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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. STEVE CHAVEZ, Defendant and Appellant.	B232273 (Los Angeles County Super. Ct. No. BA372061)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara R. Johnson, Judge. Affirmed with directions.

Jonathan B. Steiner and Ann Krausz, 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, Steven D. Matthews and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

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Steve Chavez appeals from the judgment entered upon his convictions by jury of two counts of resisting an executive officer (Pen. Code, § 69).[1] After granting appellant's *Romero*[2] motion and striking his prior felony strike, the trial court sentenced him to 16 months in state prison. Appellant contends that (1) the trial court abused its discretion when it allowed defense witnesses to be impeached with prior convictions of child-sex offenses, (2) the trial court improperly denied his motion to reduce the charged offenses to misdemeanors, and (3) the abstract of judgment must be corrected to reflect the trial court's oral pronouncement of judgment.

We affirm with directions.

FACTUAL BACKGROUND

The prosecution's evidence

On April 22, 2010, Los Angeles Deputy Sheriffs Eduardo Rodriguez and Juan Macias were working in the Los Angeles County Jail, escorting inmates, including appellant, to their cells when the inmates returned from court. They first brought the inmates to the laundry room and then took them individually to their cells. Deputy Rodriguez told appellant to remain behind for questioning, as the deputy had noticed graffiti in appellant's cell. For security, the deputies had him remove his clothing during questioning. He was cooperative at that time.

When questioning was completed, Deputy Macias took appellant, un-handcuffed, back to his cell. On the way, appellant mumbled, "fucking deputies." The deputy asked him what he said. Appellant turned and took a fighting stance, holding his hands up and making fists. Deputy Macias pushed appellant away to throw him off balance. Appellant then lunged at the deputy, put him in a bear hug, tried to reach for the deputy's flashlight and began swinging his fists.

Deputy Rodriguez heard the commotion and rushed to help Deputy Macias. They got appellant to the ground where he continued to kick and punch at the deputies, hitting

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

2 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

Deputy Macias in his mouth. Deputy Macias hit appellant in the face four or five times, causing the deputy's hand to swell. Appellant continued fighting, despite the deputies telling him to stop. Deputy Rodriguez hit him in the ribs and face. Finally, with the assistance of several other deputies, appellant was subdued and handcuffed.

Appellant was then taken to the jail medical clinic. From there, he was transferred to the hospital, suffering from a two inch laceration to his head, a lost tooth, swelling and redness to his legs near his knees, a collapsed lung, and fractures of his nose and two ribs.

The defense's evidence

Inmate Willy Ponce (Ponce) was housed near appellant. They were not friends. On the day of the charged altercation, Ponce heard Deputy Rodriguez on the phone asking for appellant's whereabouts. He then saw Deputy Rodriguez turn to Deputy Macias and say that appellant was in court, but they would get him later and "give him some flashlight therapy. . . ." Later that day, Ponce saw appellant naked in the laundry room talking to the deputies. When Ponce was back in his cell, he heard someone yelling, "stop," "that's it," "help," and "ow."

Inmate Luis Pena (Pena) was also not friends with appellant, but was housed near appellant's cell. At the time of the charged incident, he heard a noise and from his cell saw appellant helplessly curled up on the ground trying to cover his face, as he was being punched by five to six deputies. Pena did not see appellant punch or kick the deputies. A deputy saw Pena looking out of his cell and told him to get back to his bunk and face the wall. Pena did not see who started the fight and did not report the incident.

DISCUSSION

I. Impeachment of defense witnesses with prior child-sex convictions

A. Background

The first prosecution witness at trial was Deputy Macias. When asked about his job assignment, he testified that he was assigned to the module at county jail housing "sexual predators," to which testimony defense counsel objected. The trial court sustained the objection and struck the testimony.

