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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PEDRO SANTIAGO, Defendant and Appellant.	F056686 (Super. Ct. No. DF008878A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Wanda Hill Rouzan, Deputy Attorney General, for Plaintiff and Respondent.

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In the published portion of this opinion, we uphold the trial court's use of Judicial Council of California Criminal Jury Instructions (2007-2008) (CALCRIM) No. 3550 when instructing the jury, concluding that this standardized instruction does not

*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II and III.

improperly direct minority jurors to give way to majority jurors or improperly tell the jury that all criminal cases must be decided at some point. The instruction contains none of the flaws determined to be objectionable in *People v. Gainer* (1977) 19 Cal.3d 835, which disapproved of the use of *Allen*-type instructions (*Allen v. United States* (1896) 164 U.S. 492) in California.

In the unpublished portion of the opinion, we reject appellant's contention that the prosecutor impermissibly commented on appellant's silence at trial in violation of *Griffin v. California* (1965) 380 U.S. 609 and conclude there is sufficient evidence to sustain the jury's finding that appellant suffered a prior strike conviction.

PROCEDURAL AND FACTUAL SUMMARIES

Appellant Pedro Santiago was convicted after a jury trial of possession of methamphetamine and with resisting arrest. In a bifurcated trial, the jury found that Santiago had suffered one prior strike conviction within the meaning of Penal Code[1] section 667, subdivisions (c) through (j), and that he had served eight prior prison terms within the meaning of section 667.5, subdivision (b).

The trial court, after striking two of the prior prison-term enhancements and the prior strike conviction, sentenced Santiago on the possession charge to a total term of eight years in state prison (the middle term of two years, plus six, one-year terms for the remaining prior prison terms). The court imposed a 90-day concurrent term on the resisting-arrest count.

Santiago was arrested and charged after a Delano City Police Officer stopped a car in which he was a passenger. The car had a cracked windshield and lacked a front license plate. After noting the car's condition, the officer recognized Santiago as someone with an outstanding warrant who had been alleged to be armed and dangerous. When the officer initiated the traffic stop, the car did not immediately pull over. When it did,

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

Santiago refused to follow the officer's instructions to stay in the car and to keep his hands visible. Santiago was ultimately Tasered by the officer. When the passengers were removed, the officer found methamphetamine in the middle of the passenger seat where Santiago had been sitting.

DISCUSSION

I. CALCRIM No. 3550

Santiago claims that the court erred when it included in the instruction to the jury standardized CALCRIM No. 3550 over defense counsel's objection. He claims that the instruction led to a jury verdict that was not based upon the evidence and arguments presented at trial. He argues that the instruction suggested instead that minority jurors give way to the opinions of majority jurors and to consider in deliberations that all criminal cases must be decided at some point. According to Santiago, CALCRIM No. 3550 is an impermissible *Allen*[2]-type instruction.

As given, CALCRIM No. 3550 reads as follows:

> "When you go into the jury room, the first thing you should do is select a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard. It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict, if you can. Each of you must decide the case for yourself but only after you have discussed the evidence with the other jurors.
>
> "Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you. Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. [¶] … Your role is to be impartial judges of the facts …."

[2] *Allen v. United States, supra*, 164 U.S. 492 (*Allen*).

CALCRIM No. 3550 is a predeliberation instruction, given before the matter is submitted to the jury. In contrast, the instruction given in *Allen, supra,* 164 U.S. 492, was drafted in an attempt to avoid a deadlocked jury. It was given during deliberations after the jury reported that it could not reach a verdict. There were a number of statements made by the court to the jury in *Allen* that were designed to prevent the deadlock. Among them, the instruction advised the minority jurors to consider the expressed opinions of the majority jurors. In addition, the minority jurors were told to consider whether any doubt they might have was reasonable given that other equally honest and intelligent jurors were convinced otherwise. The instruction also told the deadlocked jurors they had a duty to decide the case. (*Id.* at p. 501.)

In *People v. Gainer, supra,* 19 Cal.3d 835 (*Gainer*), the California Supreme Court disapproved of the use of *Allen*-type instructions. The court in *Gainer* held that an *Allen*-type instruction was impermissible in California because it "instructs the jury to consider extraneous and improper factors, inaccurately states the law, carries a potentially coercive impact, and burdens rather than facilitates the administration of justice …." (*Gainer, supra,* at pp. 842-843.)

There are three common recognized features to an *Allen*-type instruction, although these features will often appear with different nuances. First, the instruction generally contains a discriminatory admonition to minority jurors to rethink their position in light of the majority's views. Second, there is often an inaccurate assertion that the case must at sometime be decided, ignoring the prosecution's option to dismiss after a mistrial. A third common feature is a reference to the expense and inconvenience of a retrial. (*Gainer, supra,* 19 Cal.3d at pp. 845, 852.) In disapproving the *Allen*-type charge, the court ruled, "it is error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that

if the jury fails to agree the case will necessarily be retried." (*Gainer, supra,* at p. 852, fn. omitted.)

We reject Santiago's contention that CALCRIM No. 3550 falls within the same category as the instruction disapproved in *Gainer.* CALCRIM No. 3550 does not raise any of the concerns identified in *Gainer*. It is not directed at a deadlocked jury. It does not improperly direct a deadlocked jury that it is required to reach a verdict. It does not place any constraints on an individual juror's responsibility to consider and weigh the evidence. It does not coerce the jurors into abdicating their independent judgment to majority jurors for expediency. It does not encourage jurors to look at the numerical split in determining whether to hold fast to their views of the evidence. It does not suggest that a failure to reach a verdict will result in an expensive retrial. (See *People v. Brown* (2004) 33 Cal.4th 382, 393; *People v. Engelman* (2002) 28 Cal.4th 436, 439-440.) Telling a jury it should reach a verdict if it can, before deliberations begin, is not coercive. Similar language has been approved in this state. (*Gainer, supra,* 19 Cal.3d at p. 856 [approving similar language in CALJIC No. 17.40]; *People v. Whaley* (2007) 152 Cal.App.4th 968, 975, 982 [words "if you can" suggest jury may reach deadlock and do not tell jurors they must reach verdict]; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1121 [telling jury it should deliberate with goal of reaching verdict if it could do so without violence to individual judgment did not direct jury to reach verdict or place constraints on individual juror's responsibility].)

In reviewing a challenge to the instructions given to a jury, the appellate court considers the entire charge, not parts of a particular instruction. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016; *People v. Zepeda* (2008) 167 Cal.App.4th 25, 31.) The remaining portions of CALCRIM No. 3350 instruct the jurors that they each must decide the case for themselves and that they should not change their minds just because other jurors disagree. In other instructions, the court told the jurors in this case that there is always a possibility that the jury would not be able to reach a verdict. In addition, the

jury was instructed that facts could be proved by direct or circumstantial evidence and that the jurors must decide whether a fact in issue has been proved based on all the evidence. The jury understood its responsibility.

"The basic question [under *Allen* and *Gainer*] … is whether the remarks of the court, viewed in the totality of applicable circumstances, operate to displace the independent judgment of the jury in favor of considerations of compromise and expediency. Such a displacement may be the result of statements by the court constituting undue pressure upon the jury to reach a verdict, whatever its nature, rather than no verdict at all." (*People v. Carter* (1968) 68 Cal.2d 810, 817, abrogated on other grounds by *Gainer, supra,* 19 Cal.3d at pp. 851-852; see also *People v. Rodriguez* (1986) 42 Cal.3d 730, 775.) CALCRIM No. 3550 has none of the fatal flaws identified in *Gainer*, and none of the concerns in *Gainer* are reflected in the overall instructions given to the jury in this case.

II. Alleged prosecutorial misconduct

Santiago contends that the prosecutor committed misconduct when he noted in closing argument that there was no evidence that Santiago knew there was a warrant out for his arrest at the time the traffic stop was initiated. According to Santiago, this was an improper comment upon his failure to testify, in violation of *Griffin v. California*, *supra*, 380 U.S. 609, 615 (*Griffin*).

At trial, the prosecutor needed to convince the jury that the drugs belonged to Santiago and not the driver, or that both had equal control over the drugs. (*People v. Williams* (1971) 5 Cal.3d 211, 215 [possession may be imputed when contraband found in place immediately and exclusively accessible to defendant and subject to his dominion and control, or to joint dominion and control of defendant and another].) The prosecutor argued that, when the car was stopped, the driver was very calm, but Santiago was very nervous, which suggested the drugs belonged to Santiago. To preempt any claim that Santiago was nervous because of the existing warrant, and not his possession of drugs,

the prosecutor argued that both men had warrants out for their arrest. He also argued there was no evidence that Santiago knew about the warrant. Defense counsel objected, and the court ordered that the "no evidence" portion of the prosecutor's argument be stricken.

"Pursuant to *Griffin*, it is error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf." (*People v. Hughes* (2002) 27 Cal.4th 287, 371.) It is also "error for the prosecution to refer to the absence of evidence that only the defendant's testimony could provide." (*Id.* at p. 372.) However, although the prosecutor may not directly or indirectly comment on the failure of a defendant to take the witness stand, the prosecutor is allowed to comment on the state of the evidence. (*People v. Harrison* (2005) 35 Cal.4th 208, 257.)

