SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

People of the State of California, Plaintiff and Respondent, v. Ruben Perez Gomez, Defendant and Appellant.	)	No. S087773 Superior Court No BA156930

Appellant's supplemental reply brief

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People of the State of California,	)	
	)	
Plaintiff and Respondent,	)	
	)	No. S087773
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	)	
Ruben Perez Gomez,	)	
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Table of contents

Table of authorities

State cases

Federal cases

Federal constitution

Introduction

In appellant's supplemental opening brief, Mr. Gomez contended that the trial court erred not only in arranging for and admitting the testimony of Deputy John Ganarial, but also in refusing to strike it after it ranged far beyond the ostensible purpose for which Ganarial was called. Gomez further contended that the admission of the testimony and the denial of counsel's motion to strike it constituted prejudicial error not only under state law, but under the state and federal constitutions.

In this supplemental reply brief, Mr. Gomez incorporates by reference and reaffirms the arguments made in his supplemental opening brief. Gomez replies to contentions by respondent that necessitate an answer in order to present the issues fully to this Court. The absence of a reply to any particular argument, sub-argument, or allegation made by respondent, or of a reassertion of any particular point made in appellant's previous briefs, does not constitute a concession, abandonment, or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects his view that the issue has been adequately presented and the positions of the parties have been joined.

Argument

The trial court abused its discretion and violated Mr. Gomez's constitutional rights when it arranged for Deputy Ganarial to testify about Mr. Gomez's refusal to come to court, and when it denied the defense motion to strike after Ganarial testified not only about the refusal to come to court, but also about the security measures to which he was subject and the fact that he was housed in a disciplinary unit in the jail.

In his supplemental opening brief, Mr. Gomez contended that the trial court erred in arranging for and refusing to strike Deputy Ganarial's testimony about Gomez's refusal to come to court one morning, testimony which included details about the security conditions in which he was held at the jail. As he did at trial, Gomez contends that Ganarial's testimony was irrelevant.

Respondent offers no theory of relevance for this evidence. This evidence, which was not only lacking in any relevance but also inherently prejudicial, violated Gomez's federal constitutional rights, requiring reversal.

A. This claim has not been forfeited.

Respondent claims that Mr. Gomez has forfeited parts of this claim. (SRB 5.) Respondent contends that defense counsel "forfeited any distinct federal constitutional claim by failing to raise it in the trial court, and any claim that the trial court erred by failing to strike certain portions of Deputy

Ganarial's testimony." (SRB 5.)

First, regarding his constitutional claim, Mr. Gomez contends that the trial court erred in arranging for, admitting, and refusing to strike Ganarial's testimony, and that the error had the effect of violating Gomez's federal constitutional rights. This Court's precedents hold that the federal component of such a claim has not been forfeited even if the federal implications of the error were not argued below. (See, e.g., *People v. Partida* (2005) 37 Cal.4th 428, 438 [despite failing to object on constitutional grounds at trial, defendant "may argue an additional legal consequence of [an] asserted error in overruling [an] Evidence Code section 352 objection is a violation of due process"]; *id.* at pp. 433-439; *People v. Gutierrez* (2009) 45 Cal.4th 789, 809; *People v. Boyer* (2006) 38 Cal.4th 412, 441 & fn. 17; *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6; *People v. Cowan* (2010) 50 Cal.4th 401, 464, fn. 20.)

Second, respondent's contention that defense counsel somehow forfeited a portion of the claim because he "did not specifically point to his concerns that the jury heard that appellant was in a discipline module, fed through a slot in the cell door, waist chained, and transported by a movement team," is unavailing. (SRB 5.) After Deputy Ganarial testified to these matters and more, counsel moved to strike his testimony "as being

irrelevant to the charges for what Mr. Gomez is presently on trial." (12RT 1854.) Counsel's objection was to Ganarial's entire testimony — and on appeal, he continues to maintain that Ganarial's entire testimony was irrelevant.

More, as explained further below, counsel's objection was on the mark: this testimony was entirely irrelevant to the charges. Indeed, respondent still offers no defense of the testimony about the disciplinary security conditions at the jail.[1]

B. The trial court abused its discretion in refusing to strike Deputy Ganarial's testimony; respondent offers nothing to support its apparent claim that Ganarial's testimony about the security conditions in which Gomez was held was relevant.