At sidebar, the trial court told Deputy Macias not to mention anything about sexual predators. The prosecutor informed the trial court that he wanted to utilize prior convictions of defense witnesses, Ponce and Pena, for impeachment. On October 20, 2010, Pena had suffered a prior conviction of continuous sexual abuse of a child (§ 288.5). In 2008, Ponce had suffered a prior conviction of lewd acts on a child (§ 288, subd. (a).). In an action in 2010, he was convicted of both cruelty to a child (§ 273a) and resisting arrest, and, in another action, of lewd acts on a child under 14 years of age (§ 288, subd. (a)).

Defense counsel asked that the offenses be sanitized because of the prejudicial impact of child-sex offenses. He argued that appellant was acquitted of the offense for which he was incarcerated at the time of the charged offenses and had never been convicted of any sexual offense, but if the jury learned that two of his witnesses had such priors, it might infer that appellant did also.

The trial court denied the defense's request, stating: "Well, I think that because [the] officer, even though it was sustained, made that reference, that we can tell the jury that this defendant has not been convicted of any sex crime; but I think that it is relevant to these witnesses' credibility as to whether or not, what type of crime that they've been convicted of, especially when there's resisting arrest and especially when there's a—when there's three such crimes there. It goes to their credibility." The trial court said that for impeachment purposes the prosecutor could identify by name of the offense either Ponce's cruelty to child and resisting arrest convictions or the lewd act conviction. The prosecutor opted to use the lewd act conviction and refer to the other convictions simply as felonies.

At the close of the People's case-in-chief, defense counsel renewed his request to sanitize the defense witnesses' convictions of child-sex offenses because they were "incredibly prejudicial," particularly in light of the stricken testimony, heard by the jury, that appellant was housed in the module housing sexual predators. The trial court adhered to its previous ruling but said that it was willing to instruct the jury that appellant was not convicted of any sex offense.

B. Contentions

Appellant contends that the trial court abused its discretion in allowing defense witnesses to be impeached with their prior child-sex offenses. He argues that under Evidence Code section 352, the evidence was unduly prejudicial and not as relevant as moral turpitude offenses such as theft, which have as an element of the offense dishonesty. Even if the trial court abused its discretion in admitting evidence of the defense witnesses prior child-sex offenses, there was no undue prejudice to appellant.

C. Standard of Review

We review the trial court's ruling on the admissibility of evidence for impeachment purposes under the abuse of discretion standard. (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532 [review of Evid. Code, § 352 ruling]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1113 [relevance of evidence], disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) "'The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules. . . . [Citation.]'" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.)

D. Impeachment with prior convictions of crimes of moral turpitude

A witness in a criminal trial may be impeached with a prior felony conviction if the least adjudicated elements of that felony necessarily involve moral turpitude. (*People v. Castro* (1985) 38 Cal.3d 301, 317 (*Castro*); *People v. Bautista* (1990) 217 Cal.App.3d 1, 5 [crime of moral turpitude is crime that reveals a person's dishonesty, general readiness to do evil, bad character, or moral depravity].) Moral turpitude involves a "'general readiness to do evil'" (italics omitted) which will support an inference of a witness's readiness to lie. (*Castro*, *supra*, at p. 314.) "Whether a conviction involves such turpitude is a question of law; its answer depends on the elements of each crime in the abstract, rather than the underlying facts of the earlier prosecutions." (*People v. Collins* (1986) 42 Cal.3d 378, 390.) A child molestation offense is a crime of moral

turpitude (*People v. Massey* (1987) 192 Cal.App.3d 819, 823 ["It is well established that child molesting in California law is a crime of moral turpitude for impeachment . . ."]), thus making it admissible for impeachment purposes.

While Ponce and Pena's prior convictions of child-sex offenses were admissible to impeach them, the trial court still retained discretion under Evidence Code section 352 to exclude them if it determined that the "probative value [of such evidence] [was] substantially outweighed by the probability that its admission [would] (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; *Castro, supra,* 38 Cal.3d at p. 307.)

