hearings in which Officer Hess was accused of misconduct. Appellant also asked for exculpatory or impeaching materials. Counsel for the Pomona Police Department opposed the motion, arguing, inter alia, that defense counsel had failed to comply with the requirements of Evidence Code section 1043. The trial court found

good cause to conduct an in-camera hearing. It found no discoverable information to be turned over to the defense and ordered the transcript of the proceedings sealed.

We independently review the sealed records of in camera hearings on pretrial discovery motions to determine whether the denial of disclosure of police personnel records constituted an abuse of discretion. (*People v. Myles* (2012) 53 Cal.4th 1181, 1209.) The sealed transcript of the proceedings, in which the court describes for the record the documents it examined, has been found adequate for the purposes of conducting a meaningful appellate review. (*Ibid.*)

We have reviewed the sealed transcript of the in camera hearing in which the trial court described each document examined in some detail. We conclude that the trial court's ruling refusing to disclose the requested personnel files was not an abuse of discretion.

III

In case No. KA090970, the trial court imposed a security fee of $40 pursuant to section 1465.8. Appellant argues that the version of that statute effective on the date of his plea and conviction (August 15, 2010) provided for a $30, rather than $40 fine. He requests that the abstract of judgment be amended to reduce the fine to $30. Respondent concedes the error and agrees the abstract of judgment should be so amended. We agree that the version of section 1465.8 in effect when appellant pled guilty and was convicted provided for a $30 fine. (Stats. 2009-2010, 4th Ex. Sess. ch. 22, § 30.) The abstract and minute order are to be amended to reflect the correct $30 fine.

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment and minute order to reflect the correct fine of $30 in case No. KA090970 and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P.J.

We concur:

WILLHITE, J.

SUZUKAWA, J.