Respondent contends that under the "deferential" abuse of discretion standard, a trial court's ruling will be disturbed on appeal only if the court acted in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (SRB 6, citing *People v. Tucker* (2011) 196 Cal.App.4th 1313, 1317.)

The scope of a trial court's discretion, however, always resides in the law being applied, "i.e., in the 'legal principles governing the subject of

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[1] Respondent does contend that the evidence of Gomez's refusal to come to court was relevant, but as noted in appellant's reply brief, respondent fails to address this Court's precedents clearly establishing that it is not. (See ARB 63-64; see SRB 6.)

[the] action . . . .' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion. [Citation.]." (*People v. Jacobs* (2007) 156 Cal.App.4th 728, 737.) As this Court has explained, sound "[d]iscretion 'is compatible only with decisions 'controlled by sound principles of law, ...'" (*People v. Bolton* (1979) 23 Cal.3d 208, 216.) In other words, "[a]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977; see AOB 204-207.)

The legal principle at issue here is relevance; a trial court has no discretion to admit irrelevant evidence. (Evid. Code § 350; see *People v. Cowan, supra,* 50 Cal.4th 401, 482; see *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; U.S. Const., 14th Amend.; AOB 210-211.) Respondent asserts conclusorily that "the trial court acted within its discretion, and preserved appellant's federal constitutional rights, when it refused to strike Deputy Ganarial's testimony." (SRB 6.) Nowhere, however, does respondent explain how the security conditions in which Mr. Gomez was held in a disciplinary unit in the jail were in any way relevant to the charges he faced. (SRB 6-11.)

Respondent contends that this testimony was different from shackling or prison garb. (SRB 7-11.) Respondent appears to suggest, initially, that *Deck* is distinguishable because the defendant in that case was shackled without legal justification. (SRB 6; see *Deck v. Missouri* (2005) 544 U.S. 622.) Mr. Gomez maintains here, of course, that Ganarial's testimony about the security conditions in which he was held was similarly without legal justification. And, as noted above, respondent has not offered any theory of relevance for this evidence. (Respondent's theory that the court's ruling fostered the dignity of the court proceedings is addressed and refuted below.)

Of course, as respondent notes, shackling implicates concerns other than the presumption of innocence. (See *Deck v. Missouri*, *supra,* 544 U.S. at pp. 630-631.) But, like shackling and prison garb, Ganarial's testimony about the security conditions in which Gomez was held subverted the presumption of innocence by communicating that he was in custody and was particularly dangerous.[2] Why else would he be in a disciplinary unit in

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[2] Respondent appears to suggest that prison garb is particularly prejudicial because it symbolizes, rather than communicates directly, the defendant's culpability and dangerousness. (SRB 11.) Nothing in *Estelle v. Williams* suggests that it is because jail clothes communicate guilt *symbolically* that defendants may not be forced to wear them. (*Estelle v. Williams* (1976) 425 U.S. 501, 503-506.) While *Estelle* notes the "constant

(continued...)

the jail? Why else would he be waist-chained and handled by a "movement team"?

Respondent argues that shackling is more prejudicial than testimony about security procedures within the jail because shackling suggests that jurors and others in the courtroom must be protected from the defendant; respondent also suggests that because the security procedures were implemented within the jail, the testimony about them did not implicate danger to "the community at large." (SRB 7.) Of course, a defendant's status as a jail inmate itself indicates the need to separate him from the community at large. (See *Holbrook v. Flynn* (1986) 475 U.S. 560, 569 [shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large].) And the testimony here went beyond that; it was particularly prejudicial because it suggested that even within the custodial environment, additional measures had to be taken to discipline or restrain Gomez.

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[2](...continued)
reminder" of the defendant's condition that is implicit in jail clothing, it is because the presumption of innocence is impaired that jail clothing may not be forced upon a defendant. (*Id.* at pp. 504-505.) Of course, jail clothing communicates the defendant's culpability by communicating that he is in jail. Communicating that fact — and indeed, that the defendant is in a particular unit of the jail reserved for inmates facing discipline — through testimony, rather than through symbols, is no less improper, irrelevant, and prejudicial.

