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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH GENO RIGGINS, Defendant and Appellant.	B279914 (Los Angeles County Super. Ct. No. TA140398)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa P. Magno, Judge. Affirmed.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb,

Supervising Deputy Attorney General, and Nicholas J. Webster, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Joseph Geno Riggins (Riggins) of second degree robbery (Pen. Code, § 211[1]). The trial court sentenced Riggins to five years of formal probation on the condition that he serve one year in county jail.

On appeal, Riggins advances two arguments. First, he contends that he was improperly impeached with his own testimony that he suffered a prior misdemeanor conviction for false impersonation. The People concede that the trial court erred when it allowed the impeachment, but argue that the error was harmless given the "strong" evidence of Riggins's guilt. We agree. Having reviewed the entire record in this case, we hold that there is no reasonable probability Riggins would have received a more favorable result had the jury not learned of his misdemeanor conviction. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

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

Robbery, unlike theft, involves the threat or use of violence. Specifically, robbery is the "felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of *force or fear*." (§ 211, italics added.)

Second, Riggins maintains that his trial counsel's direct examination as to the conduct underlying his misdemeanor conviction amounted to ineffective assistance. Riggins's argument is premature. Accordingly, we affirm without prejudice to any rights Riggins may have to relief by way of a petition for writ of habeas corpus.

BACKGROUND

I. The robbery

On April 11, 2016, at approximately 3:00 p.m., Robert Kim (Kim), a loss prevention officer working undercover at a Fallas Discount Store in Compton, California, saw Riggins and a woman enter the men's clothing department. Riggins carried a turquoise diaper bag and the woman carried a burgundy "Hello Kitty" handbag. Kim observed both Riggins and the woman putting items of men's clothing into a shopping cart. Riggins and the woman then walked the shopping cart to the bedding department in the back of the store, an area where, due to the lack of surveillance, a "high percentage of theft concealment activities occur."

Once Riggins and the woman were in the bedding department, they both placed items of clothing from the shopping cart into the bags that they were carrying. For a time, while the woman was placing clothing into the bags, Riggins walked back and forth; to Kim, who had served as a loss prevention officer for more than 10 years, Riggins appeared to be acting as a "look out."

After placing all of the clothes from the shopping cart into their bags, Riggins and the woman pushed the empty

shopping cart to the women's department on the other side of the store. Once they reached the other side of the store, Riggins and the woman dumped all of the clothing from their bags back into the shopping cart and left the store with their bags. Kim informed the manager what had occurred, and suggested leaving the cart as it was to see if Riggins and the woman came back.

Two minutes after leaving the store, Riggins and the woman re-entered and walked directly back to the shopping cart they had used previously. They then pushed the cart to the shoe department, where the woman once again put items of clothing from the cart into her Hello Kitty bag while Riggins looked around the store. Again, to Kim, it appeared as though Riggins was acting as a lookout. Riggins and the woman, walking "pretty fast," then exited the store without making any attempt to pay for the items of clothing in the woman's Hello Kitty bag.

Once Riggins and the woman exited the store, Kim followed, identified himself—both orally and with his badge—as a loss prevention officer, and explained that he was stopping them for shoplifting. After Riggins denied ever being in the store and after he displayed signs of resistance, Kim grabbed the woman's Hello Kitty bag and explained that he had been following the pair throughout the store.

Soon after he grabbed the woman's bag, Kim heard a "crackling" sound and saw Riggins holding a pink-striped taser. Riggins then threatened Kim with the taser. Scared, Kim let go of the woman's bag. Riggins then told the woman

to run and after a brief scuffle with Kim, Riggins ran after the woman. Riggins and the woman ran to a car and drove off. Kim followed to get the car's license plate and, as he did, Riggins continued to point the taser at Kim. Kim immediately called 911 and gave the license plate number to the operator.

Los Angeles County Sheriff's Detective Paul Ocampo (Ocampo) identified Riggins as a possible suspect based on the license plate number provided by Kim. On April 28, 2016, Ocampo went to Riggins's last known address, and told Riggins's mother to have Riggins contact him. As part of his investigation, Ocampo also learned that the car Kim identified was then held by a towing company and from that company Ocampo learned that among the car's contents was a pink-striped taser.[2]

On April 22, 2016, Kim identified Riggins in a six-pack photograph lineup as the man who had threatened him with a taser outside the Fallas department store. On June 9, 2016, Riggins contacted Detective Ocampo and turned himself in.

II. The trial

At trial, the People relied principally on the testimony of Kim, the recording of his 911 call, and on surveillance

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[2] In the record, there are slightly varying descriptions of the taser. Kim described the taser held by Riggins as having a "zebra pattern of pink and white." The witness from the towing company described the taser recovered from the car as "pink and black striped."

camera footage—video and screen shots from the video—of the confrontation outside the Fallas department store.[3] One of the video screen shots showed Kim approaching Riggins and the woman with his badge raised. Another showed Kim holding the woman's bag and Riggins's raised arm with the taser. A final photograph depicted Riggins "threatening" Kim with the taser.

A. RIGGINS AND THE ROBBERY

Riggins testified on his own behalf. With regard to the robbery, he testified that he went to the store to purchase a new outfit with money he had just received as part of his unemployment benefits; as he was driving to the store he saw the woman, an "acquaintance," and offered to give her a ride because it was hot outside. While Riggins admitted to putting clothes in the shopping cart, Riggins denied ever putting any clothes in his bag or acting as a lookout for the woman as she put clothes in her bag, because he did not want to "get in trouble for that." Although he did not put any clothes into either his or the woman's bag, he did see the woman put items of clothing into both his and her bag. According to Riggins, as soon as he saw the woman stuffing clothes into the bags, he stopped her, dumped the clothes back into the shopping cart and left the store. He initially left the store in order to return to his car to get more money

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[3] Video surveillance footage from inside the Fallas store was not available at trial, because it had not been preserved by the store.

so that he could buy the woman "a few things." He was willing to buy an acquaintance things because he is a "nice guy" and "Fallas is cheap." When Riggins and the woman reentered the store, he did not see the woman put any clothing into her bag, because he was distracted by his search for shoes and because he was on his cell phone.

When Kim approached them outside of the store, Riggins initially testified that Kim did not show them his badge, but when confronted with the video screen shot of Kim showing his badge, Riggins testified that he did not see the badge. When Kim said, " 'Ma'am, you need you to come with me," Riggins initially thought Kim was the woman's "crazy ex-boyfriend" not a loss prevention officer even though a few minutes earlier he had seen the woman shoplifting. When Kim grabbed the woman's bag, Riggins pulled out his taser because he was "scared." Riggins was scared because even though he was taller than Kim, Kim was brawnier and because Riggins had been a crime victim in the past, which is why he carried a taser. When Kim grabbed Riggins by the shirt, he was "petrified"; he thought Kim was "trying to kill [him]," which is why he ran from the scene. Although Riggins felt that he was a victim of a crime—he had been "roughed up" by Kim during their brief scuffle—he did not call for help or run into one of the other nearby stores. Even though he had his cell phone with him, Riggins did not call 911 at any point after the incident. Even though their path away from the incident took them near the Compton

Sheriff's station, Riggins and the woman did not stop to report an assault.

B. RIGGINS AND HIS MISDEMEANOR CONVICTION

Prior to Riggins's testimony, during an Evidence Code section 402 hearing, the trial court ruled—over a defense objection on hearsay grounds—that the People would be allowed to impeach Riggins with a 2011 prior misdemeanor conviction for false personation (§ 529). The court further ruled, under Evidence Code section 352, that, in order to avoid a trial within a trial, the fact of that conviction alone and not the conduct underlying it would be admissible unless the defense, through Riggins's direct testimony, opened the door to admission of the underlying conduct.

On direct examination, Riggins testified both to suffering a misdemeanor conviction in 2011 and to the conduct giving rise to that conviction.[4] Specifically, Riggins testified that he had received a citation while riding on a Metro train and, because he had just been offered a "really

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[4] Given the firmness with which the trial court indicated during the 402 hearing that the fact of Riggins's misdemeanor conviction was going to be admitted into evidence—the trial court even went so far as to dictate to the People the language it should use when introducing the conviction—defense counsel seemingly made the strategic decision to soften the impact of the People's cross-examination on the conviction by having Riggins briefly discuss on direct examination both the underlying conduct and the conviction.

good new job" and "didn't want to mess up the background check," he signed someone else's name on the citation.

On cross-examination, over a defense objection, Riggins affirmed that he had suffered a misdemeanor conviction for false personation, because he was riding on the Metro train without a ticket. Riggins admitted further on cross-examination that he signed his brother's name on the citation and that he never told his employer about the citation or the subsequent misdemeanor conviction.

The jury began its deliberations mid-afternoon on December 1, 2016. Almost immediately after beginning its deliberations, the jury made two requests: to hear Kim's testimony about where Riggins and the woman were standing "during the concealment the second time they were in the store"; and to re-watch the outside surveillance video in slow motion. On the morning of December 2, 2016, the jury resumed its deliberations. That afternoon, the jury requested a number of clarifications regarding the law, two of which concerned the lesser charge of petty theft. The last such request, made at 2:48 p.m., was posed as follows: "If we agree on the lesser charge [petty theft] but we cannot agree on the greater charge [second degree robbery] what should we do?" At 3:03 p.m., just minutes after hearing the trial court's answer to its last request for information, the jury returned its verdict of guilty on the second degree robbery charge.

DISCUSSION

I. The admission of the misdemeanor impeachment testimony was harmless error

A trial court may, in its discretion, admit evidence of past criminal conduct amounting to a misdemeanor conviction where it has some logical bearing upon the honesty and veracity of the witness, and where its probative value outweighs any potential for prejudice, confusion, or undue consumption of time. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295–297 (*Wheeler*); *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1522.) However, the fact of such a conviction remains inadmissible under traditional hearsay rules (*Wheeler*, at pp. 298–299) unless a certified record of the conviction is admitted into evidence. (See Evid. Code, § 452.5; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1459–1461; *People v. Wesson* (2006) 138 Cal.App.4th 959, 967–968.)[5] In other words, a defendant may be impeached with

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[5] In *Wheeler*, *supra*, 4 Cal.4th 284, a defense witness, Burton, admitted a misdemeanor conviction. (*Id*. at p. 289.) Our Supreme Court held that the admission of the misdemeanor conviction was error, stating that "even if Burton's testimony was competent to establish the fact of conviction, the conviction itself was inadmissible hearsay evidence of underlying criminal conduct relevant to impeachment. We therefore conclude that evidence of a misdemeanor *conviction*, whether documentary or testimonial, is inadmissible hearsay when offered to impeach a witness's credibility." (*Id*. at p. 300.) In reaching its decision, the court in *Wheeler* noted, however, that the

an official record of his or her misdemeanor conviction, but testimony alone of a misdemeanor conviction is inadmissible hearsay and, as a result, cannot be used for impeachment.

Here, it appears the People could have introduced a certified record of Riggins's misdemeanor conviction—during jury deliberations, the trial court noted that the People had presented it with "a certified rap sheet . . . indicating the misdemeanor conviction." However, no such certified rap sheet was ever introduced into evidence. Accordingly, the People now concede that the trial court erred when it allowed Riggins to be impeached on his misdemeanor conviction by testimony alone.

Consequently, the first issue that we must address is whether the trial court's error was harmless under the *Watson* test. As discussed below, we hold that the error was harmless.

A. STANDARD OF REVIEW

A trial court's evidentiary ruling is reviewed for an abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.) "Absent fundamental unfairness, state law error in

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Legislature was not precluded from creating a hearsay exception that would allow the use of misdemeanor convictions for impeachment in criminal trials. (*Ibid.*, fn. 14.) In 1996, four years after *Wheeler*, the Legislature did just that, creating a hearsay exception for qualified court records proving the fact of a conviction. (See Evid. Code, § 452.5; see also *People v. Duran*, *supra*, 97 Cal.App.4th at pp. 1459–1461.)

admitting evidence is subject to the traditional . . . test [set forth by our Supreme Court in *Watson*, *supra*, 46 Cal.2d at p. 836]: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

B. THE ERROR WAS HARMLESS

Riggins argues that, but for the trial court's error, it is reasonably probable that he would have received a more favorable outcome. For support, Riggins points to the length of the jury's deliberations and its requests for a readback of Kim's testimony, a replay of the surveillance video footage, and clarifications about the applicable law. According to Riggins, those requests show that the jury was "troubled" by the People's case against him and that in the jurors' minds the case was "close." We are not convinced by Riggins's argument.

While we recognize that in some cases our Supreme Court has inferred a close case from unduly lengthy deliberations (see, e.g., *In re Martin* (1987) 44 Cal.3d 1, 23, 51 [jury deliberated almost 22 hours over 5 days]), we cannot do so under the facts of this case. Here, the jury deliberated for approximately five and half hours over the course of two days. Given that the jury heard testimony and argument over the course of three and half days, the length of the deliberations do not lead necessarily to a conclusion that the jury was troubled or that the case was close. As one court noted, the "length of the deliberations could as easily be

reconciled with the jury's conscientious performance of its civic duty, rather than its difficulty in reaching a decision." (*People v. Walker* (1995) 31 Cal.App.4th 432, 439; see *id.* at p. 438 [no close case even though deliberations (6.5 hours) exceed presentation of evidence (2.5 hours)].)

Similarly, the jury's almost immediate requests for a readback of testimony and a replay of video evidence strongly suggest conscientiousness, not contentiousness. As for the jury's request for more information about the lesser charge of petty theft, the speed with which the jury returned a guilty verdict on the second degree robbery charge after hearing the court's answer to its question—less than 15 minutes—strongly suggests that any division within the jury between the two charges was not very substantial.

The record also indicates that with or without Riggins's impeachment on his misdemeanor conviction, his version of events would have strained the credulity of a rational trier of fact in such a fashion as to render the improper references to his previous conviction of little consequence. For example, Riggins testified that he and the woman initially left the store so that he could get some more money from his car in order to buy some things for the woman as compensation for not letting her shoplift; but, when they returned to the store, they did not go shopping for the woman; instead they went straight to the shopping cart they had used on their first visit to the store and pushed it to the shoe department where the woman proceeded to stuff her Hello Kitty bag with the men's clothing that they had previously dumped in the cart.

Riggins's story became increasingly less credible the further it went. Even though Riggins, just minutes earlier, had caught the woman shoplifting, he purportedly paid no attention whatsoever to her when they returned to the store and did not notice her full bag when they left the store a second time. Once outside the store, Riggins mistook Kim—a man calmly displaying a badge and talking firmly but politely to them—for a crazy ex-boyfriend of the woman, even though the woman never identified Kim as such. Moreover, Riggins purportedly mistook Kim for a crazy ex-boyfriend and not a loss prevention officer even though a few minutes earlier Riggins himself had caught the woman shoplifting. Instead of trying to calmly resolve the situation, Riggins threatened Kim with a taser. Instead of getting help from one of the neighboring stores or calling 911 after his brief scuffle with Kim, Riggins and the woman fled on foot and then in a car. Although Riggins was "hysterical" and so shook up by the incident that he threw up a few blocks from the store, instead of calling 911 or going to the nearby sheriff's station after reaching safety, he and the woman went "to the mall" to do more shopping.

In short, as Riggins argues on appeal, the trial was "essentially a credibility contest" between himself and Kim. Unfortunately, for Riggins, Kim was a far more credible witness, with his testimony being supported by video and audio evidence. Kim's credibility was further enhanced by the testimony of one of the responding officers, who

described Kim's demeanor at the scene as "serious. He seemed like a serious person."

Compounding matters for Riggins is that the People did not focus the jury's attention on his misdemeanor conviction. In fact, the misdemeanor conviction took up only a small part of the People's closing argument. The People's closing argument extended for roughly 24 pages in the reporter's transcript. The People's discussion of Riggins's conviction took up less than a single transcript page. Moreover, in its rebuttal argument, which extended for approximately 11 pages in the transcript, the People did not even mention the misdemeanor conviction once.

Having thoroughly reviewed the record before us, we hold that the trial court's error was harmless, because it was not reasonably probable that Riggins would have received a more favorable outcome at trial absent the error.

II. Riggins's ineffectiveness of counsel argument is premature

Riggins argues that his trial counsel's direct examination of him "as to the conduct underlying his prior misdemeanor conviction in no way benefitted [Riggins] while causing considerable harm to [his] credibility." According to Riggins, by examining him on the misdemeanor's underlying conduct, rather than having him only admit the misdemeanor conviction, his trial counsel "succeeded in putting evidence before the jury on how [he] was dishonest in three instances instead of just one. Not only did the jury learn of appellant's misdemeanor conviction for false

impersonation, it . . . also learned . . . how appellant allegedly sought to avoid paying the fare on a train (the citation) and how he sought to deceive a potential employer as to his background regarding the citation." As discussed below, we decline to resolve this claim.

A. STANDARD OF REVIEW

To prevail on a claim of ineffective assistance of counsel, a defendant must establish his attorney's representation fell below professional standards of reasonableness and must affirmatively establish prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Hart* (1999) 20 Cal.4th 546, 623–624.) If the defendant's showing is insufficient as to one component of this claim, we need not address the other. (*Strickland*, at p. 697.)

However, "[a] claim on appeal of ineffective assistance of counsel must be rejected ' "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." ' [Citations.] Unless the record affirmatively discloses that counsel had no tactical purpose for his act or omission, 'the conviction will be affirmed and the defendant relegated to habeas corpus proceedings at which evidence dehors the record may be taken to determine the basis, if any, for counsel's conduct or omission.' " (*People v. Hinds* (2003) 108 Cal.App.4th 897, 901.)

As our Supreme Court observed in *People v. Mendoza Tello* (1997) 15 Cal.4th 264 (*Mendoza Tello*), "[b]ecause claims of ineffective assistance are often more appropriately litigated in a habeas corpus proceeding, the rules generally prohibiting raising an issue on habeas corpus that was, or could have been, raised on appeal [citations] would not bar an ineffective assistance claim on habeas corpus." (*Id.* at p. 267.) In *Mendoza Tello*, the Supreme Court unanimously reversed the Court of Appeal's reversal of the defendant's conviction on the grounds that counsel was ineffective for failing to make a suppression motion; the court did so due to gaps in the record: "On this record, we do not know what [the deputy] would have said had he been asked at a suppression hearing why he did what he did. . . . [P]erhaps he did have a reason, of which defense counsel was aware, and which justified counsel's actions. Perhaps there was some other reason not to suppress the evidence." (*Ibid.*) "No one gave [the deputy] the opportunity to point to any specific and articulable facts justifying his actions. Nor did the prosecution have the opportunity to offer some other possible reason not to suppress the evidence." (*Ibid.*)

The lesson from *Mendoza Tello*, *supra*, 15 Cal.4th 264, is that an appellate court should not reverse "unless it can be truly confident *all* the relevant facts have been developed." (*Id.* at p. 267, italics added.) Or, as the court in *People v. Hinds*, *supra*, 108 Cal.App.4th 897, put it, "[w]e are wary of adjudicating claims casting aspersions on counsel when counsel is not in a position to defend his conduct. A

claim of ineffective assistance of counsel instead is more appropriately made in a habeas corpus proceeding." (*Id.* at p. 902.)

B. THE RECORD IS TOO UNDEVELOPED TO SUPPORT DIRECT APPELLATE REVIEW

Here, we decline to resolve Riggins's ineffectiveness of counsel claim because the record does not contain any explanation for his counsel's conduct, or necessarily rule out a satisfactory one.

Riggins argues that "whatever tactical reasoning, if any, caused defense counsel to pursue [the misdemeanor conduct] questioning [it] was so flawed that lawyers of ordinary training and skill in criminal law would find that defense counsel lacked competence." The People, however, have advanced a number of potentially meritorious arguments why Riggins's counsel decided to elicit testimony from his client regarding the conduct underlying the misdemeanor conviction. For example, the People note that the defense could have reasonably concluded that, in order to control the narrative about his client's misdemeanor conviction, it made sense to show on direct examination that Riggins's actions were not malicious, that he was merely trying to get a good job.

What is missing from the record before us is direct evidence about the strategy and tactical decisions by Riggins's counsel. "Action taken or not taken by counsel at a trial is typically motivated by considerations not reflected in the record. It is for this reason that writ review of claims of

ineffective assistance of counsel is the preferred review procedure. Evidence of the reasons for counsel's tactics, and evidence of the standard of legal practice in the community as to a specific tactic, can be presented by declarations or other evidence filed with the writ petition." (*In re Arturo A.* (1992) 8 Cal.App.4th 229, 243.)

Accordingly, we affirm "without prejudice to any rights [Riggins] may have to relief by way of a petition for writ of habeas corpus." (*People v. Garrido* (2005) 127 Cal.App.4th 359, 367.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J. LUI, J.