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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. KARL VANDERVALL, Defendant and Appellant.	B234012 (Los Angeles County Super. Ct. No. NA087853)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tomson T. Ong, Judge. Affirmed as modified.

Gloria C. Cohen, 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, Shawn McGahey Webb and David Zarmi, Deputy Attorneys General for Plaintiff and Respondent.

Defendant and appellant Karl Vandervall (defendant) appeals from his conviction of three counts of robbery. He contends that he was denied due process by the trial court's questioning of witnesses and that his counsel was ineffective for failing to object to the court's questions. We conclude that defendant's contentions are without merit and affirm the judgment. At respondent's request, we order the superior court to issue an amended abstract of judgment correctly reflecting the trial court's imposition of a court security fee and a criminal conviction assessment fee for each of the three counts.

BACKGROUND

1. Procedural history

Defendant was charged with three counts of second degree robbery, in violation of Penal Code section 211[1] after he and a companion robbed two employees and a customer at a marijuana dispensary. The information alleged as to all three counts that defendant personally used a firearm in the commission of the crimes, within the meaning of section 12022.53, subdivision (b). It also alleged that defendant had served a prior prison term within the meaning of section 667.5, subdivision (b).

Following a jury trial, defendant was convicted on all counts as charged. The jury found true the firearm allegations. Defendant admitted the prior prison term allegation.

On June 21, 2011, the trial court sentenced defendant to a total prison term of 24 years 8 months. The sentence as to count 1 was comprised of the upper term of five years, plus a 10-year firearm enhancement and a one-year enhancement for the prior prison term. Choosing to run the sentences consecutively, the trial court imposed one year (one-third the middle term of three years), plus a firearm enhancement of three years four months (one-third the middle term of 10 years) as to each count 2 and 3. The court assessed mandatory fines and fees and awarded defendant 131 days of presentence

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

custody credit.[2] In addition, the trial court found a probation violation in case No. OLG07300 and terminated probation.

Defendant filed a timely notice of appeal from the judgment.

2. Prosecution evidence

During the evening of January 3, 2011, defendant and a companion entered the Capacity Caregivers of San Pedro, a marijuana dispensary. The men ordered the two employees and one customer to the floor, demanded money and property from them at gunpoint, and left after taking property from the three victims, money from the cash register, and jars of marijuana.

Floyd Jones (Jones) was working in the dispensary that evening as manager and security guard. Jones identified defendant in court as one of the robbers and testified that both men were armed when they entered the pharmacy portion of the dispensary. Sometime during the robbery defendant threatened to shoot Jones. Jones also heard defendant say to dispensary worker Rosa Singh (Singh), "Don't push the button or I will shoot you."

Jones testified that the guns the robbers carried were authentic. Jones was familiar with guns as he had undergone firearm training before becoming a licensed armed security guard, in addition to having worked for the Compton Police Department as an armed security guard for five years. In his security work Jones carried both .380 and nine-millimeter firearms, as permitted under his license. Jones had owned or carried guns his entire life, including real guns, replicas, and BB rifles. Jones had previously been robbed at gunpoint. Jones explained that imitation guns were usually made of black plastic, while defendant's gun was a silver color. Also, the gun defendant carried had

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[2] Among the fees imposed were a $40 court security fee per count, pursuant to section 1465.8, and a $30 criminal conviction assessment fee per count, pursuant to Government Code section 70373, for a total of $210. Respondent requests that the abstract of judgment be corrected, as it shows the imposition of only one of each of the two types of fee. We thus order the superior court to prepare an amended abstract which reflects the actual order of the court.

some gold or rust color around the barrel, as though it had not been cleaned, which would not have been found on a plastic gun. Jones also felt cold steel when the barrel of defendant's gun touched the back of his head, and he could tell that it was fairly heavy. The gun was larger than a regular handgun and Jones believed it was a "Tech 9" which he described as an automatic weapon with a large clip and a long barrel.

Daniel Silagy (Silagy) testified that he was a customer in the dispensary when two men entered and one of them ordered everyone to the ground, announcing, "This is a robbery" or "This is a holdup." Silagy could see, though not closely, that one of the men was holding a small nine-millimeter pistol. The robber touched Silagy's back with the gun, and Silagy could tell it was heavy. He thought the other robber was possibly carrying a "Mac-10." Silagy testified that he was familiar with guns. He owned two guns, and had been handling guns since childhood. He was also familiar with airsoft and replica guns and testified that he could distinguish them from real guns. Silagy was unable to identify the robbers.

