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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BEHZAD MIRZALOU,

Defendant and Appellant.

B240728

(Los Angeles County
Super. Ct. No. LA061589)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Martin L. Herscovitz, Judge. Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant
and Appellant.

No appearance for Plaintiff and Respondent.

Behzad Mirzalou appeals from revocation of probation previously granted after his plea of no contest to assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).¹ The trial court sentenced Mirzalou to two years in state prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

*1. Facts.*²

a. The prosecution's case.

Early in the day on March 17, 2009, Armin Tashvighi accompanied appellant and defendant, Behzad Mirzalou, to a Big-5 sporting goods store in order to purchase a B.B. gun. Mirzalou had told Tashvighi that he was buying the gun “for his little cousin.”

Later that day, at approximately 2:00 p.m., Tashvighi, Mirzalou and a woman named Yesenia Canal were near the intersection of Millbank and Woodman Streets in the County of Los Angeles. Mirzalou was driving the car and, as Canal had a prescription enabling her to purchase marijuana, the three had gone to a nearby marijuana club to get some.

As they were returning from the club, Mirzalou pulled out a gun, pointed it at Canal and said, “ ‘Give me all your stuff.’ ” When Tashvighi asked what was going on, Mirzalou pointed the gun at him and said, “ ‘Shut the f[uck] up or I’ll kill you too.’ ” Mirzalou aimed the gun at Tashvighi’s face then, after taking a white bag from Canal,

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

² The facts have been taken from the transcript of the preliminary hearing.

told her to get out of the car. When Mirzalou took the bag from Canal, she looked “shocked” and “scared.”

Los Angeles Police Officer Ricardo Gonzalez responded to a call regarding a robbery near the intersection of Millbank and Woodman Streets. When he and a fellow officer arrived at the scene, Canal told them that she had been with two men she had believed were her friends, Mirzalou and Tashvighi. She had met them at the corner of Millbank and Woodman, where she had gotten into their car. They had then gone to a Western Union to get some money so that she could purchase marijuana from a medical marijuana clinic.

Canal told Gonzalez that, after she purchased the marijuana, they drove back to the intersection of Millbank and Woodman. There, Mirzalou pulled out a gun, pointed it at Canal and told her to “ ‘[g]ive [him] everything [she had].’ ” Canal gave to Mirzalou two of the three bags of marijuana that she had and he reached out and grabbed the third one. In addition, he took \$500 cash from her bag. He then told her to get out of the car. As she was getting out, Mirzalou pointed the gun at Tashvighi and Canal asked Mirzalou “ ‘What [he was] doing?’ ” When she received no response, Canal “took off.” A little while later, Canal received a phone call from Mirzalou in which he said, “ ‘If you call the police, I’m gonna kill you.’ ”

Tashvighi indicated that, after Canal had gotten out of the car, Mirzalou took him to a restaurant, where they ate. Tashvighi was “scared for [his] life” and did “not [want] to say anything, or try to run away from [Mirzalou]. . . . [T]hat’s the only reason [he] went out to eat with him.” After they ate, Mirzalou went to Tashvighi’s home and

dropped him off. He told Tashvighi “how . . . sorry he was for doing that [but] he needed to pay his rent for his house.”

On March 18, 2009, Los Angeles Police Officer Daryl Blackhall went to an apartment at 4500 Woodman Avenue to look for a suspect in the March 17th robbery. When he arrived at the apartment, both the suspect, Mirzalou, and his girlfriend were present.

Blackhall and several other officers performed a search of the apartment. They were looking for “cash, baggies of marijuana and [a] handgun.” Under the couch where Mirzalou and a friend had been sitting, the officers found “four baggies of marijuana and a replica Walter PPK handgun.” The B.B. gun was loaded with pellets and appeared to be in working order.

After completing the search, Blackhall spoke to Mirzalou’s girlfriend, Arezoo Alvandi, who told the officer that Mirzalou had purchased the gun just a couple of days earlier. That same day, Mirzalou and a friend of his had borrowed Alvandi’s car, a white BMW. She had left the apartment for a time and when she returned, Mirzalou and his friend were there. They were “both intoxicated—under the influence of marijuana”

Los Angeles Police Detective Jeff Case interviewed Mirzalou. After he waived his *Miranda*³ rights, Mirzalou told the detective that at approximately 1:00 p.m. on March 17, 2009, Canal arrived at his house.⁴ She had asked Mirzalou to take her to a

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

⁴ Although Mirzalou testified that Canal arrived at his home at approximately 1:00 p.m., the police report indicates she arrived at 7:00 p.m. and that the robbery

club so that she could purchase some marijuana. Mirzalou agreed to go and he first took Canal to a Western Union so that she could get some money. Mirzalou and Tashvighi, who had come with them, then took Canal to the marijuana club.

