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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR ARMANDO RODRIGUEZ,

Defendant and Appellant.

A103190

(Contra Costa County
Super. Ct. No. 050016063)

I. INTRODUCTION

A jury found Hector Rodriguez guilty of assault with a firearm (Pen. Code, § 245, subd. (a)(2)¹ [count one]), two counts of dissuading a witness or victim by force or threat (§ 136.1, subd. (c)(1) [counts two & five]), two counts of making terrorist threats (§ 422 [counts three & six]), and being an ex-felon in possession of a firearm (§ 12021, subd. (a)(1) [count four]). The jury also found true allegations that Rodriguez personally used a firearm while committing the offenses charged in counts one, two and three (§ 12022.5, subd. (a)(1)), and that Rodriguez had a prior strike conviction (§ 667, subd.(b)-(i); § 1170.12). Rodriguez was sentenced to a total term of 12 years in state prison.

On appeal, Rodriguez contends (1) the evidence does not support his conviction for assault with a firearm, (2) his convictions for dissuading a victim or a witness must be reversed because of instructional error, and (3) he was denied his constitutional right to

¹ All undesignated statutory references are to the Penal Code.

effective representation by conflict-free counsel. We reject each of these contentions. Rodriguez also challenges the sufficiency of the evidence to support the jury's finding that he suffered a prior strike. As we will explain, a defect in the proof of this alleged prior strike requires resentencing and possible retrial of the prior strike allegation. This case will be remanded for that limited purpose.

II. STATEMENT OF FACTS

On November 16, 1999, Rodriguez broke into Jimmy Ceja's car and stole a car stereo. Ceja, who saw the incident and was acquainted with Rodriguez, reported the theft to police. Later that day, Ceja was walking down the street with two infant relatives when he saw Rodriguez get out of his truck and walk toward him. Rodriguez said that he would kill Ceja, and Ceja's wife and daughter if Ceja reported the stereo theft to the police. Ceja took Rodriguez's threat seriously and was frightened by it.

On March 19, 2000, Ceja and his wife were in a car at a stop light when they saw Rodriguez's truck. Rodriguez turned his truck around and began to chase Ceja's car. Rodriguez drove between 80 and 90 miles per hour and chased Ceja for a mile or two, until Ceja's wife stopped their car at a Safeway where she reported the incident to security. At that point, Ceja noticed that Rodriguez had a knife in his hand. Ceja was afraid Rodriguez was going to kill them.

On May 19, 2000, Ceja was at his mother's home when he heard a couple of gun shots. Later, Ceja left the house with his mother's one-year-old baby and his sister's three-year-old toddler and saw Rodriguez get out of his car which was parked across the street.² Rodriguez approached, touched a gun to Ceja's chest, and said that the only reason he was not going to kill Ceja was because Ceja had the children with him. He told Ceja he would "get him later." He also said he would kill Ceja's wife and child if Ceja

² At the time of the incident, Ceja told police that he saw Rodriguez approximately 30 minutes after he heard the two gun shots. At trial, Ceja said that he saw Rodriguez "not too long" after he heard the shots and estimated an hour or two may have passed.

called the police. The gun that Rodriguez touched to Ceja's chest had a clip in it and looked real to Ceja who was very frightened.

After Rodriguez went back to his truck and drove away, Ceja went home. He was afraid to go outside. Later that night, Ceja went to the police station to report the incident. The Concord police officer who took the report recalled that Ceja was very nervous and afraid and that his hands were shaking and he was sweating when he made the report at around 11:00 or 11:30 p.m. on May 19, 2000. Early the next morning, Rodriguez was arrested and his truck was searched. In the left speaker of the truck, under the dash near the driver's side, police found a loaded gun with 13 live rounds. They also recovered two expended, nine-millimeter casings from Rodriguez.

On May 25, 2000, Ceja drove past Rodriguez. As Rodriguez began to get out of the car, Ceja sped up. Ceja heard Rodriguez say he would carry out his prior threats. Ceja feared for his life.

III. DISCUSSION

A. *Assault with a Firearm*

Rodriguez contends the evidence is insufficient to support his conviction for the crime charged in count one of the information, violating section 245, subdivision (a)(2) (section 245(a)(2)), on May 19, 2000, by committing "an assault with a firearm upon the person of Jimmy Ceja."

Section 245(a)(2) punishes "[a]ny person who commits an assault upon the person of another with a firearm" "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Assault requires the willful commission of an act that by its nature will probably and directly result in injury to another (i.e., a battery), and with knowledge of the facts sufficient to establish that the act by its nature will probably and directly result in such injury." (*People v. Miceli* (2002) 104 Cal.App.4th 256, 269; see also *People v. Williams* (2001) 26 Cal.4th 779, 782 (*Williams*).)