Regardless of whether appellant's witnesses prior convictions should have been admitted, it is highly unlikely the verdict would have been different had the court excluded that evidence or sanitized it before admitting it.

1. Relevance of prior child-sex crimes

Relevant evidence is evidence having "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) As previously stated, all convictions of crimes of moral turpitude have some relevance. However, there are two types of moral turpitude crimes, one being more relevant to credibility than the other. (*Castro, supra,* 38 Cal.3d at p. 315.) One type includes crimes in which dishonesty is an element, such as theft or perjury. (*Ibid.*) It directly undermines credibility as commission of the crime has shown that the witness lies. The second type of moral turpitude crime is a crime that does not specifically involve dishonesty, but instead indicates a general readiness to do evil, from which a readiness to lie can be inferred. (*Ibid.*) This type of crime does not directly undermine credibility. It therefore does not possess the same probative value on a witnesses' credibility. (See *Ibid.*)

Among the factors the court may consider in deciding the relevance for impeachment of a prior conviction is "(1) whether the prior conviction reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of a prior

conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not testify out of fear of being prejudiced because of the impeachment by prior convictions." (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) Where the witness to be impeached is not the defendant, the primary factors the court should consider are numbers 1 and 2 above. (*People v. Clair* (1992) 2 Cal.4th 629, 654.)

Applying the *Mendoza* factors to nondefendants Ponce and Pena, we find their child-sex convictions relevant. All of their offenses occurred within a year or two before the charged offenses; Pena's occurring in late 2010 and Ponce's in 2008 and 2010. Though those offenses do not have dishonesty as an element, they are still probative of credibility because they reflect a general readiness to do evil, and hence an inference of a readiness to lie. The initial question here is whether that relevance is outweighed by prejudice.

2. Prejudice

Convictions of sex offenses against children are among the most odious crimes. They are committed against the most vulnerable in society, and the consequences of such crimes can adversely affect children for life. So reprehensible are such acts that child sex offenders are often mistreated in prison by other inmates and viewed as the bottom of the prison inmate hierarchy. Hence, commission of a sex crime against a child can evoke an emotional response by jurors and a bias against the witness far beyond that warranted by a general readiness to do evil.

Based on our discussion in part I.E., *post*, we need not decide whether the trial court committed error. For the benefit of the trial court, however, we note that because the witnesses' prior child-sex offenses have no honesty component, their probative value derives not so much from the nature of the offenses but from the fact that they are felonies involving moral turpitude. Thus, sanitizing those offenses by referring to them as "felonies" would have eliminated any potential prejudice that resulted from the nature of the crimes without sacrificing the legitimate probative value derived from the readiness to do evil.

E. Harmless error

In any event, had there been an abuse of discretion, it was harmless in that it is not reasonably probable that appellant would have received a more favorable verdict had the evidence been excluded. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018–1019; *People v. Watson* (1956) 46 Cal.2d 818, 836.) First, the evidence against appellant was strong. Multiple police officers testified as to his conduct during the altercation. Deputy Macias testified that appellant precipitated the confrontation by taking a fighting stance and refusing to stop fighting and allow the officers to subdue him.

Second, the evidence of prior child-sex offenses did not relate to appellant, but to the defense witnesses. Thus, while it may have prejudiced Ponce and Pena's credibility to the jury, it did not directly prejudice appellant.

Third, it is not as though Ponce and Pena were upstanding citizens that would likely have been believed by the jury even if it did not learn of their child-sex offenses. They were inmates in jail for commission of felonies. Even without impeaching them with the child sex-abuse felonies, it is more than doubtful that they would have been believed over sheriff's deputies sworn to uphold the law.

Fourth, in any event, Ponce and Pena's testimony was weak on the critical question of what precipitated the altercation. Neither saw how the fight started. This was critical evidence in determining whether the deputies were appropriately responding to a violent inmate or had simply beaten appellant without justification, as appellant contended. Moreover, Ponce and Pena's testimonies were impeached in other respects. For example, there was evidence that they were not in a physical location to be able to see that which they testified to having seen.