Canal was inside the club for approximately 30 minutes. When she came out, Mirzalou told her that he was angry with her for taking so long. He was apparently driving with a suspended license and did not want to get stopped by the police. In addition, Mirzalou believed that it was illegal to drive with marijuana in the car. He felt that he was doing Canal a favor and that she should not have made him wait so long.

Mirzalou told the detective that he then drove back to his house. There, Canal got out of the car and headed home. Mirzalou and Tashvighi went inside Mirzalou's house for a short time, then out to dinner. After dinner, Mirzalou took Tashvighi home.

Two police reports were made with regard to this case and Detective Case relied on both of them. On the first page of the second report it says " 'victim Canal received the call from suspect Mirzalou, went to suspect Mirzalou's house at 4500 Woodman to hang out with Mr. Mirzalou and [Tashvighi.]' " However, in the report, it does not state that Canal went inside Mirzalou's home. "[S]he allegedly stated that she waited on the sidewalk until she entered the vehicle [that] Mr. Mirzalou[] was driving" It was also reported that Canal already had in her possession an ounce of marijuana when she arrived at Mirzalou's residence. The marijuana had been in her purse.

occurred at approximately 7:10 p.m. Another police report indicates that the incident was reported at 8:00 p.m. In addition, Canal had given to a detective a receipt from Western Union. The receipt showed that the transaction had occurred at 9:12 p.m.

b. *Defense evidence.*

Arezoo Alvandi testified that she had been Mirzalou's girlfriend for the last two and one-half years. Alvandi and Mirzalou lived together. On March 17, 2009, Mirzalou and his friend, Tashvighi, were in the house for most of the day. However, at approximately 4:00 or 4:30 p.m., the two men left the house for approximately 10 or 15 minutes.

During the evening hours, Tashvighi was still at Alvandi's and Mirzalou's apartment. The two men were talking and laughing and "smoking pot And then [they all] had some dinner together. And everything was okay. He was relaxed." At no time did Tashvighi "appear to be under any coercion from [Mirzalou.]"

That night, police officers came to the house. They first discovered the B.B. gun. The gun, which Mirzalou had purchased for both he and Alvandi because there had been a robbery at their apartment and he believed the gun would allow them to protect themselves, was usually kept in the closet or kitchen drawer. Alvandi did not know where the gun was when the police officers found it.

Mirzalou testified in his defense. He stated that at approximately 10:30 a.m. on March 17, 2009, he received a call from his friend Tashvighi. Tashvighi and his father were having an argument and Tashvighi asked Mirzalou to come and pick him up. Mirzalou arrived at Tashvighi's house at approximately 11:15 a.m. After he picked up Tashvighi, Mirzalou, who was a personal user, indicated that he " 'need[ed] three ounces of weed.' " Tashvighi suggested that Mirzalou get it from Canal.

Mirzalou and Tashvighi met with Canal that day. She went to Mirzalou's house and the three then got into Mirzalou's car. He first went to Western Union so that Canal could get some money. Mirzalou then drove approximately 15 minutes to "the club on Reseda and Hart." Canal was inside the club for approximately 15 to 20 minutes. Mirzalou and Tashvighi waited in the car until Canal returned with three bags of marijuana. When she started to open the bags in the car, Mirzalou stopped her. The odor from the marijuana was strong and Mirzalou's driver's license had been suspended. He did not want to be pulled over for having marijuana in his car.

When they arrived at Mirzalou's apartment, Tashvighi, who had been playing with the B.B. gun, put it on the table while Mirzalou opened the packages of marijuana. Of the three bags Canal had purchased, one was not to Mirzalou's satisfaction and he refused to pay for it. After he gave her \$1,000 for the two bags he intended to keep, Canal, who was angry for " 'trusting [Mirzalou],' " stormed out of the apartment, leaving the third bag on the table. Mirzalou told Tashvighi that he did not mind "smoking it for free."

Mirzalou did not tell one of the officers that he had not left the house that day except to go to a 7-Eleven store. However, when he was taken to the station and told that he was being charged with " 'robbery with [a] gun,' " he was "shocked."

2. Procedural history.

Following the preliminary hearing, defense counsel made a motion to dismiss the matter for "insufficiency of the evidence and discriminatory prosecution." The trial court denied the motion, stating, "I do not find the defendant credible. I do not find the defendant's witness credible, relative to the reason why the B.B. gun was purchased.

Using the B.B. gun as domestic defense against presumed robbery is ludicrous. [¶] I found the first witness, Armin Tashvighi to be more credible”

On May 4, 2009, Mirzalou was charged in a three-count information with second degree robbery (§ 211), during which he used a deadly and dangerous weapon (§ 12022, subd. (b)(1)) (count 1), and two counts of assault with a deadly weapon (§ 245, subd. (a)(1)) (counts 2 and 3).

At proceedings held on June 30, 2009, the prosecutor indicated that he and Mirzalou had reached an agreement. Mirzalou was to plead guilty or no contest to count 2, assault with a deadly weapon of Canal. He was to be granted probation with a “stay-away” order and to serve “however much time” was agreed upon.

The trial court addressed Mirzalou, stating, “assault with a deadly weapon is a . . . serious felony, a strike, under the current state of the law. It’s punishable by imprisonment in the state prison for two years, three years, or four years. It’s probation-eligible. [¶] The promise here is you’ll be placed on probation initially for three years. It could be extended for as long as five years. There will be terms and conditions of your probation. One will be that you serve 79 days in county jail. I’ll give you credit for the time that you’ve served. [¶] There will be other terms and conditions of your probation. If you violate your probation . . . , you could be sent back to the county jail for a total of up to one year, or to state prison for two years, three years, or four years” Mirzalou stated that he understood.

The trial court indicated that, among other terms, Mirzalou would be required to pay a \$200 victim restitution fine (§ 1202.4, subd. (b)), a stayed \$200 probation

revocation restitution fine (§ 1202.45), a \$40 court security fee (§ 1465.8, subd. (a)(1)), and a \$30 criminal conviction assessment (Gov. Code, § 70373).

The trial court then advised Mirzalou of his constitutional rights. He informed Mirzalou of his right to a jury trial, his right to confront and cross-examine the witnesses against him, the privilege against self-incrimination and the right to remain silent, and his right to subpoena witnesses and documents to present a defense. Mirzalou indicated that he understood and was willing to waive those rights. His counsel joined in the waivers and stipulated to a factual basis for the plea.

Mirzalou then pleaded no contest to the charge that “on or about March 17, 2009, . . . [he] committed an assault with a deadly weapon, in violation of . . . section 245[,] [subdivision] (a) (1), a felony, in that [he] did willfully and unlawfully commit an assault upon Yesenia Canal . . . with a deadly weapon[.]” The trial court accepted Mirzalou’s plea and found him “guilty based upon that plea.”

Mirzalou was then released from custody and ordered to return to court for sentencing on July 30, 2009. The court informed Mirzalou that “in order to take advantage of this plea bargain, [he was to], number one, remain crime-free; [and] number two, don’t get near any of the victims named in this case.”

At proceedings held on July 30, 2009, the trial court suspended imposition of sentence and placed Mirzalou on formal probation for a period of three years under various terms and conditions, including that he not own or use any deadly or dangerous weapons. The trial court then granted the People’s motion to dismiss the remaining counts and allegations.

On February 10, 2012, the trial court noted that Mirzalou had been arrested with an illegal knife, had a misdemeanor case pending against him and, although he had been ordered to be present, had failed to appear at court that morning. The court found Mirzalou in violation of his probation, summarily revoked it and issued a bench warrant for his arrest.

Mirzalou, without counsel, made an appearance later that day. After apologizing for being late and indicating that he would be retaining an attorney, he told the court that he was “totally innocent” of the charge of possession of a switch-blade knife. In addition, Mirzalou claimed that he had been at the courthouse since 8:30 that morning, but was unaware of the fact that he was supposed to check in. He claimed he was “[un]familiar with the court of law and the rules.” The following colloquy then occurred: “The Court: You’re unfamiliar? You’ve been on probation since 2009. [¶] [Mirzalou]: I really don’t come to court, Your Honor. This is my—maybe the third time, and — [¶] The Court: What about your domestic violence case in 2008? [¶] [Mirzalou]: It was a reject, right? [¶] The Court: And your — [¶] [Mirzalou]: Because I had no case, Your Honor. [¶] The Court: No. You were on probation in that case. And then, in 2008, you had an intimidating a witness case and criminal threats. [¶] [Mirzalou]: But there was no — [¶] The Court: Okay. [¶] [Mirzalou]: I’m retaining a private attorney — [¶] The Court: Okay. You can. [¶] [Mirzalou]: — I’ll be able to, you know, get on my case. [¶] The Court: You’re entitled to an attorney of your own choosing. [¶] [Mirzalou]: Right. [¶] The Court: But we’re going to remand you — [¶] . . . and set no bail. We’ll have you come back. Have your attorney here on Tuesday. We’ll be back in session on Tuesday.”

