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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TOBY JAMES COLEMAN, Defendant and Appellant.	A128329 (Lake County Super. Ct. No. CR902994)

I.

INTRODUCTION

Appellant Toby James Coleman appeals from a sentence imposed by the trial court following a partial reversal and remand from this court (*People v. Coleman* (May 27, 2009, A121842 [nonpub. opn.] (*Coleman I*)). He contends the trial court abused its discretion in not reducing the amount of county jail time imposed at resentencing in light of this court's reversal of his conviction on one of two counts. We discern no abuse of discretion and affirm the court's judgment.

II.

FACTUAL BACKGROUND

We recite the factual background of this case from our prior unpublished opinion in *Coleman I*:

A. Count Seven: Unlicensed Contracting (Espinoza)

Appellant dropped out of school when he was in the ninth grade, and started doing construction work. He admittedly did not have a contractor's license in 2001 and 2002.

In December 2000, Rafael Espinoza approached appellant about remodeling his garage into an office and a small bedroom. Appellant agreed to do the work for $2,000. When appellant looked at the project, he suggested that he could, instead, convert the garage into a master bedroom for an additional $1,000, so that the whole project would cost a total of $3,000 including materials and labor.[1] Espinoza agreed, and in February 2001, he gave appellant a check for $800 as an initial payment. Appellant wanted a down payment of half the total price, but Espinoza could not afford to give him more than $800. Appellant took a piece of vinyl siding off the garage so that he could try to match it.

Appellant told Espinoza that he could not start working on the project immediately, because he had another job in progress. Around the time Espinoza gave appellant the check, appellant dropped off some framing lumber, sheet rock, insulation, and other materials, and a stove. Espinoza did not make a list of the materials, but estimated that they were worth "not even close" to $800. Appellant, on the other hand, testified that all of the money Espinoza gave him was spent on materials. Appellant left the materials at Espinoza's house, but never returned the piece of siding he had taken.

When appellant told Espinoza that his workers would start on the job the next day, Espinoza replied that he wanted to get a permit for the work first. That was the last contact they had. Appellant testified that he understood Espinoza was going to obtain the permit and then get back to him, but he never heard from him.

B. Counts Four and Six: Diversion and Unlicensed Contracting (Hill)

Beverly Smith was a long-time family friend of appellant's, and in the fall of 2002, appellant was living in a house that Smith owned. At around that time, Smith started working at a beauty salon owned by Sherri Hill.

Hill wanted someone to install an additional sink, and to do some other remodeling work in Hill's salon. Smith recommended appellant. On September 18,

[1] Appellant testified that he did not recall how much he told Espinoza he would charge for the work.

2002, Hill and appellant entered into a written contract under which appellant agreed to purchase and install a new countertop and install Smith's exiting sink into it; frame, drywall, and paint a wall; change some electrical units, and install some appliance hookups. The price for the job was $1,200, including the cost of materials.

Hill initially paid appellant $500 in advance, and was to pay the balance due when he completed the job. On October 4, 2002, appellant asked Hill to advance him an additional $600 against the contract price so that he could pay what he owed Smith for her house for that month. Hill gave appellant a check in that amount, with Smith's name as the payee.[2]

Appellant never completed the job he had contracted to do for Hill. He did only a little electrical work; some framing, and some of the plumbing. At one point, he explained to Hill that he could not work for three weeks due to an injury, but even after the three weeks were over, he neither came back to finish the job nor contacted Hill.[3] After two months, Hill sent a friend to tell appellant his services were no longer needed, and to get back the key she had given appellant. Hill then paid a friend to install the appliances. Appellant testified that Smith told him not to install the sink he had agreed to put in, because it was not going to be needed after all.

C. Counts Three and Five: Diversion and Unlicensed Contracting (Flores)

Appellant's contracting job for Bulmaro Flores was the genesis not only of counts three and five, but also, indirectly, of counts one and two. By the time of appellant's trial, Flores had known him for at least eight years, originally as a coworker. In 2001, appellant helped Flores fix a trailer for between $3,000 and $4,000. Flores was satisfied with appellant's work on that project, so when Flores wanted some remodeling work done on an older house he purchased in November 2002, he hired appellant to perform it.

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[2] Smith confirmed that appellant turned Hill's check over to her as a payment for the house.

[3] Appellant testified that he told Hill his injury would prevent him from working for two months.

Flores hired appellant to do three phases of work on the house, each for a fixed price that included both labor and materials. Their agreements was not in writing. First, appellant agreed to install doors, windows, and sheet rock in the bedrooms and living room for $7,000. While that work was in progress, appellant agreed that after Flores himself demolished the existing walls and floors in the kitchen and bathroom, appellant would refurbish those two rooms, essentially in their entirety, for $8,000. Finally, appellant agreed to install floor tile in the kitchen for $1,500.[4]

Appellant started Flores's project in November 2002. Flores paid him in installments, starting with a payment of about $3,000 to buy materials. Flores paid appellant in cash, and at first, he did not keep records of what he had paid appellant, but he later decided he wanted to do so. He prepared dated receipts showing that he had paid appellant $6,300 and then another $8,000, as well as a later, undated receipt for $1,300 for the floor tiles. The dates on the first two receipts did not reflect the actual dates on which Flores had made the payments. Appellant admitted signing these receipts, but testified at trial that they were blank at the time, and did not reflect the actual price of the work he did. Then, in late December 2002, appellant asked Flores for another $1,000, which Flores paid him without making out a receipt.

Appellant did most of the work he was supposed to do for Flores, but not all of it.[5] The tasks appellant left undone included putting sealing and trim around windows and doors, and installing an interior door, baseboards, electrical outlet covers, and electrical connections for the kitchen appliances. Flores ended up doing these tasks himself, or paying others to do. Flores used his own wood to finish the trim, even though appellant was supposed to provide the materials. Flores gave appellant money to buy a new

[4] Appellant's description of the scope of the work he agreed to do was somewhat at variance with that given by Flores, but the difference is not material to the issues on appeal.

[5] Appellant testified that at the time he stopped working on Flores's project, the two men had a falling out because Flores still owed him $5,200, and wanted appellant to do additional work without charging for it.

kitchen sink, but appellant never provided one, so Flores finally told him to reinstall the original one.

Flores was dissatisfied with some aspects of the work appellant did, such as the joints in the sheetrock, the floor tiling, and the toilet installation. When appellant stopped working, he took the unused portion of the materials away. This was all material that appellant had brought to the site for the job, however; none of it belonged to Flores.

D. Count One: Perjury

Sometime during 2002, appellant apparently fell behind on his child support obligations with respect to his children by two different women, whom we will refer to as the support obligees. In the fall of 2002, the Lake County Department of Child Support Services (DCSS) initiated efforts to collect the delinquent child support payments from appellant. As part of those efforts, appellant was served with an order to attend a judgment debtor's examination (the debtor exam) at the Lake County Superior Court, so that DCSS could inquire into appellant's assets, income, and employment history during the preceding year.

The debtor exam occurred on December 4, 2002. At the debtor exam, appellant was sworn in by the clerk; instructed by a court commissioner to answer under oath all questions put to him; and then directed into a jury room to be questioned by Daniel Sean Navarro, an investigator for the Lake County District Attorney's Office. Appellant's attorney, Karen Evans, went into the jury room with appellant and Navarro, as did the two support obligees. Patricia Shaw White, an attorney with DCSS, came into the jury room about 30 minutes after the debtor exam started, and remained until it ended about 30 minutes later. The debtor exam proceedings in the jury room were not reported by a court reporter or otherwise recorded.

In the jury room, Navarro asked appellant to respond to each question on a three or four-page preprinted form questionnaire used for debtor exams. While he was doing so, the support obligees became upset and accused appellant of giving false answers, and the parties began yelling at one another. The resulting noise was loud enough to prompt the court commissioner to send bailiffs to the jury room to restore order.

During the debtor exam, Navarro wrote down appellant's answers as he gave them, both on the questionnaire and on separate pages of notes. By the time of appellant's trial in the current case, which occurred in August 2007, Navarro had little or no independent recollection of appellant's answers, and his testimony was based primarily on his notes. The questionnaire had a space for the debtor to sign under penalty of perjury, but Navarro did not ask appellant to sign it.

Appellant told Navarro that he worked for a plumbing company during part of 2002, but was no longer working there. When appellant explained that he had done some remodeling work, the support obligees mentioned specific jobs, prompting appellant to confirm that he had done a remodeling job for Flores that involved tiling, electrical work, and windows.

According to Navarro's interpretation of his notes, appellant told him that he had charged Flores $5,200 for the entire job, which consisted of $2,200 for materials, $1,500 for other people's labor, and $1,500 for appellant. Some of the information Navarro wrote down in his notes came from the support obligees rather than from appellant, and Navarro did not recall what information came from which source. Navarro was positive that the figures he wrote down about the Flores job came from appellant, however, because the support obligees would not have known that information.

Appellant testified he told Navarro that he did not know how much money he had already received for the Flores job, and that the $5,200 was only what Flores still owed him, not the entire price of the job. White had an "unspecific recollection" that appellant told Navarro that he had done some work for Flores for which appellant had not yet been paid, and it "sound[ed] familiar" to her that appellant gave Navarro a breakdown of what Flores owed him, as between the total cost and the various elements of it.

Navarro did not recall whether he interpreted what appellant told him about the cost of the Flores job to mean that appellant had already collected the money or was still owed it. Navarro was certain, however, that appellant never told him that Flores had paid appellant anything more than $5,200 for the work appellant did for him. Navarro may have asked appellant whether Flores still owed him money for the job, but he was not

sure. Navarro did record that appellant answered "No" to a general question as to whether anyone owed appellant any money.[6]

E. Count Two: Solicitation of Perjury

After the debtor exam, by which time Flores had paid appellant all the money reflected in the receipts, appellant stopped by Flores's house and told him that "someone from CPS[7] [*sic*] was going to come to my house to ask me how much I had paid [appellant]." According to Flores, appellant "told me to tell them that I had paid him $5,000," and Flores agreed to do so, though he told appellant he wanted him to finish the work on his house in return.