Finally, the jury had already heard that Ponce and Pena were housed in the sexual predator module, though that evidence was stricken, jurors might still infer that appellant and his witnesses were child-sex criminals. Thus, admission of Ponce and Pena's prior child-sex offenses was somewhat cumulative.

Appellant's principle argument at trial was that by impeaching his two witnesses with child-sex offenses, the jury was likely to believe that appellant was also a child

sexual predator, and he would directly suffer prejudice. However, even if appellant's concern was justified, it was mitigated when the trial court instructed the jury that appellant was acquitted of the crime for which he was held in custody when the charged incident occurred.[3]

II. Reduction of felony to misdemeanor

A. Background

Defense counsel made a motion to reduce appellant's convictions from a felony to a misdemeanor, arguing that the officers suffered no serious injuries. The prosecutor argued that the charged offenses did not require that injury occur, and the jury found that the defendant resisted by use of violence, requiring the use of force against him.

The trial court denied the motion, stating: "I think the jury had an option to reduce it themselves by finding a 148, which is a lesser included offense which was given to them to do, and they did not choose to do so. It's not so much whether or not the officers received injuries. It's whether the threat of violence that can be caused in a closed jail setting that can cause all kinds of havoc, and we've heard about it more than once when inmates do not follow the orders and commands of the officers involved. So I'm not saying that—and I don't know—I don't know that in this case, when the jury has decided it shouldn't be a misdemeanor, that this is the case for that."

B. Contention

Appellant contends that the trial court improperly denied his request to reduce his convictions to misdemeanors. He argues that it had discretion to do so and failed to exercise that discretion because it rendered its decision because the "jury ha[d] decided that it shouldn't be a misdemeanor." This contention lacks merit.

C. Standard of review

We review the trial court's decision whether or not to reduce a felony to a misdemeanor for abuse of discretion. (*People v. Superior Court* (*Alvarez*) (1997) 14

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3 The jury was instructed: "The attorneys have stipulated as follows: Mr. Chavez was found not guilty of all charges for which he was being held on April 22, 2010."

Cal.4th 968, 977 (*Alvarez*).) Whether an offense is a misdemeanor or felony is a question of law to be decided by the trial court, not an issue of fact for the jury. (*People v. Burres* (1980) 101 Cal.App.3d 341, 356, disapproved on other grounds in *People v. Colantuono* (1994) 7 Cal.4th 206, 220, fn. 11.)

D. Trial court power to reduce offense

"[S]ection 17 'vest[s] in the trial court discretion to sentence defendants convicted of [wobblers] to state prison or to jail, without mention of standards for exercise of that discretion.' Nonetheless, the choice between felony and misdemeanor under section 17, subdivision (b)(1), 'is dependent on a determination by the official who, at the particular time, possesses knowledge of the special facts of the individual case and may, therefore, intelligently exercise the legislatively granted discretion.'" (*People v. Dent* (1995) 38 Cal.App.4th 1726, 1730.) While this discretion is exceedingly broad, "'[t]he courts have never ascribed to judicial discretion a potential without restraint.' . . . '[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.'" (*Alvarez, supra*, 14 Cal.4th at p. 977.) "'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational and arbitrary. In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives.'" (*Ibid.*)

Among the factors to be considered in exercising this discretion are "'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial."' (*Alvarez, supra*, 14 Cal.4th at p. 978.) The trial court must consider the individualized considerations of the offense, the offender and the public interest. (*Ibid*.) The trial court should also, when appropriate, consider the general objectives of sentencing. (*Ibid.*)

E. Trial court's exercise of its discretion

We start with the basic proposition that the trial judge, sitting through the trial, is in the best position to assess whether a wobbler should be considered a misdemeanor or a felony. We cannot substitute our judgment for that of the trial judge. (*Alvarez, supra*, 14 Cal.4th at p. 978.)