First, we see no merit to respondent's argument that the issue is waived for failure to request an admonition. Defense counsel's objection was sustained and the court ordered the matter stricken. We conclude this is sufficient to preserve the objection for review on appeal. The cases cited by respondent are distinguishable. In *People v. Cunningham* (2001) 25 Cal.4th 926, 1000-1001, there was no objection to the alleged misconduct at trial. In *People v. Heldenburg* (1990) 219 Cal.App.3d 468, 474-475, the court did not sustain the objection in front of the jury nor did it give an admonition, despite a bench conference at which the trial court agreed the objection had merit and an admonition should be given. Counsel did nothing to correct this situation. In *People v. Carter* (2005) 36 Cal.4th 1114, 1204-1205, the court merely sustained the objection, but counsel failed to request that the argument be stricken or that an admonition be given. Here, not only did the jury hear the court sustain the objection, but it heard the court order that the argument be stricken. We believe the jury would understand from the court's ruling on the objection that it was not to consider the prosecutor's argument.

Further, we presume the jury followed the court's admonition. (*People v. Lindberg* (2008) 45 Cal.4th 1, 26.)

Second, the prosecutor's comments were not objectionable under *Griffin.* There "was no reasonable likelihood the jury would have construed or allied the prosecutor's remarks as focusing upon defendant's silence or failure to take the witness stand." (*People v. Stewart* (2004) 33 Cal.4th 425, 506.) A statement that there is no evidence is generally not objectionable under *Griffin*. (See *People v. Valdez* (2004) 32 Cal.4th 73, 128.) This is especially true where there are no references, express or implied, to the defendant's silence. (See *People v. Medina* (1995) 11 Cal.4th 694, 756; *People v. Vargas* (1973) 9 Cal.3d 470, 478-481.)

Finally, even if we were to accept Santiago's characterization of the prosecutor's remark, "it was an indirect, brief and mild reference to [his] failure to testify as a witness without any suggestion of an inference of guilt. [Citation.] Such references have uniformly been held to be harmless error. Under the circumstances in this case, the error was certainly harmless beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 446-447.)

III. Sufficiency of evidence to support prior-strike finding

Santiago also contends that there is insufficient evidence to support the jury's finding that he had suffered a prior strike within the meaning of section 667, subdivisions (c) to (j). Respondent argues that the issue is moot because the trial court struck the prior conviction at sentencing. Since we conclude there is sufficient evidence to sustain the jury's finding, we do not address respondent's contention that the issue is moot.

To prove the prior strikes, the prosecutor presented the jury with a section 969b packet containing, among other things, certified copies of a chronological history and an abstract of judgment dated April 7, 2003, for the prior strike. The trier of fact "may look to the entire record of the conviction" to establish "proof of the substance of a prior

conviction …." (*People v. Guerrero* (1988) 44 Cal.3d 343, 355.) An abstract of judgment is admissible to prove the nature of the offenses. (*People v. Banuelos* (2005) 130 Cal.App.4th 601, 606.)

A violation of section 245, subdivision (a)(1), is a strike offense only if it is an assault with a deadly weapon. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065.) A document referring simply to a violation of section 245, subdivision (a)(1), does not in itself provide substantial evidence that the prior assault constitutes a serious felony and thus a strike offense. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262.) There must be some additional evidence that the assault is one involving a deadly weapon and not simply an assault by means of force likely to produce great bodily injury, the other action prohibited by section 245, subdivision (a)(1). There is no longer a need to prove that a defendant personally used the deadly weapon. (*People v. Luna* (2003) 113 Cal.App.4th 395, 398; §§ 667, subd. (d)(1), 1170.12, subd. (b)(1), 1192.7, subd. (c)(31) ["assault with a deadly weapon … in violation of Section 245"].)

Contrary to Santiago's contention, the abstract of judgment is not ambiguous, at least not as far as it distinguishes between whether the assault was committed with a deadly weapon or by means likely to commit great bodily harm. The abstract states that Santiago was convicted of "ASSAULT W/DEADLY WEAPON OTHER THAN FIREARM." The abstract sufficiently established that the Santiago's prior conviction was for assault with a deadly weapon and not for assault likely to commit great bodily harm. There is sufficient evidence to sustain the jury's finding that his 2003 prior conviction was a strike within the meaning of the Three Strikes law.

DISPOSITION

The judgment is affirmed.

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Wiseman, Acting P.J.

WE CONCUR:

_____
Gomes, J.

_____
Hill, J.