3. Defense evidence

Defense firearms expert Patricia Fant (Deputy Fant), testified that she is a retired Los Angeles County Deputy Sheriff and forensic firearms examiner. She had received training in distinguishing between real firearms and replicas, and was familiar with airsoft guns as well as BB guns and pellet guns. She testified that airsoft guns were not always made solely of plastic; the more expensive ones were made with some metal in them to make them look realistic. Deputy Fant testified that by law in California replica guns must have orange tips to make them distinguishable from real firearms, but acknowledged they could be made to appear more realistic by painting over or removing the orange tips. The presence of rust would not be determinative of whether a gun was real or a replica, as metal replicas could rust. Because only real firearms could fire bullets containing gunpowder, only real firearms would require cleaning. Some replicas are made with an ammunition magazine and a realistic ejection chamber, making it difficult to tell whether they are authentic without a close examination.

Deputy Fant was shown an excerpt from the dispensary's surveillance video in which one of the robbers could be seen taking a gun out of his pocket or waistband and crossing his other hand over the gun. Deputy Fant testified that she could not tell what the movement was because the gunman was wearing gloves, but if the movement was a manipulation of the slide at the top of the gun, it would be consistent with the use of a real firearm. She explained, however, that some replicas, BB guns, and pellet guns also had slides for loading ammunition.

4. Court questions and comments

On a dozen or so occasions throughout the two days of testimony, the trial judge asked several questions of the witnesses. For convenience, we use the same numbering as in respondent's brief, although some "instances" include more than one question or comment by the court.

First instance

During Jones's testimony, the prosecutor asked for a description of defendant's companion. Jones replied that the companion was taller, not skinny, but not fat, wearing a striped sweater. Defense counsel then objected to the testimony as a narrative. The judge said, "No. This is description." The following colloquy ensued:

"The Court: Taller than [defendant] you say?

"[Jones]: Yes.

"The Court: Asian? White? Black?

"[Jones]: Black.

"The Court: Any hats? No hats?

"[Jones]: I believe he had a hat on and the gentleman here had a hoodie on.

"The Court: Any glasses? No glasses?

"[Jones]: No glasses. They both had on gloves.

"The Court: Do you remember the color of the gloves?

"[Jones]: Black, I believe it was.

"The Court: Next question, please."

Second instance[3]

After Jones testified that the gun appeared not to have been cleaned, the prosecutor asked, "You know this from your experience and training with guns; is that correct?" In response to a defense objection that the question was leading, the court said, "Ask the question, how do you know this?" The prosecutor used the suggested words, and Jones replied, "I have been around guns all my life."

When Jones testified that "where the bullets eject from" looked real, the court asked, "Called the ejection port?" Jones replied, "Yes."

Third instance

Just after Jones had testified that defendant told Singh to stop pushing the button or he would shoot her, Jones said, "I guess they assumed she was pushing the panic button." The court said, "Don't assume," and struck the answer on motion of defense counsel. Jones then testified that defendant took Singh's purse and cell phone. Defense counsel objected due to lack of foundation with regard to Jones's ability to perceive. The following ensued:

"The Court: Well, let's find out. Did you see anybody taking [Singh's] cell phone or purse?

"[Jones]: At the time when the purse was taken, I was lying on the floor. I heard. After they was gone, the purse and phone was gone.

"[Defense counsel]: Motion to strike the answer.

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3 An unnumbered instance mentioned by defendant occurred when Jones testified that it was not the first time he had a gun in his face. The court said, "Hold on a second. 'Put in your face.' How far was it, the weapons that were present?" The witness indicated but the record does not reflect the result.

"The Court: We don't have an answer yet. Did you see who took the purse and the telephone?

"[Jones]: At the time, no.

"The Court: But it was gone?

"[Jones]: Yes.

"The Court: There you go. Next."

Fourth instance

After playing a video recording of the robbery, the prosecutor asked Jones to describe various items in the scene, then began the question, "Did you just observe the defendant's partner grab the money --." Defense counsel objected "to any type of narrative testimony by the witness with respect to what's going on in the video." The court responded: "Stop. No speaking objection. Ms. [prosecutor], . . . why don't you ask the witness to describe what's happening." The prosecutor said "Okay. Describe what you saw the partner of the defendant do with respect to that customer here." After the witness replied, "He walked over and took the money from his hand," the court said, "You don't know who that is." Jones then replied, "I don't know him personally. I just know that he is a patient."