Appellant's principal contention is that the trial court failed to exercise discretion because its decision was based on the jury's determination that appellant was guilty of forcefully resisting arrest when, based upon the instructions given, it could have found him guilty of only the misdemeanor, lesser included offense of resisting an officer without force within the meaning of section 148.

We find no error in the trial court giving consideration to the jury's verdict as one factor in assessing whether to reduce the offense to a misdemeanor. Nothing in the record suggests that the trial court did not consider other relevant considerations. It did not say that it was bound by the jury's findings or that it considered nothing else. In fact, it stated that the determination of whether appellant's offenses were felonies or misdemeanors turned on more than simply whether the deputies were injured. The trial court pointed out that appellant's violence in a closed jail can cause havoc. These statements by the trial court indicated that it considered more than just the jury's findings. In the face of a record which does not affirmatively indicate that the trial court failed to consider all of the appropriate factors, we presume that it considered all relevant criteria (see *People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 836) and knew and applied the correct statutory and case law (*People v. Jacobo* (1991) 230 Cal.App.3d 1416, 1430).

The facts of this case, which the trial court is presumed to have considered, support its refusal to reduce the offenses to misdemeanors. Appellant was incarcerated in jail at the time of the incident and was supposed to follow instructions of the officers in charge. Nonetheless, he took a fighting stance, bear-hugged Deputy Macias, began kicking and punching him and Deputy Rodriguez, ignored warnings to stop, hit Deputy Macias in the face, injuring the deputy's lip, and required five or more deputies to subdue him. This incident took place in the incendiary environment of a jail, where, as the trial court aptly observed, violence can cause havoc. Finally, appellant had a significant criminal record. He was convicted, among other convictions, in 1996 of resisting a public officer (§ 148, subd. (a)), in 2004 of making a criminal threat (§ 422), in 2006 of inflicting injury on a child (§ 273a), and in 2007 of making a criminal threat. All of these

convictions were of crimes of violence or threatened violence. These facts justified the trial court's refusal to reduce appellant's convictions to misdemeanors.

III. Correction of abstract of judgment

A. Background

At the sentencing hearing, the trial court sentenced appellant to the low term of 16 months on count 1 and a concurrent 16 months on count 2. The abstract of judgment, however, reflects that the two counts were sentenced consecutively.

B. Contention

Appellant contends that the abstract of judgment must be corrected to reflect the sentence rendered by the trial court in its oral pronouncement of judgment. The People agree with appellant, as do we.

C. Oral pronouncement is paramount

Rendition of judgment is an oral pronouncement. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) Entry of judgment in the minutes is a clerical function. (*Ibid.*; § 1207.) An abstract of judgment is not the judgment of conviction and cannot add to or modify the judgment it purports to summarize. (*People v. Mesa, supra,* at p. 471.) The oral pronouncement of judgment controls over the abstract of judgment. (*People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1416.) If a minute order or abstract of judgment fails to reflect the judgment pronounced by the trial court, the error is clerical and the record can be corrected at any time to make it reflect the true facts. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Mesa*, *supra,* at p. 471; see also *People v. Williams* (1992) 10 Cal.App.4th 827, 830, fn. 3; *People v. Jack* (1989) 213 Cal.App.3d 913, 915–916.)

D. Conflict in oral pronouncement

The trial court announced concurrent sentences on counts 1 and 2. The abstract of judgment reflects consecutive sentences on those counts. Because the abstract of judgment does not conform to the trial court's oral pronouncement of judgment, it must be corrected to reflect that the sentences on counts 1 and 2 are concurrent.

DISPOSITION

The judgment is affirmed. On remand, the trial court is directed to prepare a corrected abstract of judgment consistent with the judgment orally pronounced by the trial court.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