Assault with a deadly weapon does not require a specific intent; assault is a general intent crime. (*Williams, supra*, 26 Cal.4th at p. 786-788.) There must be an

intent to commit an act ““which would be indictable [as a battery], if done, either from its own character or that of its natural and probable consequences.’ [Citation.]” (*Id.* at p. 787.) In other words, while “assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur,” it does require “an intentional act and knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.” (*Id.* at p. 790.)

Rodriguez contends that his conviction for this offense cannot be sustained because the evidence proves he did not have the present intent to shoot Ceja when he confronted him on the street on May 19, 2000. Rodriguez underscores Ceja’s own testimony that Rodriguez said “the only reason he wasn’t going to kill me was because I had the kids with me.” Rodriguez maintains that because this threat and, indeed, all of the threats he made on May 19 were threats to inflict harm *in the future*, none of them constituted an intentional act (i.e., an attempt) toward the commission of a violent injury.

The People acknowledge authority establishing that “[t]he intention must be to commit a present, and not a future injury, upon a different occasion. The acts done must be in preparation for an immediate injury.” (*People v. McMakin* (1857) 8 Cal. 547, 548; see also *People v. Page* (2004) 123 Cal.App.4th 1466, 1473-1474.) However, the People maintain the jury could properly have found that Rodriguez expressed an intent to harm Ceja “at that moment if he did not comply with [Rodriguez’s] demand that he not call the police.” The People maintain that, although this threat was conditional, it nevertheless constituted a threat to inflict immediate injury.

““A conditional threat can be punished as an assault, when the condition imposed must be performed immediately, the defendant has no right to impose the condition, the intent is to immediately enforce performance by violence and defendant places himself in a position to do so and proceeds as far as is then necessary.”” (*People v. Bolin* (1998) 18 Cal.4th 297, 339.) However, Ceja’s testimony undermined the People’s argument that Rodriguez made an actionable conditional threat. Ceja testified that Rodriguez said that he would kill Ceja’s “whole family” if Ceja called the police. The threat was clearly one

to commit a future act of violence. According to Ceja, Rodriguez unequivocally stated that he was not going to kill Ceja at that time because the children were present. Rodriguez also said he would get Ceja “later.”

Although we agree that threats Rodriguez made on May 19, 2000, did not constitute assaults, we disagree that this conviction is not supported by the evidence. Indeed, the theory highlighted during the prosecutor’s closing argument did not characterize Rodriguez’s threats as assaults. Rather the prosecutor underscored that Rodriguez “made physical contact with the victim’s chest with his gun” and he argued that such conduct “constitutes the application of direct application, the willful and intentional application of physical force, and that is a completed assault. . . .”

In his opening brief, Rodriguez concedes that pressing the gun against Ceja’s chest could have constituted a simple assault but argues that this evidence does not satisfy the “element of a purpose to use force likely to cause great bodily injury that distinguishes aggravated assault from simple battery or simple assault.” Rodriguez does not cite any authority to support his claim that intent to use force likely to cause great bodily injury is an element of this offense. Section 245(a)(2) imposes no such requirement.

Furthermore, Rodriguez’s argument is inconsistent with relevant case law. As noted above, assault is a general intent crime. (*Williams, supra*, 26 Cal.4th at p. 288.) “[T]he intent for an assault with a deadly weapon is the intent to attempt to commit a battery, a battery being ‘any willful and unlawful use of force or violence upon the person of another.’ [Citation.]” (*People v. Rocha* (1971) 3 Cal.3d 893, 899.) “The intent to cause any particular injury [citation] to severely injure another, or to injure in the sense of inflicting bodily harm is not necessary.” (*Id.* at p. 899, fns. omitted.) Indeed, as the People contend, every completed battery includes an assault. (*People v. Yeats* (1977) 66 Cal.App.3d 874, 878.) This principle was recently affirmed in *People v. Page, supra*, 123 Cal.App.4th at page 1473, footnote 1, a case upon which Rodriguez relies.

In his reply brief, appellant attempts to withdraw his concession that the evidence supports a finding that he committed simple assault. He belatedly argues that assault, whether simple or aggravated, requires evidence of an intent to inflict great bodily injury

and there was no evidence that he possessed that intent. Again, Rodriguez cites no authority to support this contention, a contention which is simply inconsistent with the authority referenced above.

Rodriguez also argues that, if this court finds that pressing the gun against Ceja's chest constituted an assault, then the trial court erred by failing to instruct on simple assault as a lesser-included offense. "A defendant is entitled to instruction on lesser included offenses, without a request or even over objection, if the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged. [Citation.]" (*People v. Miceli, supra*, 104 Cal.App.4th at pp. 271-272.)

Rodriguez contends he was entitled to an instruction on simple assault because "assuming *arguendo* that touching Ceja on the chest with a gun is an assault, the evidence shows that defendant had no intent to inflict violent injury with the gun within the meaning of *McMakin* [*supra*, 8 Cal. 547]." Again, Rodriguez simply ignores that "[t]he intent to cause any particular injury [citation], to severely injure another, or to injure in the sense of inflicting bodily harm is not necessary" to prove this offense. (*People v. Rocha, supra*, 3 Cal.3d at p. 899, fns. omitted.)