Fifth instance

The next question by the court came during the testimony of the investigating officer, Los Angeles Police Department Detective Erika Nuttman. The prosecutor asked, "As part of your investigation, did you ever find any of the two firearms that were used in this incident that we see on the video?" When defense counsel objected to the term "firearms," the court asked Detective Nuttman, "Did you find any of the things that appear[] to be firearms that are in the video?" She replied, "No, we did not."

Sixth instance

During Silagy's testimony, the court asked, "When you saw the instrument that you believe is a .9 or a .45, how far was that instrument in front of you when you saw it?" Silagy replied that it was a foot behind him.

Seventh instance

The prosecutor played a portion of the surveillance video and asked, "[I]s the individual standing next to you, . . . one of the males that you saw that night?" The court asked Silagy, "Are you the one in the blue cap with the plaid shirt?" Silagy replied, "Yes, sir." Another segment of the video was played, and the prosecutor asked whether the person closest to him was the man in the striped sweater, and whether he was present in court at that time. When Silagy replied that he could not see the face well enough, the following ensued:

"[Prosecutor]: So you don't recognize that individual here?

"[Silagy]: Not with that picture.

"[Prosecutor]: Okay.

"The Court: I guess the question is when you were there and you are holding your head down, at any point in time, did you have a good look at either one of the two people?

"[Silagy]: I did, but he is not here in court today."

Eighth instance

Defense counsel showed Silagy a photograph of a gun and asked him, "[I]f somebody was briefly pointing a gun at you, can you tell in that split second whether it's a real gun or not?" When the prosecutor objected as calling for speculation, the court said, "No, as to him. Will you be able to tell if the gun -- that's two-dimensional. If you are looking at three-dimensional, briefly in front of you, are you able to tell if it's real or fake?" Silagy replied, "I believe I can."

Ninth instance

The court asked several questions during the testimony of retired Deputy Fant regarding ways of determining whether a gun was genuine or a replica. Referring to the orange tip manufacturers are required to install, defense counsel asked, "[A]s an individual if I was to buy a replica I could color the orange tip black to make it look realistic without getting in trouble?" Deputy Fant replied, "Yes, you could." The court then said, "Well, that question is not really complete. Without getting in trouble, you could take a black marker and color that and that would be lawful?" The witness stated that she believed it would be lawful and continued her testimony, during which a video was shown. The court then said, "While you are thinking about your next question, I'm going to help your expert. Read Penal Code section 12553(a)(1) to yourself." After the witness complied, the court asked her, "Having read the Penal Code because you weren't sure before the jury, I want to make sure the jury does not get misinformation. It's a crime in California to alter the orange tip by coloring it or taking it out in any way." Deputy Fant replied, "Yes, it is," and the court then said, "Next."

Tenth instance

Deputy Fant identified a photograph of a replica Tech-9 firearm which she described as realistic, other than the yellow ammunition. Defense counsel asked: "But if that was modified in some form would you be able to tell by looking at it whether or not it was a replica or a real gun?" The court asked: "You are saying looking at the picture?" Defense counsel replied, "Yes. Looking at the picture." The witness explained that given time to study the photograph, she would possibly be able to determine whether it was genuine by the manufacturer's name or the appearance of the ammunition. When defense counsel asked Deputy Fant whether the law required guns to have orange tips in the 1980's, the court asked, "The tip of replicas?" The witness replied, "That's correct."

On cross-examination, the prosecutor asked Deputy Fant how many times she had testified regarding replica or BB guns. After she began a nonresponsive answer with, "Well, the ones that I have examined," the court stated: "The question is, since this is

cross, how many times have you testified in superior court on the subject matter of replicas and real guns?" Deputy Fant replied, "None." Later, on redirect, the court and Deputy Fant engaged in the following dialogue:

