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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. JOHN JOSEPH KEYS, Defendant and Appellant.	2d Crim. No. B279453) (Super. Ct. No. 2016021712) (Ventura County)

Appellant John Joseph Keys was charged with battery upon a peace officer resulting in injury (Pen. Code, § 243, subd. (c)(2);[1] count 1), and resisting a peace officer (§ 69; count 2). A jury convicted appellant, on count 1, of the lesser included offense of misdemeanor battery (§ 242). It also convicted him on count 2.

Appellant requested that his conviction on count 2 be reduced to a misdemeanor pursuant to section 17, subdivision (b).

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

The trial court denied the request, suspended imposition of sentence and placed appellant on two years of formal probation. As a condition of probation, appellant was ordered to serve 300 days in county jail, with credit for time served of 261 days.

Appellant contends the trial court committed prejudicial error by denying his request under Evidence Code section 352 to exclude the admission of a post-arrest audio recording. Appellant also asserts the court abused its discretion by denying his request to reduce his felony conviction on count 2 to a misdemeanor. We affirm.

FACTS

On June 5, 2016, Chad Dockery was at a public park in Simi Valley when he saw appellant lying on the ground near a pile of clothes. Concerned that appellant "might be dead," Dockery approached him. Dockery saw appellant move and determined there was "no immediate emergency." A few minutes later, another park visitor, Steve Baird, came by and also saw appellant. Baird and Dockery decided to call the police.

Officer Steve Jennings arrived to conduct a welfare check on appellant. When the officer awoke appellant and spoke to him, appellant responded, "[F]uck you" and "get the fuck away from [me]." Appellant then extended his hand toward the nearby pile of clothing. Fearing that appellant was reaching for a weapon, Officer Jennings kicked appellant's hand and instructed him to keep his hands where they could be seen. Appellant "rolled over to his knees, put his hands down, bracing himself to stand up, [and] said he was going to kill [the officer]." Officer Jennings told appellant to remain on the ground. When appellant failed to do so, the officer kicked appellant in the face and shoulders to try to get him down.

At one point, Officer Jennings felt appellant grabbing at his belt and gun. The officer activated his Taser on appellant. Although Dockery recorded a video of these events on his cell phone, he did not capture most of the discussion between Officer Jennings and appellant.

Shortly thereafter, two other police officers, Officer Gene Colato and Senior Officer Kyle Crocker, arrived and helped handcuff appellant. Senior Officer Crocker recorded an audio of the officers' conversation with appellant following his arrest. During that profanity-laced conversation, appellant referred to the officers as, among other things, "fucking idiots," "fucking cunts" and "fuckin' assholes," and threatened to "[f]ucking kill" them.

Officer Jennings suffered a strained wrist and lower back during the incident. He was taken to the hospital and released the same day. Appellant also was taken to the hospital with injuries, including bleeding from his face.

DISCUSSION

Admission of the Audio Recording

Appellant contends the trial court committed prejudicial error by denying his request under Evidence Code section 352 to exclude the audio recording at trial. He asserts that admitting the audio recording "served little purpose other than to inflame the jury against appellant." We are not persuaded.[2]

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[2] At our request, the trial court transferred the trial exhibits to us for review. Among other things, we viewed Dockery's cell phone video (People's Exh. 1), and also listened to the entire audio recording (People's Exh. 9).

Evidence Code section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, "prejudicial" is not synonymous with "damaging."'" (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

The decision whether to exclude evidence under Evidence Code section 352 is reviewed for abuse of discretion and will not be disturbed unless there is a clear showing the trial court exceeded the bounds of reason, all circumstances considered. (*People v. Martinez* (1998) 62 Cal.App.4th 1454, 1459.)

There is no doubt that the audio recording was "prejudicial" in the sense that it was damaging to appellant's case. But it cannot be said that the recording had very little effect on the issues. Count 2 charged appellant with resisting a peace officer (§ 69). Section 69 has two basic elements: (1) the defendant must attempt to deter or resist an officer (2) in the performance of his or her duty. The audio recording is highly

relevant to both elements. It shows that appellant was attempting to deter or resist the officers while they were in the process of arresting him and taking him into custody. Not only did appellant threaten to kill the officers, but he also threatened to get them fired. He said, "You're gonna get fired. You're gonna get a pink slip today. . . . You don't give a fuck, do you?"

It is true that appellant's extensive use of profanities does not paint him in a flattering light. But that does not render the audio recording inadmissible under Evidence Code section 352. In *People v. Watson* (2008) 43 Cal.4th 652 (*Watson*), the defendant argued the trial court erred in admitting crime scene and autopsy photographs because they were more prejudicial than probative and were cumulative of other evidence. (*Id.* at pp. 682-683.) The prosecutor contended the photographs were relevant to prove intent and the cause of death. He also asserted that the photographs were relevant to corroborate witness testimony. (*Id.* at p. 683.) Defense counsel maintained that intent and the cause of death could be established by other, less inflammatory evidence. The trial court overruled defense counsel's objection. (*Ibid.*)

The Supreme Court concluded that the photographs "are highly probative of motive, intent, and the cause and manner of death. Although unpleasant, they depict the nature of the crime without unnecessarily playing upon the jurors' emotions. [Citation.] The probative value of the photographs thus is not clearly outweighed by their prejudicial effect." (*Watson*, *supra*, 43 Cal.4th at p. 684.) In so ruling, the court noted that "the photographs were not made inadmissible by the prosecutor's ability to prove motive, intent, and cause of death through other evidence." (*Ibid.*) It explained that prosecutors

are not required to prove their case with evidence solely from live witnesses. (*Ibid.*)

As in *Watson,* the prosecutor in this case was not obliged to base her case primarily on live witness testimony. She had an audio recording revealing both appellant's menacing conduct and his threats toward the officers. The trial court did not abuse its discretion by allowing the prosecutor to introduce that corroborating evidence. (*Watson*, *supra*, 43 Cal.4th at p. 684.) *People v. Thornton* (2000) 85 Cal.App.4th 44, explains that "[a] criminal trial must always be fair. But it need not be fair in the sense of a fair fight: one in which each side has an equal chance to win. We do not handicap the parties to a criminal trial. If one side or the other has overwhelming evidence, it is allowed to use as much as it chooses, subject only to exercise of the trial court's considerable discretion under Evidence Code section 352." (*Id.* at pp. 47-48, italics omitted.)

Finally, any error in admitting the audio recording was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As appellant effectively concedes, his guilt was established by "other evidence presented by the prosecution." Appellant has not shown that evidence that objectively confirms witness testimony is the type of prejudicial information that invalidates a conviction.

Request to Reduce Felony Conviction to a Misdemeanor

Appellant argues the trial court was required at sentencing to reduce his felony conviction on count 2 (violation of section 69) to a misdemeanor. We disagree.

Section 69 is a "wobbler" offense which may be treated under section 17, subdivision (b) as either a misdemeanor or a felony at the time of sentencing. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510; see *People v. Superior Court (Alvarez*)

(1997) 14 Cal.4th 968, 977 (*Alvarez*).) A trial court has broad discretion in ruling on a motion to reduce charges under section 17, subdivision (b), and it is presumed to have acted to achieve legitimate sentencing objectives. (*Alvarez,* at p. 977.) "'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.]'" (*Ibid.*) Furthermore, "'[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]'" (*Id.* at p. 978.) Therefore, we review the court's ruling on a motion under section 17, subdivision (b) for abuse of discretion. (*Id.* at pp. 977-978.)

The trial court is entitled to consider multiple factors when deciding whether to punish a "wobbler" as a misdemeanor rather than a felony. "[S]ince all discretionary authority is contextual, those factors that direct similar sentencing decisions are relevant, including '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.' [Citations.] When appropriate, judges should also consider the general objectives of sentencing such as those set forth in California Rules of Court, [former] rule 410 [now rule 4.410]." (*Alvarez*, *supra*, 14 Cal.4th at p. 978, fn. omitted.)

The record confirms the trial court considered these factors and objectives. The court began the sentencing hearing by stating it had read the probation report. That report listed 11 prior convictions, including a felony conviction for animal cruelty (§ 597, subd. (a)). In discussing the factors weighing against

probation, the deputy probation officer noted that appellant's prior record is "significant," that appellant's ability to comply with and successfully complete probation is compromised by his unaddressed mental health issues, and that appellant "will be a danger to others." The officer further noted that while being arrested in Venice, California, appellant had a similar altercation with police in which he claimed "he was the victim of an attack perpetrated by police."

When asked to comment on sentencing, the prosecutor requested that the trial court decline to reduce the felony conviction to a misdemeanor. Among other things, she cited the fact that it took three officers to handcuff appellant following his arrest. In contrast, defense counsel argued that appellant was not doing anything wrong at the time he was approached by Officer Jennings, that appellant "has paid his dues" by being held in custody for 131 days, that appellant was injured in the altercation, and that his prior felony conviction occurred 11 years earlier and was the result of a mental health issue he was experiencing at the time.

After hearing these arguments, the trial court denied the section 17, subdivision (b) motion. It agreed with defense counsel that "this is an interaction that didn't need to occur," but noted that appellant "is the one who initiated and kept pursuing the altercation with the police officer." The court further found, after "weigh[ing] the factors outlined in the probation report," that prison would be inappropriate and that appellant "is entirely suitable to probation."

The nature and circumstance of the offense are relevant matters that the trial court properly could, and did, consider in sentencing appellant. (See *Alvarez*, *supra*, 14 Cal.4th

at pp. 977-978.) The court also considered the relevant mitigating and aggravating factors before finding that the balance tilted against reducing the conviction to a misdemeanor. Appellant has failed "'to clearly show that the sentencing decision was irrational or arbitrary.'" (*Id.* at p. 977.) Accordingly, we presume the court acted to achieve legitimate sentencing objectives, and do not disturb its discretionary decision to impose a particular sentence. (*Ibid.*)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Roger L. Lund, Judge
Superior Court County of Ventura

Richard B. Lennon and Suzan E. Hier, under appointment by the Court of Appeal, for Defendant and Appellant.

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