The factual contention at the root of all of Rodriguez's theories is that he did not have the present intent to shoot and/or kill Ceja on May 19, 2000. Accepting that argument does not undermine the jury's verdict with respect to this offense. Substantial evidence that Rodriguez had the present intent to, and did indeed press a loaded handgun against Ceja's chest, satisfies the intent element of the offense in question.

B. *Dissuading a Witness*

Rodriguez contends his convictions for two counts of violating section 136.1, subdivision (c)(1),³ by dissuading a victim or witness to a crime must be reversed

³ Section 136.1 provides in pertinent part: ". . . [¶] (b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not

because of instructional error. Specifically, Rodriguez objects to the following instruction which was given to the jury:

“Defendant is accused in . . . counts two, five and seven of having violated Section 136.1 subdivision (c)(1) of the Penal Code, a crime. [¶] Every person who knowingly and maliciously prevents or dissuades or attempts to prevent or dissuade any witness or victim from making any report of such victimization to any peace officer, state or local enforcement officer, probation or parole or correctional officer, any prosecution agency or to any judge, arresting or causing to seek to arrest, seeking the arrest of any person in connection with such victimization by means of force or violence or by an expressed or implied threat of violence upon the person or property of the witness or victim or any other person is guilty of a violation of Penal Code section 136 subdivision (c)(1) of the Penal Code, a crime. [¶] It is irrelevant whether an attempt to prevent or dissuade was successful. The fact, if it be a fact, that no person was injured physically or intimidated is not a defense.

“.....

“In order to prove this crime, each of the following elements must be proved. [¶] One, Jimmy Ceja was a witness or victim; . . . [¶] . . . Second element is, another person with specific intent to do so prevented or dissuaded or attempted to prevent or dissuade Jimmy Ceja from making a report of such victimization to any peace officer or from arresting or causing or seeking the arrest of any person in connection with such

more than one year or in the state prison: [¶] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge. [¶] . . . [¶] (3) Arresting or causing or seeking the arrest of any person in connection with that victimization.

“(c) Every person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years under any of the following circumstances: [¶] (1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person. . . .”

victimization; [¶] Three, that person acted knowingly and maliciously; [¶] Four, the act of preventing, dissuading or attempt[ing] thereto was accomplished by force of by an expressed or implied threat of violence upon the person or property of a witness or victim or any other person.”

Rodriguez contends that this instruction, a version of CALJIC No. 7.15 that was modified to reflect the facts of this case, is erroneous and that giving it constituted reversible error because it did not direct the jury that the prosecution had to prove that Ceja was a witness *to a crime* or the victim *of a crime*. Rodriguez contends that omitting this information from the instruction constituted a failure to instruct on an element of the charged offense and thereby diluted the prosecutor’s burden of proof and amounted to a violation of due process.

Rodriguez’s theory is that, without the express direction that the jury must find that the victim or witness had to have been a witness to or victim of a crime, the jury likely misunderstood these terms. He posits that a positive finding by the jury could have been based on its observation that Ceja was a witness at trial rather than a witness to or victim of an actual crime. He further suggests that the word “victim” has a common meaning and understanding that is substantively different from the special meaning it has in the context of this statute.

In considering Rodriguez’s argument, we review the record as a whole to determine “‘whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the constitution.” (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; see also *People v. Kelly* (1992) 1 Cal.4th 495, 525-527.)

We find it is not reasonably likely that the jury misinterpreted the instruction in the ways Rodriguez suggests. When these terms are considered in the context of the instruction in which they appeared and of the case that was presented, a reasonable juror would certainly have understood that Ceja had to be a witness to or a victim of a crime. The standard CALJIC language employed in this case adequately conveyed this requirement. Rodriguez cites no authority to support his contrary interpretation of the instruction.

Rodriguez does make the point that the term “victim” is defined in CALJIC No. 7.16 and that the use note to CALJIC No. 7.15 references this fact. CALJIC No. 7.16 defines a victim as “any natural person with respect to whom there is reason to believe that any crime as defined under the laws of this state or any other state or of the United States is being or has been perpetrated or attempted to be perpetrated.”

In the lower court, Rodriguez did not argue that the term “victim” was unclear or request that the jury be instructed with CALJIC No. 7.16. Nor does he offer any explanation to this court as to how this CALJIC definition differs from the commonly understood meaning of the word “victim.” “In the absence of a specific request, a court is not required to instruct the jury with respect to words or phrases that are commonly understood and not used in a technical or legal sense.” (*People v. Navarette* (2003) 30 Cal.4th 458, 503.)

Rodriguez suggests that the requirement that Ceja had to be a witness or victim to a crime was particularly important in this case because it was not clear that this requirement was satisfied as to either of his convictions for violating section 136.1, subdivision (c)(1).

First, to the extent Rodriguez is suggesting that the jury was required to find Ceja was victimized by or witnessed conduct which constituted an actual crime before it could convict Rodriguez of the charged offense, we find no authority to support such a conclusion. Indeed, CALJIC No. 7.16, which Rodriguez cites with approval, clarifies that the term victim is not limited to situations where an actual crime occurred.

Second, we simply disagree with Rodriguez’s patently unreasonable assessment of the factual record. Rodriguez’s convictions for dissuading a victim or witness pertained to the November 16, 1999, incident (count five) and the May 19, 2000, incident (count two). Undisputed evidence shows that, on November 16, 1999, Rodriguez said that he would kill Ceja and his wife and daughter if Ceja reported to police the stereo theft from Ceja’s car that Ceja witnessed earlier that same day. Further, as to the May 19, 2000, incident, the jury found, pursuant to separate instructions that Rodriguez does not challenge, that Rodriguez assaulted Ceja with a firearm during that same incident. Thus,

it necessarily found that Ceja was a victim of a crime when Rodriguez dissuaded him from making a report of his victimization.

C. *Prior juvenile strike conviction*

The jury found true an allegation that Rodriguez suffered a prior strike conviction. (See §§ 667 & 1170.12.) The prior strike was a juvenile adjudication pursuant to which Rodriguez was convicted of violating section 245, subdivision (a)(1) (section 245(a)(1)). On appeal, Rodriguez challenges the sufficiency of the evidence to support the prior conviction finding and the court's use of the prior to enhance his sentence.

1. *Evidence relating to prior conviction allegation*

On March 5, 1992, a juvenile court petition was filed charging Rodriguez with one count of felony burglary and two counts of petty theft. Handwritten notations on the petition indicate that Rodriguez admitted the petty thefts but denied the burglary allegation.

A supplemental petition, filed January 7, 1993, reflects that Rodriguez was convicted of the two petty thefts that were alleged in the original petition and that he was a ward of the juvenile court. The supplemental petition also states that Rodriguez failed to comply with prior court orders and that he "continues to come within the provisions of Section 602 of the Juvenile Court Law." The supplemental petition charged Rodriguez, who was 17-years-old at the time, with "assault with a deadly weapon other than a firearm or by force likely to produce great bodily injury," a felony violation of section 245(a)(1).

An arraignment on the felony assault charge occurred on January 13, 1993. The minute order from that hearing reflects that Rodriguez admitted the allegations of the supplemental petition, and that he was detained in juvenile court pending disposition. A dispositional hearing was held on January 28, 1993. The minute order from that hearing reflects, among other things, that Rodriguez was "continued as a ward of the Court."

A second supplemental petition was filed on March 31, 1993. The second supplemental petition alleged that Rodriguez committed misdemeanor battery and misdemeanor disturbing the peace by fighting in public. The list of prior convictions set

forth in the second supplemental petition includes the two petty thefts and the January 13, 1993, felony assault conviction.

2. Sufficiency of the evidence

Rodriguez contends the prosecutor failed to prove that his juvenile conviction for felony assault constitutes a strike. We review the jury's finding under the substantial evidence standard of review. (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1232; *People v. Rodriguez* (2004) 122 Cal.App.4th 121, 129.)

For a prior juvenile conviction to qualify as a strike, four conditions must be met: (1) the juvenile was 16 years of age or older when the offense was committed; (2) the offense is listed in Welfare and Institutions Code section 707, subdivision (b), or would be a qualifying strike if committed by an adult; (3) the juvenile was found to be a fit and proper subject to be dealt with under the juvenile law; and (4) the juvenile was adjudicated a ward of the court, within in the meaning of Welfare and Institutions Code section 602, as a result of the offense. (*People v. Garcia* (1999) 21 Cal.4th 1, 4-15; § 667, subd. (d)(3); § 1170.12, subd. (b)(3).)

Rodriguez challenges the sufficiency of the evidence to support the fourth condition set forth above, that he was adjudicated a ward of the court as a result of the offense. We reject this challenge. The record clearly shows that Rodriguez was already a ward of the court when he was charged with violating section 245(a)(1), that he admitted the felony charge on January 13, 1993, and that he was continued as a ward of the court as a result of the felony assault conviction.

Rodriguez takes the position that a finding continuing a juvenile as a ward of the court as a result of a serious felony conviction does not satisfy the requirement of the Three Strikes Law that the juvenile must be "adjudicated a ward of the court" as a result of the offense. We are not surprised that Rodriguez has found no authority to support this unreasonable argument. By continuing his wardship as a result of the felony assault conviction, the court adjudged Rodriguez a ward of the court within the meaning of the Three Strikes Law.

Rodriguez further contends that his January 13, 1993, conviction should not have been counted as a strike because the juvenile court minute order pertaining to that conviction fails to demonstrate that the juvenile court complied with former rule 1487 of the California Rules of Court, which was in effect when the court took Rodriguez's plea and which required (1) a knowing and intelligent waiver of a hearing on the matter; (2) that the admission be freely and voluntarily made and (3) a factual basis for the admission.

The People correctly characterize Rodriguez's argument as an impermissible collateral attack on the validity of his January 13, 1993, conviction. As the People argue, collateral challenges to prior convictions are limited to claims that a defendant was denied the assistance of counsel or that he was not given proper "*Boykin-Tahl*"⁴ advisements in connection with a guilty plea. (*People v. Allen* (1999) 21 Cal.4th 424, 429 & 442-443.)

Rodriguez implicitly concedes this point in his reply brief by essentially abandoning his argument that a former Rule of Court may not have been followed. Instead, Rodriguez argues for the first time that his plea was constitutionally invalid because the record does not show that he (a) affirmatively waived his right to counsel, or (b) received *Boykin-Tahl* advisements regarding his rights to a hearing, and to confront witnesses against him. This argument is not only untimely, it is factual wrong.

The juvenile court minute order for the January 13, 1993, hearing expressly reflects that, at the time Rodriguez entered his guilty plea to the felony assault charge, he was represented by counsel. Further, the juvenile court indicated on the minute order that Rodriguez was expressly advised of his rights to a trial, to silence, to subpoena witnesses, and to confront and cross-examine witnesses. Rodriguez was also expressly advised that admitting the charge against him could result in placement in a locked facility for a maximum of 52 months.

⁴ See *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122.

3. *Use of strike to enhance the sentence*

As noted earlier, Rodriguez was sentenced to a total prison term of 12 years. That term consisted of a three-year midterm sentence for assault with a firearm (count one) which was doubled to six-years because of the prior strike enhancement, a term of four years for the personal use of a firearm enhancement, and an additional two-year term for dissuading a witness or victim by force or threat (count five). This two-year term was calculated by taking one-third the midterm for count one, i.e. one year, and doubling it because of the strike.

Rodriguez contends that the trial court erred by doubling the term for his count five conviction for dissuading a witness because the evidence did not establish that, at the time this offense was committed, Rodriguez's juvenile felony assault conviction qualified as a strike. The People concede this point. Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1990, amended the Three Strikes Law by, among other things, designating assault with a deadly weapon as a serious felony. (§ 1192.7, subd. (c)(31).) Proposition 21 became effective on March 8, 2000, after Rodriguez committed the offense in question.⁵

The offense of dissuading a witness or victim alleged in count five was committed on November 16, 1999. At that time, an aggravated assault qualified as a strike if the defendant inflicted great bodily injury on any person other than an accomplice, used a firearm, or used a dangerous or deadly weapon. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 261, superseded as stated in *People v. Luna* (2003) 113 Cal.App.4th 395.) The People concede that the evidence submitted in the lower court did not show that any of these grounds for finding that Rodriguez's juvenile felony assault conviction qualified as a strike were satisfied.

Thus, the two-year sentence imposed for the count five offense must be reversed. The People contend that they are entitled to a remand for resentencing and retrial of the

⁵ By contrast, the felony assault against Ceja was committed on May 19, 2000, after Proposition 21 became effective.

prior strike allegation so the prosecution can show that it was a strike under the pre-Proposition 21 statutory scheme. (Citing *People v. Barragan* (2004) 32 Cal.4th 236.) Rodriguez does not disagree. Therefore, we will remand the case for resentencing and possible retrial of the prior strike allegation.

D. Assistance of Counsel

Rodriguez contends he was denied his Sixth Amendment right to the effective assistance of counsel because the attorney appointed to defend him had a conflict of interest.

1. Procedural Background

Douglas Warrick, an attorney employed by the Alternate Defender Office (ADO), was appointed to represent Rodriguez on February 13, 2001, after an attorney from the Public Defender's Office (PD) was excused because of a conflict of interest. Warrick represented Rodriguez throughout the trial and during part of the post-trial proceedings.

On July 31, 2002, when the parties appeared before the trial court for Report and Sentence, Rodriguez made an ex-parte motion to remove Warrick which the court construed as two separate motions, a *Marsden*⁶ motion and a motion for new trial because of a conflict of interest. By the time the *Marsden* motion was heard, Warrick was no longer employed by the ADO. The court denied the *Marsden* motion on November 25, 2002.

The court appointed John Philipsborn to represent Rodriguez with respect to the motion for new trial. Pleadings filed in connection with the motion articulated the following theory: The ADO represented Rodriguez in this case while the PD simultaneously represented Ceja in another case, the ADO and the PD were essentially the same office, and thus, Rodriguez's lawyer was conflicted. Rodriguez further maintained he was prejudiced by the conflict because it caused Warrick not to do certain things critical to Rodriguez's defense. A hearing on the new trial motion was held on

⁶ See *People v. Marsden* (1970) 2 Cal.3d 118.

March 28, 2003. Warrick testified pursuant to a limited waiver of the attorney client privilege. The trial court denied the motion for new trial on May 23, 2003.

2. *Warrick's Testimony*

Warrick began his employment with the Contra Costa PD in May 1992. Three months later, he was transferred to the ADO where he worked until September 2002. When Warrick was transferred to the ADO he was notified that it was a "one-way trip," and that ethical and confidentiality rules which separated the ADO from the PD must be strictly observed. At that time, secretaries who worked at the ADO had access to a countywide computer network. Everyone else who worked at ADO had personal computers that were not connected to a network. Charles James, who was then the public defender, did not supervise case assignments or work performed by attorneys at the ADO, although his approval was required for some employment decisions, like leaves of absence or work schedule changes. In Warrick's opinion, ethical walls between the ADO and the PD ensured that the two offices functioned as separate entities.

In 1998 or 1999, David Coleman replaced James as the public defender. Warrick testified that Coleman issued a directive that Coleman's name was to appear on pleadings in ADO cases. Further, beginning in the summer of 1999, there were several transfers of personnel between the two offices.

At some unspecified time, the ADO and PD began to share a computer network which included inter office mail, a calendar system and "some basic documents" that everybody could access. The system appeared to give each individual a hard drive for storage of documents that could not be accessed by others. However Warrick testified that, one day, in March 2002, he was working on a document and temporarily lost access to it.

Warrick became concerned that the independence of the ADO from the PD was being eroded. He shared those concerns with clients and offered to file motions seeking to protect their rights to conflict-free representation. During the spring of 2002, Warrick had several discussions with his supervisor at the ADO about these client conversations. In June 2002, Warrick was told to stop discussing conflict issues with clients, stop filing

motions regarding the issue and to refer any clients with questions about conflicts to management.

During the time that Warrick represented Rodriguez in this case the ADO and the PD had separate offices, separate phone number, and separate fax numbers. Warrick's perception, throughout the time that he represented Rodriguez, was that the ADO and the PD functioned as separate offices. His concerns about structural problems and potential ethical breaches all arose after Rodriguez was convicted.

3. Discussion

Rodriguez contends that the trial court deprived him of his constitutional right to conflict-free representation by refusing to remove the ADO as his counsel after he established an actual conflict of interest existed. He maintains that prejudice is presumed when a court erroneously refuses to comply with a request to remove conflicted counsel and that reversal of the judgment is automatic. (See *Holloway v. Arkansas* (1978) 435 U.S. 475, 488.)

Rodriguez contends the record shows that two distinct conflicts existed. First, he maintains that Ceja was a client of the PD at the same time that the ADO was representing Rodriguez in this case. The trial court expressly rejected this theory because it was not supported by any evidence. We agree with the trial court on this issue. Rodriguez's second theory is that the PD conflict which led to the replacement of the deputy public defender who was initially assigned to this case also affected Warrick because the PD and the ADO are essentially the same office.

In *People v. Christian* (1996) 41 Cal.App.4th 986 (*Christian*), this court rejected the argument that a criminal defendant who was represented by an attorney from the Contra Costa ADO was denied his constitutional right to conflict-free representation because his co-defendant was represented by an attorney from the Contra Costa PD. Our analysis of the conflict issue presented in *Christian* was influenced in part by important distinctions between public and private sector attorneys. (*Id.* at p. 997.) As we explained, "in the public sector, in light of the somewhat lessened potential for conflicts of interest and the high public price paid for disqualifying whole offices of government-

funded attorneys, use of internal screening procedures or ‘ethical walls’ to avoid conflicts within government offices . . . have been permitted. [Citations.]” (*Id.* at pp. 998.) Ultimately, we found there were effective ethical walls between the PD and the ADO and that these two “are separate ‘firms’ for purposes of conflict analysis.” (*Id.* at pp. 999-1000.)

Our conclusion that the ethical walls between the PD and ADO were effective in avoiding conflicts of interest resulted from two related factual determinations. (*Christian, supra*, 41 Cal.App.4th at p. 999.) First, we found that the public defender’s role with respect to operation of the ADO was primarily administrative. Although nominally in charge of both the PD and ADO, the public defender was not involved in the day-to-day operations of the ADO. Second, we determined that attorneys from the two offices “remain physically apart, have no access to each other’s files, and adhere to a well-known policy of keeping all legal activities completely separate.” (*Ibid.*)

In concluding that the PD and ADO are separate firms for purposes of conflict analysis, we noted, among other things, that the two offices have been structured to have minimal contact with each other, they present themselves to the public as separate entities and conduct themselves as separate firms. (*Christian, supra*, 41 Cal.App.4th at p. 1000.) It was also important to our analysis that “supervision of ADO attorneys is the responsibility of the ADO supervising attorney, not the public defender, and neither office consults with the other on general litigation strategy or the handling of individual cases.” Thus, we found that the two firms were separate and coincided only with respect to administrative matters at the top administrative level. (*Ibid.*)

In this case, Rodriguez argues that changes in the structure of the PD and ADO have led to an erosion of the ethical separation between the two offices that we found in *Christian* and that such changes mandate a finding that these two offices are no longer separate firms for purposes of conflict analysis. As we will explain, the “changes” to which Rodriguez refers either lack evidentiary support or are not significant to the conflicts analysis we articulated in *Christian* and adhere to here.

Rodriguez contends that transfers of attorneys back and forth between the PD and ADO has broken down the separation between the offices. Although Warrick testified that, during his tenure, there were as many as five transfers between the offices, some of which were temporary, he did not have any personal knowledge regarding the circumstances of those transfers including, for example, the jobs that the transferred employees performed, the information they had access to, or the measures that were taken to ensure that confidentiality between the offices was preserved. Warrick's percipient knowledge about employee transfers was limited to his own situation. Warrick was told his transfer to the ADO was a one-way street and, indeed, he never did return to the PD. Thus, there is simply not sufficient evidence in this record that the Contra Costa PD has adopted a policy of transferring attorneys back and forth between the PD and the ADO.

Rodriguez contends that Warrick's testimony that there are no written policies, directives or manuals to inform ADO lawyers how to deal with potential conflicts shows that "there are no effective safeguards to shield staff attorneys in the PD and the ADO against conflicts." We reject the factual premise of this argument. Warrick testified that, when he first came to the ADO, he was given a letter which "very specifically set out" the ethical considerations and confidentiality rules which ensured that the ADO was a separate office. There is no evidence that individuals who came to the ADO after Warrick were not given a similar letter or written directive. Warrick's testimony that "I don't recall specifically reading anything" about policies governing conflicts issues does not mean that no such policies existed.

Rodriguez argues that Warrick's testimony about changes to the computer system at the ADO shows that the ethical firewall we approved in *Christian* is now "penetrable by the PD." Again, we disagree. Warrick testified that the computer network enables the ADO and PD to share purely administrative information. According to Warrick, attorneys have a hard drive on the computer where confidential documents are stored.

Furthermore, we disregard as irrelevant Warrick's testimony that his computer work on an unspecified document was once temporarily interrupted.⁷

Rodriguez contends that evidence Coleman instituted a policy change by having his name appear on the attorney identification block of ADO pleadings signifies that the appearance that the PD and ADO are separate offices has been compromised. A pleading filed in the lower court in this case includes Coleman's name in the attorney identification block and identifies him as the public defender. That information block also lists the supervising attorney and the responsible attorney at the ADO who handled this case and it distinguishes them from the public defender by listing their names below the heading "ALTERNATE DEFENDERS OFFICE." This signature block accurately reflects that the public defender is nominally in charge of the ADO but that the ADO, as opposed to the PD, is representing the defendant.

Rodriguez contends that evidence Coleman instructed Warrick not to share conflict of interest concerns with the court or clients shows that the public defender has become involved in the day-to-day operation of the ADO. This argument mischaracterizes the evidence. Warrick testified that his supervisor at the ADO, not Coleman, instructed him not to talk to clients about conflict concerns.

Further, Warrick's testimony on this issue indicates to us that his supervising attorney at the ADO became concerned that Warrick was undermining efforts by management to preserve the ethical separation between the PD and the AOD by erroneously and repeatedly challenging the efficacy of that separation. Whether or not we approve of the specific directive that Warrick's supervisor allegedly made, that statement does not itself demonstrate any breach in the ethical separation between the

⁷ Warrick's hearsay testimony that the interruption was caused by a "clerical manager" who worked at PD was not admitted for its truth but only for the limited purpose of explaining Warrick's state of mind. Even if we considered this testimony, it would not change our conclusion that only administrative functions were performed on the shared part of the computer system in place at the two separate offices.

offices.⁸ Furthermore, even if we were presented with evidence that the public defender worked with supervising attorneys at the ADO to develop conflict polices designed to maintain and preserve the separation between these offices, such conduct would not constitute involvement with the day-to-day operation of the ADO.⁹

Rodriguez has failed to support his contention that structural changes to the ADO have eroded the ethical separation between it and the PD. The evidence in this record does not alter the conclusion we reached in *Christian*, that the ADO and the PD are separate firms for purposes of conflict of interest analysis.¹⁰

Rodriguez also argues, though somewhat imprecisely, that his supervisor's directive not to disclose conflict concerns to clients or the court created a distinct conflict of interest by preventing Warrick from complying with Rule 3-110 of the California Rules of Professional Conduct, which requires him to make just such disclosures. There are at least two problems with this argument. First, Warrick *did* disclose his conflict of

⁸ In supplemental briefs filed after oral argument in this case the parties addressed the question whether the public defender or supervising attorney at the ADO could properly instruct a deputy not to disclose conflict of interest concerns directly to clients or the court. After reviewing the supplemental briefs that were filed, we find that the issues on appeal do not require us to make an ultimate determination as to the propriety of the alleged directive by Warrick's supervisor. We note though, that our Supreme Court has held that a supervising attorney remains ultimately responsible for decisions as to declarations of conflicts. (See *Gendron v. State Bar* (1983) 35 Cal.3d 409, 417, fn. 8.)

⁹ Rodriguez also relies on Warrick's hearsay testimony that the public defender, and managers from both PD and AOD "would meet to make hiring, retention and promotion decisions for both of the offices." This evidence was not admitted for its truth but only for the limited purpose of explaining the state of mind of the witness. Further, even if we were to consider this evidence we would agree with the trial court's observation at the hearing on the motion for new trial that evidence the public defender participated in employment related decisions would not be problematic under the conflicts analysis we articulated in *Christian*.

¹⁰ Rodriguez's allegations, though lacking sufficient evidentiary support, merit a cautionary note: If the PD and the ADO are to retain their status as separate firms for purposes of conflict analysis, Public Defender Coleman and management in both the PD and the ADO must continue to maintain, if not strengthen, the ethical separation between these offices that we recognized in *Christian*.

interest concerns in the present case. Second, to the extent Warrick's conflict concerns were unfounded and misguided, he had no ethical obligation to disclose them to anyone.

In other words, we reject as factually erroneous Rodriguez's repeated contention that Warrick was precluded from disclosing an actual structural conflict of interest. Such a conflict simply has not been proven on this record. The record does demonstrate, however, that Warrick did disclose his concerns about such a conflict to Rodriguez. Since Rodriguez failed to demonstrate to the court that an actual conflict existed, the trial court did not err by denying the motion for substitute counsel.

IV. DISPOSITION

The judgment is affirmed but the case is remanded for re-sentencing and a possible retrial of the prior strike allegation.

Haerle, J.

I concur:

Ruvolo, J.

Concurring opinion of Kline, P.J.

I concur in the judgment. I write separately solely to underscore the concerns that justify my colleagues' "cautionary note." (Maj. opn. at p. 20, fn. 10.)

I agree the record does not satisfactorily establish the conflict appellant claims. Inadequate as it may be, however, the record is not bereft of troubling indications that the "ethical wall" separating the Contra Costa County Public Defender's Office (PD) and that county's alternate defender office (ADO) may need to be strengthened.

In *People v. Christian* (1996) 41 Cal.App.4th 986, in which we rejected a claim that the same PD and ADO with which we are here concerned were not separate entities for conflict of interest purposes, we pointed out that "files of the primary branches of the PD are protected as separate and likewise inaccessible to ADO attorneys or staff" and that "[e]very employee of the PD and ADO has been specifically advised to maintain the confidences of individual clients and to be sensitive to the required degree of separation between the ADO and the PD." (*Id.* at p. 993.) We also emphasized that the Public Defender of Contra Costa County "is not involved in any way in the day-to-day operation of the ADO. He may not initiate any promotional or disciplinary actions; rather his role is limited to reviewing and acting upon the recommendations of the ADO supervising attorney." (*Id.* at p. 999.) For these and other reasons, we rejected as meritless the appellant's assertion "that Charles James's role as administrative head of both the PD and ADO necessarily impairs the integrity and independence of client representation, and results in both the appearance of and actual ethical impropriety" (*Id.* at p. 1001.)

I am not today as confident of the adequacy of the ethical wall between the two offices as I was when I wrote the opinion in *Christian*.

Since *Christian* issued, it appears that there have been numerous transfers of attorneys between the two offices; that David Coleman, Charles James's successor, has directed that his name and that of the PD be paced in the identification block on pleadings

filed by the ADO in behalf of its clients;¹ and that certain legal documents are shared by the two offices. Furthermore, the record does not demonstrate the manifest falsity of Warrick’s belief that his supervisor, William Veale, directed him to cease questioning the ethical wall between the ADO and PD because he was told by Coleman to do so. While Veale remained ultimately responsible for Warrick’s decisions as to declarations of conflict, and could therefore direct his handling of such matters (*Gendron v. State Bar* (1983) 35 Cal.3d 409, 417, fn. 8), this cannot be said of Coleman.

Responsible representatives of the PD and ADO might do well to reconsider whether the ethical wall between their two offices still unquestionably complies with the prescriptions set forth in *People v. Christian, supra*, 41 Cal.App.4th 986, and other relevant opinion.

Kline, P.J.

¹ The majority opinion says “[t]his signature block accurately reflects that the public defender is nominally in charge of the ADO but that the ADO, as opposed to the PD, is representing the defendant.” (Maj. opn. at p. 19.) I disagree. A signature or identification block on a pleading *does indicate*—at least to me, and I believe to most judges and other interested persons—the identity of the attorneys collectively representing the party on whose behalf the pleading is filed. In any event, inclusion of the PD’s name and office on pleadings filed by the ADO in behalf of its clients confuses the issue of which office supervises the work of the assigned ADO attorney and serves no useful purpose. Courts and opposing counsel are not ordinarily interested in whether the PD is nominally in charge of the ADO, but only in the identity of the defendant’s counsel.