> "The Court: I have questions. Because you are here to educate the jury. I'm an old guy. I remember when you fire a weapon, a real weapon, okay, you fire because there is a cartridge inside with gunpowder, a casing, and a projectile that shoots out, right?
>
> "[Deputy Fant]: That's correct.
>
> "The Court: And the gunpowder explodes to get the firing pin, it's in the back of the cartridge so that the projectile can come out?
>
> "[A.] The gunpowder ignites.
>
> "The Court: Ignites. Thank you. And so your weapon gets dirty, that's why we have to clean our weapons?
>
> "[A.] Yes.
>
> "The Court: Because of the gunpowder. I have also, in younger days, shot BB guns. That's usually an air cartridge.
>
> "[A.] They have the little cartridge that you buy or you can do the pump.
>
> "The Court: Or the pump, and it's the projectile the little BB, is shot out because of air pressure, am I right?
>
> "[A.] Yes.
>
> "The Court: You technically don't have the gun powder to clean up afterwards?
>
> "[A.] That's correct.
>
> "The Court: The airsoft, how does that work or the paintball, do they use gunpowder or air?
>
> "[A.] They have the little cartridge, also, you can get.
>
> "The Court: So the projectiles are shot out by air?

"[A.] Or you have, when you pull the slide back and forward that gives it just enough for it to come out.

"The Court: So it's by spring or by air?

"[A.] Yes.

"The Court: So there is no gunpowder?

"[A.] No."

The court then asked the prosecutor and defense counsel if they had any further questions and each replied, "No."

DISCUSSION

Defendant contends that the trial court's examination of witnesses resulted in the denial of a fair trial and violation of his constitutional right to due process. Respondent contends that defendant has forfeited the issue by failing to object to the court's questions.[4]

"It is settled that a judge's examination of a witness may not be assigned as error on appeal where no objection was made when the questioning occurred. [Citations.]" (*People v. Corrigan* (1957) 48 Cal.2d 551, 556.) However, a failure to object may be excused in particularly egregious cases where the trial judge persistently, "officiously and unnecessarily usurps the duties of the prosecutor by taking over the questioning of witnesses and in so doing creates the impression that he is allying himself with the prosecution, [such that] harm to the defendant is inevitable." (*People v. Robinson* (1960) 179 Cal.App.2d 624, 632 (*Robinson*).)

Defendant contends that this is such a case because the trial court elicited material evidence favorable to the prosecution and that which discredited a defense witness. (See *Robinson*, *supra*, 179 Cal.App.2d at pp. 633-635.) Defendant gives three examples:

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[4] At a posttrial hearing, defendant's trial counsel expressed his belief that the trial court had helped the prosecution. The court interrupted counsel and continued the hearing so that counsel could file a written motion for new trial. No motion was filed.

Jones had been around guns his entire life; the expert's opinion that only genuine guns become dirty with gunpowder; and the expert's lack of prior experience testifying about replicas and real guns. Defendant argues that the remaining instances, although not directed to material issues, favored the prosecution, and that 12 instances over two days were so frequent that they must have influenced the jurors.

We cannot agree that a dozen questions over two days are so frequent as to be "constant and extensive" as in *Robinson*; nor do we find any similarity to the "needless interruptions" of that case which were so favorable to the defense as to suggest that any objection would be unavailing. (*Robinson*, *supra*, 179 Cal.App.2d at pp. 631, 633, 637-638.)

Defendant contends that if his claim of judicial misconduct has been forfeited, his counsel rendered ineffective assistance by failing to object. (See U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) It is the defendant's burden to establish that counsel's assistance was constitutionally inadequate and that he was prejudiced by it. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) Defendant has established no error and no prejudice.

"The right of a trial judge to examine witnesses is not disputed. [Citations.]" (*People v. Corrigan*, *supra*, 48 Cal.2d at p. 555.) "[I]t is the right and the duty of a judge to conduct a trial in such a manner that the truth will be established in accordance with the rules of evidence. [Citations.]" (*Id*. at p. 559.) The court may examine witnesses in the same manner as if called by an adverse party. (Evid. Code, § 775.) Indeed, it is the trial court's duty to clarify testimony and elicit material facts, so long as it is done fairly, without showing bias or the court's opinion of the witness's credibility. (*People v. Cook* (2006) 39 Cal.4th 566, 597.) "'The object of a trial is to ascertain the facts . . . .' [Citations.]" (*People v. Martinez* (1952) 38 Cal.2d 556, 564-565.) "'Considerable latitude is allowed the judge in this respect as long as a fair trial is indicated both to the accused and to the People. Courts are established to discover where lies the truth when issues are contested, and the final responsibility to see that justice is done rests with the judge.'" (*People v. Carlucci* (1979) 23 Cal.3d 249, 255.)