Appellant recounted this conversation differently. He testified that he asked Flores to tell DCSS that Flores and appellant agreed that the $5,200 that Flores still owed appellant could be paid to DCSS instead, to be applied to appellant's child support debt. In any event, Flores and appellant each testified unequivocally that appellant did not ask Flores to come to court and lie, or even to come to court at all.

III.

PROCEDURAL HISTORY

As a consequence of these events, appellant was charged and convicted of the following crimes: (1) perjury at the debtor exam regarding the amount of money appellant had received from Flores (Pen. Code, § 118); (2) solicitation of Flores to commit perjury (§ 653f, subd. (a)); (3) and (4) two counts of diversion of funds received to purchase labor and materials for a construction project that was not completed (diversion of funds, § 484b); and (5), (6), and (7) three counts of engaging in the business of acting as a contractor without a license (Bus. & Prof. Code, § 7028).

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[6] Technically, this was true as to Flores, because given appellant's unlicensed status, any promise by Flores to pay him additional funds was legally unenforceable. (Bus. & Prof. Code, § 7031; *Great West Contractors, Inc. v. WSS Industrial Construction, Inc.* (2008) 162 Cal.App.4th 581, 587-588.)

[7] Flores understood, correctly, that appellant was using the term "CPS" to refer to something having to do with unpaid child support.

On June 23, 2008, the trial court entered a judgment of conviction, but suspended imposition of sentence, and placed appellant on formal probation for five years. The conditions of probation included 300 days in county jail, but the trial court granted appellant's motion for bail pending appeal, and stayed the county jail term pending appeal.

As noted, appellant appealed, and in our decision in appeal No. A121842, we affirmed all convictions, except count two; solicitation of Flores to commit perjury. Our disposition in that opinion was as follows: "The conviction for solicitation of perjury (count 2) is reversed. In all other respects, the judgment is affirmed. *If the trial court's stay of the imposition of sentence is dissolved, the trial court shall take into account the reversal of appellant's conviction on count 2 when imposing sentence.*" (Italics added.)

At resentencing, the trial court dismissed count two, dissolved the stay of imposition of sentence, and ordered appellant to formal probation "on all of the prior terms given." Appellant was then ordered to surrender on June 2, 2010, to commence service of his 300 days of county jail time, although the court granted appellant leave to apply for the county's work release program.

This appeal followed.

IV.

ANALYSIS

Appellant's sole claims on this appeal are that the trial court abused its discretion at resentencing in failing to take into account our reversal of count two, and by not reducing his 300-day county jail term. He reads our disposition as an expectation on our part "that the trial court was expected to reduce the 300-day jail term to reflect that one of the two felony counts had been dismissed." Alternatively, he argues that, even if not expected or ordered to reduce the jail term, it was an abuse of discretion not to do so.

First, it was not our intention to order or "expect" a reduction in appellant's jail time at resentencing. We simply directed the trial court to take into account, or to consider, our reversal of one of seven counts in resentencing appellant. In fact, appellant's counsel at resentencing did not argue that there was an expectation by this

court that his jail time would be reduced. Counsel simply appealed to the discretion of the trial court in arguing for a reduction.

As to appellant's alternative argument that the trial court abused its discretion in not reducing the jail term, we begin by noting that trial courts enjoy very broad discretion in making sentencing decisions. The trial court is in the best position to consider those options that are most appropriate to the needs of society for reasonable safety, and the legitimate need to address supervision of the defendant. Sentencing decisions will not be overturned on appeal unless there is a clear showing that the trial court abused its discretion. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831; *People v. Giminez* (1975) 14 Cal.3d 68, 72; *People v. Cazares* (1987) 190 Cal.App.3d 833, 837.) This discretion includes the determination of "whether an eligible defendant is suitable for probation and, if so, under what conditions. [Citations.]" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; Cal. Rules of Court, rule 4.414.)

The original sentencing report by the Lake County Probation Department recommended that appellant receive a state prison term. Nevertheless, the court granted probation with conditions, including that appellant serve 300 days in county jail. Upon resentencing, the court again referred the matter to the probation department which recommended that, if the court granted probation once more, appellant should be ordered to serve a 300-day county jail term.

At resentencing, appellant's counsel argued for a reduced term in light of the dismissal of count two. On the other hand, the prosecutor argued for a 300-day term. The prosecutor pointed out that the dismissed count was "probably minimal compared to all the other counts," and the inclusion of count two was not argued at the first sentencing as an aggravating factor in arriving at the original 300-day term.

The record reflects the trial court considered the dismissal of count two in imposing a 300-day term as a condition of probation. Its decision to follow the recommendation of the probation department and the prosecutor was not an abuse of discretion, particularly in light of the numerous remaining counts for which appellant was convicted, and which we affirmed.

V.

DISPOSITION

We find no error in resentencing appellant. The judgment is affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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SEPULVEDA, J.