Mirzalou then begged the court to release him. He indicated that he had just started a job, that his father was ill and needed his care, that he could not afford to go to jail but that he would deposit \$500 into probation for the payments for which he was in arrears and that he was expecting a child in a few days. Mirzalou stated, “I’m asking for one chance, so I can be able to” In response, the court indicated, “You had your chance when I placed you on probation, so — [¶] . . . [¶] We’ll see you Tuesday. No bail.”

On Tuesday, February 14, 2012, Mirzalou was present in court, represented by a deputy public defender. When the trial court asked Mirzalou if he could afford to hire a private attorney, Mirzalou indicated that he had received a letter from the Probation Department indicating that he owed \$920. After the public defender informed the court that Mirzalou was “under the misimpression that the court [was] concerned about the money owed to probation,” the court responded, “I’m many times more concerned about whether [Mirzalou is] in violation of [his] probation [for] possessing a butterfly knife.” When Mirzalou then informed the court that he did not have the money to hire an attorney, the trial court appointed the public defender to represent him.

The trial court asked counsel whether Mirzalou wished to admit the probation violation or have a formal hearing on the matter. Counsel indicated that Mirzalou also had a pending misdemeanor case in which there was to be a hearing and, with regard to the present charge, Mirzalou continued to insist that he was “totally innocent.” Under these circumstances, the trial court determined the matter should be set for a formal hearing to be held on March 12, 2012.

Mirzalou then addressed the court and argued that, in the meantime, he should be released from custody. He again asserted that he had a job, that he was the only one caring for his ill father and that he was expecting a child in three days. The trial court responded that “this [was] not a negotiation” and that he would see Mirzalou on the 12th.

At proceedings held on March 12, 2012, Los Angeles Police Officer Christine Nakano testified that, at approximately 5:30 a.m. on January 14, 2012, she was on patrol when she received a call regarding a burglary suspect. When the officer arrived at the apartment complex and spoke with the manager of the building, who had made the call, the manager indicated that she believed the burglary suspect was in the restroom in the lobby. Nakano and her partner, who did not see anyone else in the area, went down to the restroom and knocked on the door. Mirzalou came out.⁵

When the officers asked Mirzalou if he “had any weapons on him[.]” he indicated that he had a knife in his pocket. Nakano’s partner recovered the knife, a black folding knife with a three-inch sharpened blade. The knife was a “ ‘butterfly knife,’ ” or one that “is opened by spinning it so that . . . gravity opens the blade[.]” After the officers had taken the knife, Mirzalou spontaneously stated that the knife had been given to him by a friend so that he could defend himself.

In his defense, Mirzalou testified that he had been attending a barbecue which was being held in the middle of the complex when he went to use the restroom. As he was walking toward the restroom, there was an individual walking out. When he went into

⁵ The only two people Nakano saw at the building that night were the manager and Mirzalou.

the restroom, Mirzalou found a knife sitting next to the sink. A couple of minutes later, he heard a knock on the door and believed it was the person who owned the knife. Mirzalou opened the door and saw several police officers pointing guns at him. He “got scared” and placed the knife in his pocket.

Mirzalou told the officers he was there for a barbecue and he asked them to take him back to “ ‘the barbecue place’ ” where there were three girls and four guys. The officers refused, charged him with trespassing and took him into custody.

Mirzalou knew that the police had been looking for a burglar named “Jamani.” Mirzalou “knew who this guy [was]” and described him to the officers. The group that Mirzalou had been having barbecue with “had [this man’s] number” and would try to reach him. They would have had him come over so that they could “give him up to the police.” Instead, “the police put [Mirzalou] in jail.”

The trial court indicated that it did not believe Mirzalou. The court stated: “I believe he had the weapon in his pocket for purposes of offense or defense. That was unlawful and a violation of a condition of his probation, so probation is revoked.”

With regard to sentencing, the court indicated that Mirzalou had “a bad record for violence. In 2008, he was on probation for . . . vandalism and trespass. He violated his probation twice. Then he was convicted in 2008 of criminal threats as a misdemeanor. [¶] Then, in this case, he was convicted of assault by means of force likely to produce great bodily injury, in an ugly case involving marijuana that was originally charged as a robbery. [¶] So I don’t consider the defendant a candidate for probation any longer”

Because it was his first felony case and he qualified for the low term, the trial court sentenced Mirzalou to two years in state prison. Mirzalou was awarded presentence custody credit for a total of 143 days. He was ordered to pay a \$200 probation revocation fine (§ 1202.4, subd. (b)) and “the other fines and fees previously imposed [were] forwarded to the Department of Corrections.”

On April 19, 2012, Mirzalou filed a timely notice of appeal.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed July 31, 2012, the clerk of this court advised Mirzalou to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel’s responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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CROSKEY, Acting P. J.

We concur:

KITCHING, J.

ALDRICH, J.