At most, the three examples cited by defendant as material, like all the trial court's questions, demonstrated attempts to clarify testimony or move the questioning along more quickly; they did not "consistently develop[] the prosecution's case" as defendant contends. The prosecution attempted to bring out the basis of Jones's knowledge of guns, but defense counsel objected to the question as leading. The court merely focused the question. Eliciting the expert's opinion that only genuine guns become dirty with gunpowder clarified Jones's testimony that the gun needed cleaning. Finally, the trial court's questions did not discredit the expert's qualifications as asserted in defendant's third example. Defense counsel had already elicited retired Deputy Fant's testimony that although she had taught firearm courses, the laws had changed since then. When she taught, there were no airsoft guns and the curriculum did not include distinguishing authentic guns from replicas. It was the prosecutor who asked Deputy Fant how many times she had testified regarding replica or BB guns. When her answer was nonresponsive, the court saved time by repeating the question for her rather than requiring the prosecutor to do so. Deputy Fant's response, "None," would have come out in due course.

Similarly, other instances came in response to defense objections and did not necessarily result in evidence favorable to the prosecution, but merely clarified or hastened the inevitable responses. Indeed, some questions to Silagy were favorable to the defense. The sixth instance cast doubt on Silagy's ability to identify the weapon by eliciting his testimony that it was behind him. The court also brought out Silagy's testimony that he was able to get a good look at both robbers and neither was in court, suggesting that defendant was not one of them.

Defendant contends that the trial court intended to help the prosecution, evidenced by the court's posttrial comment indicating it was convinced early in the trial that defendant's gun was real.[5] We discern no such intent from the court's comments or from

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[5] At the initial sentencing hearing, the court explained why a 13-year plea bargain would not have been acceptable after Jones testified that the gun was dirty, stating that it

the questions. In each circumstance the questions either appropriately elicited or clarified facts that might have been helpful to the jury's ascertainment of the truth. "'[I]t has been repeatedly held that if a judge desires to be further informed on certain points mentioned in the testimony it is entirely proper for him to ask proper questions for the purpose of developing all the facts in regard to them. . . .'" (*People v. Carlucci*, *supra*, 23 Cal.3d at p. 255.) Defense counsel's failure to make unmeritorious objections to proper questions did not amount to ineffective assistance. (See *People v. Price* (1991) 1 Cal.4th 324, 387.)

Moreover, defendant's claim of inadequate counsel fails for the additional reason that defendant has not shown that he was prejudiced by the court's questions or by his counsel's failure to object to them. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1126.) It is unlikely that the jury construed the court's questions as favoring the prosecution, as overwhelming circumstantial evidence that defendant's gun was a genuine firearm was elicited by counsel without assistance from the court. First, defendant represented his gun as real during the robbery by displaying it and threatening to shoot the victims: Jones testified that defendant told Singh to "stop pushing the button or I will shoot you"; when defendant placed his gun to Jones's head he said he should shoot Jones; finally, defendant said, "Don't push the button or I will shoot you." This evidence alone would support a finding that the gun was authentic. (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435-1438.)

In addition, defendant's gun appeared to Jones to be real. Jones testified that he was familiar with guns because he had owned them for several years, was a licensed armed security guard with firearms training, and had worked as an armed guard with the Compton Police Department for five years. What Jones felt on his head was "semi-heavy" "cold steel" not plastic. Silagy was also familiar with guns and testified that the gun carried by the robber closest to him looked real. In response to questioning by

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knew the "gun charge [was] good" due to the presence of gunpowder soot, and that "no matter what expert you put up here about air guns, it's not going to hold . . . ."

defendant's counsel, Silagy testified he had been handling guns since childhood, and was able to distinguish real guns from airsoft and replica guns.

Finally, any implication from the court's questions that it favored the prosecution was dispelled when the court instructed the jury with CALJIC No. 17.30: "I have not intended by anything I have said or done, or by any questions that I may have asked, or by any rulings I may have made, to intimate or suggest what you should find are the facts, or that I believe or disbelieve any witness. If anything I have done or said seems to so indicate, you will disregard it and form your own conclusion." We presume the jury followed this instruction. (See *People v. Monterroso* (2004) 34 Cal.4th 743, 784.)

In sum, as defendant has not shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," we must affirm the judgment. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; see also *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1126.)

DISPOSITION

The superior court is directed to prepare an amended abstract of judgment reflecting the imposition of a $40 court security fee and a $30 criminal conviction assessment fee as to each count, and to forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD