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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH BRABO,

Defendant and Appellant.

A106897

(Marin County
Super. Ct. No. SC130562)

Kenneth Brabo appeals his conviction of one count of resisting arrest (Pen. Code, § 69),¹ one count of battery on an officer or emergency personnel (§ 243, subd. (b)) and misdemeanor assault on a peace officer (§ 241, subd. (b)).² The court suspended imposition of sentence and placed defendant on probation for five years, on condition that he serve 180 days in jail.

Defendant contends that the trial court committed misconduct by assuming the role of the prosecutor when questioning witnesses, and conveying to the jury that the court did not credit the defense. He also contends, and the Attorney General concedes, that his conviction for assault must be reversed because the assault is a lesser included offense of the battery and these two convictions were based upon the same indivisible course of conduct.

¹ Unless otherwise indicated all subsequent statutory references are to the Penal Code.

² The misdemeanor assault was a lesser included offense of assault with a deadly weapon on a peace officer.

FACTS

Prosecution's Case

On July 4, 2003, at approximately 10:04 p.m., defendant, who was on a bicycle, approached George Pegelow, a gate supervisor at the Marin County Fair, and demanded entry. When Pegelow informed defendant that the fair was closed, defendant became verbally abusive and threatening. He insisted that he needed to get in because his family was inside. Defendant challenged Pegelow to fight, and a woman, later identified as defendant's wife, who was inside the gate, also started verbally insulting Pegelow.

The raised voices drew the attention of Michael Thompson, an employee of the Marin County Sheriff's Department. Thompson heard defendant yelling obscenities and "fighting words." He stepped between defendant and Pegelow, and explained that defendant could not go in because it was after 10, and bicycles were not permitted. He urged defendant to calm down and leave. Defendant continued to yell at Pegelow, but started backing his bicycle up towards a ticket kiosk. Thompson followed him, while defendant yelled, and flailed his arms in the air near Thompson's head. He was "extremely agitated, angry and very loud."

Sergeant Marziano, who was near a mobile command unit, heard the yelling and went to investigate. From a position slightly to the rear and side of defendant, Marziano grasped defendant's hand, which was next to Thompson's face, and told him to calm down. Marziano was wearing a uniform typical for sheriff's deputies on bicycle patrol, but different than the uniform of the other sheriff's deputies. It consisted of a green polo shirt with the sheriff's insignia on the breast and "sheriff" in large letters on the back. He was also wearing a black cap, with "sheriff" in gold letters at the top, green shorts and a black belt carrying a gun, extra magazines, pepper spray, and a collapsible baton, called an "asp." Although the lettering on the back of the shirt was not visible to Thompson, Thompson testified that he could see that Marziano was wearing the hat with the word "sheriff" printed on it. Defendant pulled his hand away, and turned his attention to Sergeant Marziano, flailing his arms, and yelling more obscenities. Marziano determined that he needed to detain defendant and place him in handcuffs until he calmed down. He

announced that he was from the sheriff's department and ordered defendant to stop resisting, while he tried to grab defendant's arm again twice. Each time defendant pulled away.³ Realizing that he was not going to be able to physically restrain defendant, Marziano backed off, pulled out his baton, and extended it. Defendant advanced toward Marziano, who realized, with the proximity of so many people, he could not safely strike defendant. Instead, he turned the end toward defendant and pushed him in the abdomen to gain some distance between them. When defendant grabbed the baton and held onto it, Marziano reached for his pepper spray and sprayed him once through his helmet. Defendant then either let go of the baton, or Marziano was able to pull it away. Marziano threw it behind him so defendant could not reach it. Defendant took off his bicycle helmet and swung it at Marziano, striking him in the face twice. Marziano sprayed him again with pepper spray, and tried to restrain him. Eventually he tackled defendant, and they fell to the ground while defendant continued to kick and flail around. Thompson and several other deputies came over to help restrain defendant and arrest him.

Defense Case

Defendant testified that he pleaded with Pegelow to let him enter the fairgrounds, and Pegelow responded with an obscenity. Defendant started to leave. Defendant's wife, who had stepped outside the fairgrounds to meet defendant, turned to reenter and rejoin their son. Defendant became angry and upset when Pegelow grabbed his wife and refused to let her reenter, even after defendant explained that she needed to get their son. Defendant challenged Pegelow to "step outside and we will handle this like men." When Thompson intervened, defendant recognized his uniform and knew he was a sheriff's deputy. Thompson was polite to defendant's wife, but defendant was still upset and complained to Thomson about Pegelow's behavior, and treatment of them. Then Sergeant Marziano appeared, and ordered defendant to give him his hand. Marziano was wearing a hat that said "security," and never identified himself as a sheriff. When

³ According to Marziano, defendant also punched him several times with a closed fist. Thompson's description was similar to Marziano's, except that he did not testify that defendant punched Marziano.

Marziano grabbed his hand, defendant pulled away. When Marziano pulled out his baton, defendant raised his arm to deflect a blow. The baton fell to the ground. Marziano sprayed defendant with pepper spray, and defendant took his bicycle helmet off to wipe away the pepper spray. They struggled, and defendant broke away. He ran toward the mobile unit of sheriff's deputies, hoping to get help. Sergeant Marziano chased him, put him in a headlock and pepper sprayed him again. Defendant spun around, and he and the sergeant fell to the ground. He struck Marziano several times with his helmet trying to get Marziano off him. Eventually, Thompson and other deputies came over and jumped on defendant. He and his wife pleaded with them to stop.

ANALYSIS

I.

Judicial Misconduct

Defendant identifies several instances during trial when the court interrogated witnesses. He contends that the cumulative effect of the court's involvement was to assist the prosecution by establishing key elements of its case, undermine the development of the defense theory that defendant did not know Marziano was a peace officer and acted only in self-defense, and convey to the jury that the court did not credit the defense theory.

The court has both the power and the duty, pursuant to Evidence Code section 775, to participate in witness examination whenever it believes that it “ ‘may fairly aid in eliciting the truth, in preventing misunderstanding, in clarifying the testimony or covering omissions, in allowing a witness his right of explanation, and in eliciting facts material to a just determination of the cause.’ ” (*People v. Carlucci* (1979) 23 Cal.3d 249, 256, quoting Gitelson, *A Trial Judge's Credo* (1966) 7 Santa Clara L. Rev. 13-14.) Yet, the court must be careful both to avoid any appearance of bias in favor of, or hostility towards, any party. “The trial judge's interrogation ‘must be . . . temperate, nonargumentative, and scrupulously fair. The trial court may not . . . withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power.’ [Citation.]” (*People v.*

Hawkins (1995) 10 Cal.4th 920, 948, overruled in part on other grounds by *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) As the reviewing court, we must decide “whether the judge ‘officiously and unnecessarily usurp[ed] the duties of the prosecutor . . . and . . . creat[ed] the impression that he [was] allying himself with the prosecution.’ [Citation.]” (*People v. Clark* (1992) 3 Cal.4th 41, 143.)

The threshold problem with defendant’s claim of judicial misconduct is that defendant never raised an objection to the court’s conduct in the proceedings below. Defendant suggests that, despite his failure to object, this court should exercise its discretion to permit him to raise the issue for the first time on appeal, either because the court’s conduct was so egregious that it deprived him of his due process right to a fair trial (see *People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5), or affected the substantial rights of defendant (§ 1259). We question whether either of these exceptions to the waiver rule would apply because our Supreme Court has specifically held that in order to preserve a claim of judicial misconduct consisting of improper examination of witnesses, the defendant must make an objection and request a curative admonition. (*People v. Hines* (1997) 15 Cal.4th 997, 1041; *People v. Corrigan* (1957) 48 Cal.2d 551, 556 [“a judge’s examination of a witness may not be assigned as error on appeal where no objection was made when the questioning occurred”].)

In any event, we have reviewed each of the court’s interventions to which defendant now objects. We need not belabor the details of each court interrogation. Instead, we shall briefly discuss a few, to illustrate our general conclusion that none of them, individually or cumulatively, demonstrate that the court lost impartiality, formed an alliance with the prosecution, or undermined or displayed a lack of belief in the defense that defendant did not know Sergeant Marziano was a deputy sheriff, and that he hit Marziano only in self-defense. Instead, the court simply sought to clarify the witnesses’ testimony, or counsel’s questions, or to expedite the process of direct or cross-examination, when counsel’s questions were repetitive, confusing or imprecise. The interventions were brief, and for the most part, patient and evenhanded.

For example, in the first intervention defendant complains of, which occurred during the direct examination of Thompson, we discern no agenda underlying the court's questions other than an attempt to clarify the prosecutor's line of questioning regarding the relative positions of Thompson, defendant, and Marziano, and how long Marziano held onto defendant's hand. In another exchange, the court, for similar reasons, interrupted the defense cross-examination of Sergeant Marziano, when Marziano appeared unsure or confused about defense counsel's questions regarding where he was located when he saw defendant and Thompson. The court's questions again were neutral, and merely sought to clarify where Marziano was in relation to Thompson and defendant.

Defendant also complains that the court interrupted defense counsel's cross-examination of Thompson to elicit testimony that would defeat the self-defense theory. Yet, the court's questions about whether Thompson saw Marziano strike, or swing the baton at, defendant were logically prompted by Thompson's ambiguous statement that Marziano "extended" the baton, and that he "whipped it out so that it extended so that he could strike the defendant." It was unclear whether Thompson meant Marziano held the baton in a position preparing or threatening to strike, or actually struck. The court simply asked questions seeking clarification. Thompson explained that the baton was collapsible, and extending it meant elongating it, that Marziano held it by his side, and he did not see Marziano strike or swing at defendant. Although the court's questions elicited answers that defendant deems damaging to his defense, the questions the court asked were themselves neutral, and reasonably directed at clarifying Thompson's testimony.

We also fail to see how the court's questioning of Marziano regarding the number of sheriffs working each shift undermined defendant's claim that he did not know Marziano was one of them. Defendant's claim was premised upon the different type of uniform Marziano wore, not upon the assertion that he was unaware of the presence of many other deputy sheriffs at the fairgrounds.

The court did display a brief moment of impatience with defendant when he gave an unresponsive answer to the prosecutor's question, and with defense counsel for

engaging in repetitive and argumentative cross-examination of Pegelow. Nonetheless, in substance, all the court did was admonish the defendant to answer the pending question, and prompt defense counsel to move on to a new point.

In sum, the court's participation in the questioning of the witnesses in this case fell within the limits of its proper role as a neutral arbiter, aiding in preventing misunderstanding, clarifying testimony, or covering omissions, and eliciting material facts. (See *People v. Carlucci*, *supra*, 23 Cal.3d at p. 256.) We see no analogy between the court's conduct in this case, and the court's conduct in *People v. Santana* (2000) 80 Cal.App.4th 1194, the case upon which defendant primarily relies. In that case, the Court of Appeal found the trial court had committed misconduct because it had engaged in extensive, repetitive cross-examination of key defense witnesses that clearly sought to undermine their credibility and belabored points that were adverse to the defendant. (*Id.* at pp. 1205-1209.) Here, the court briefly participated in interrogation only to clarify the witnesses' testimony, or counsel's questions, or to expedite the process of direct or cross-examination, when counsel's questions were repetitive, confusing or imprecise. Nor did the court's momentary display of impatience with defendant for giving an unresponsive answer, and with defense counsel's repetitive line of questioning, rise to the level of open hostility that the jury would perceive as an indication that the court did not credit the defense, or had allied itself with the prosecution.

II.

Reversal of Assault Conviction

Defendant contends, in reliance upon *People v. Lopez* (1975) 47 Cal.App.3d 8, 15, that his conviction for assault on a peace officer (§ 241, subd. (b)) must be reversed because it is a lesser included offense of the battery (§ 243, subd. (b)) of which he was also convicted. The Attorney General concedes the point and, on that basis, we shall reverse the misdemeanor assault conviction.

CONCLUSION

The conviction for violating section 241, subdivision (b) is reversed. In all other respects, the judgment is affirmed.

STEIN, Acting P.J.

We concur:

SWAGER, J.

MARGULIES, J.