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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNEDY EVANS,

Defendant and Appellant.

2d Crim. No. B278399
(Super. Ct. No. MA065596)
(Los Angeles County)

Kennedy Evans appeals after a jury convicted him on three counts of resisting an executive officer (Pen. Code,¹ § 69), and two counts of battery by a prisoner on a non-confined person (§ 4501.5). In a bifurcated proceeding, the trial court found true allegations that appellant had three prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The court sentenced him to 25 years to life in state prison. Appellant contends the court erred in failing to provide him the correct number of peremptory challenges. We affirm.

¹ Statutory references are to the Penal Code unless otherwise stated.

FACTS AND PROCEDURAL HISTORY

While an inmate in state prison, appellant elbowed a correctional officer in the face and punched and pushed another officer. Additional officers arrived and appellant swung his fists at them. He resisted being handcuffed and kicked one of the officers in the knee. As he was being returned to his housing unit, he lunged at one of the officers. The officer injured his knee while forcing appellant back to the ground.

Prior to trial, the parties informed the court that appellant's maximum sentencing exposure was 12 years and 8 months in state prison. Accordingly, the court allotted each party 10 peremptory challenges, as provided in Code of Civil Procedure section 231, subdivision (a) (hereafter section 231(a)).² Appellant exercised 6 of his challenges and thereafter accepted the jury as empaneled. He waived his right to a jury trial on the prior conviction allegations.

After the jury convicted appellant of the substantive offenses and prior to the court trial on the prior conviction allegations, the prosecutor filed a sentencing memorandum stating that if the allegations were found true, appellant's maximum sentence on each count would be 25 years to life under the three strikes law.³ The prosecutor acknowledged that

² Section 231(a) provides that "[i]n criminal cases, if the offense charged is punishable . . . with imprisonment in the state prison for life, the defendant is entitled to 20 and the people to 20 peremptory challenges. . . . [I]n a trial for any other offense, the defendant is entitled to 10 and the state to 10 peremptory challenges."

³ Appellant's prior convictions for murder and attempted murder qualify as "super strikes" under the three strikes law.

appellant thus should have been allotted 20 peremptory challenges rather than 10. Apparently believing this error precluded third-strike sentencing, the prosecutor requested that appellant be sentenced to the maximum term as a second strike offender. In an amended sentencing memorandum, the prosecutor asserted that third strike sentencing was proper notwithstanding the error because appellant “did not use all of the peremptory challenges allotted to him, nor did he object to the process or the panel as constituted.”

After the prior conviction allegations were found true, appellant asserted in a sentencing memorandum that he could not be sentenced to an indeterminate life term under the three strikes law because he had not been allotted 20 peremptory challenges as required under section 231(a).

At the sentencing hearing, the court told appellant that the error in allotting him 10 peremptory challenges rather than 20 did not preclude the imposition of a life term because “you didn’t use 10 challenges, you used six challenges and you accepted the challenge [*sic*]. So unless you exhaust all of your [peremptories] and request more and express [dis]satisfaction with the current composition of the jurors, I don’t believe . . . that issue will be preserved.” The court denied appellant’s section 1385 request to strike his prior convictions and sentenced him to 25 years to life in state prison.

DISCUSSION

Appellant contends the court committed reversible error by providing him only 10 peremptory challenges instead of the 20 to

(§ 1170.12, subd. (c)(2)(C)(iv)(IV).) Accordingly, appellant was eligible for third strike sentencing notwithstanding that he was not currently convicted of any serious or violent felonies. (*Ibid.*)

which he was entitled. (§ 231(a).) The claim of error is well-taken, but the error is harmless.

“Although [juror] challenges for cause are constitutionally guaranteed, the right to peremptory challenges is statutory. [Citation.]” (*People v. Black* (2014) 58 Cal.4th 912, 916.) “[P]eremptory challenges are not of constitutional dimension,’ but are merely ‘a means to achieve the end of an impartial jury.’ [Citation.] Mere loss of a peremptory challenge does not automatically constitute a violation of the federal constitutional right to a fair trial and impartial jury. [Citation.] If no biased or legally incompetent juror served on defendant’s jury, the judgment against him does not suffer from a federal constitutional infirmity.” (*Id.* at pp. 916-917.)

There is no dispute that appellant was entitled to 20 peremptory challenges yet was given only 10. Although he contends that such errors are reversible per se, reversal is compelled only if the defendant (1) exhausted all of the peremptory challenges he was given; (2) expressed dissatisfaction with the jury as empaneled; and (3) asked for additional challenges. (*People v. Black, supra*, 58 Cal.4th at p. 918; *People v. Marks* (1986) 184 Cal.App.3d 458, 463.) Appellant did none of these, so his claim fails for lack of prejudice. (*Black*, at p. 918; *People v. Bennett* (1953) 119 Cal.App.2d 224, 226; *People v. Bugg* (1947) 79 Cal.App.2d 174, 176.)

Appellant’s reliance on *People v. Box* (1984) 152 Cal.App.3d 461 (*Box*) is misplaced. Box, who was charged with murder, requested the 26 peremptory challenges to which he was entitled under former section 1070. He was provided only 10 and exercised 9 of them. In support of his petition for writ of habeas corpus, trial counsel submitted a declaration stating he did not

exercise the tenth challenge because he feared it might result in the seating of a juror more unfavorable than the one removed. Counsel added that he would have exercised at least 10 more challenges had he been allowed to do so. (*Box*, at pp. 462-465.)

In reversing, the Court of Appeal first acknowledged the general rule that “the failure to exercise all allowable peremptory challenges precludes the defendant from claiming prejudice from alleged error in the number of peremptory challenges allowed.” (*Box*, *supra*, 152 Cal.App.2d at p. 463.) Although *Box* did not exercise one challenge, the court reasoned that “[e]xperienced counsel seldom exercise the one remaining challenge unless they are confident they will get a better juror than the one who will be excused. This situation should be contrasted with the case where the defense has several peremptory challenges remaining unexercised when the jury is accepted. In the latter situation a strong inference arises that the defense was truly satisfied with the 12 jurors in the box otherwise counsel would have continued to exercise the peremptory challenges in the hope of getting a better jury.” (*Id.* at p. 465.) The court found that counsel’s declaration refuted any such inference and that “it reasonably may be concluded that restricting [*Box*] to 10 challenges prejudiced his right to seek an impartial jury.” (*Id.* at p. 466.)

Here, appellant did not object when he was allotted only 10 peremptory challenges and accepted the jury with “several peremptory challenges remaining unexercised.” (*Box*, *supra*, 152 Cal.App.2d at p. 465.) Moreover, he offers no evidence counsel would have exercised additional challenges had they been provided to him. His claim thus fails. (*People v. Black*, *supra*, 58 Cal.4th at p. 918; *People v. Bennett*, *supra*, 119 Cal.App.2d at p. 226; *People v. Bugg*, *supra*, 79 Cal.App.2d at p. 176.)

DISPOSITION

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Joel L. Lofton, Judge

Superior Court County of Los Angeles

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