Respondent further makes the unsupportable argument that the jail security measures Ganarial testified about were "like other routine security measures such as the placement of deputies inside the courtroom, or a clear plastic shield separating the audience." (SRB 7.) It is clear from Ganarial's testimony, however, that Gomez was in a particular "module" because he was a "K-10 inmate[] *for discipline*" (12RT 1842 [emphasis added]) — and thus, that the security measures he was subject to were not routine. Respondent offers no explanation as to why jurors would have concluded that these things were "routine"; respondent could just as easily assert, without support, that shackling is "routine." Of course, shackling cannot constitutionally be "routine." (*Deck v. Missouri, supra,* 544 U.S. at p. 632.) Nor can presenting the jury with evidence about the security conditions in which the defendant is held in jail, for there is likewise no conceivable legal basis for doing so.

Respondent also appears to suggest that Ganarial's testimony told jurors nothing they did not know already. (SRB 10 ["the jurors merely learned what they had presumably surmised from the circumstances of the proceedings"].) One might say the same about jail clothing; as respondent argued here, jurors would probably not be surprised to learn that Gomez was in jail, given the nature of the charges. (SRB 10.) Yet states are not

permitted to force defendants to wear jail clothing simply because circumstances suggest jurors may already be aware that the defendant is in jail. More, respondent offers no reason to think that jurors would have thought about, or been focused on the fact of Gomez's incarceration, or the security measures used to keep him in custody and transport him to court, had Ganarial's testimony not brought it to their attention, and implied it was relevant to the decision before them.[3]

Jail clothing and shackles are disfavored, and considered prejudicial, precisely because they communicate that the defendant is in custody. (*Holbrook v. Flynn* (1986) 475 U.S. 560, 569.) The evidence here, likewise, communicated that Gomez was in custody, and thus carried the same inherent prejudice.

Finally, respondent claims that the trial court's ruling "helped maintain the dignity of the judicial process." (SRB 8-9.) Respondent appears to argue that the trial court's evidentiary ruling was justified because Gomez's refusal to come to court interfered with the judicial

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[3] Thus, the jury instruction respondent cites, which informed jurors that they could not base their decision on bias against Mr. Gomez because he had been arrested, charged, and brought to trial (SRB 11, citing 3CT 871) did not cure the error here. Jurors were told that they were to decide the case based on the evidence before them (3CT 871) and Ganarial's testimony, of course, was evidence before them.

process, and "wasted important resources and time affecting the jail staff, the court, and the jurors." (SRB 9.) Respondent stands Supreme Court precedent on its head.

Deck charges trial judges with maintaining a dignified process, which includes respectful treatment of defendants — even where the defendants' own conduct threatens the dignity of the proceedings. (*Deck v. Missouri, supra,* 544 U.S. at p. 631; see *Illinois v. Allen* (1970) 397 U.S. 337, 344.) *Deck* and the Supreme Court's other cases addressing courtroom security procedures *limit* the trial judge's power to take measures, such as shackling, that undermine the dignity of the courtroom and the presumption of innocence. (See *Deck v. Missouri, supra,* 544 U.S. at pp. 627-628.)

Indeed, they limit this power even where the defendant has engaged in "speech and conduct *in the courtroom* which is so noisy, disorderly and disruptive that it is exceedingly difficult or wholly impossible to carry on a trial." (*Illinois v. Allen, supra,* 397 U.S. at pp. 339, 343-344 [emphasis added].) Contrary to respondent's suggestion (SRB 9), Gomez's refusal to come to court is not comparable to the behavior of the defendant in *Illinois v. Allen*, whose disorderly conduct in the courtroom was "clearly of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint." (*Illinois v. Allen, supra,* 397 U.S.

at p. 346; *id.* at p. 338.)

Most significant, respondent entirely fails to explain *how* the trial court's evidentiary ruling contributed to the dignity of the proceedings. Respondent's argument appears to be that because Gomez's actions were an affront to the court's dignity, the court's response must have promoted the court's dignity. (SRB 8-9.)

To the extent respondent suggests that the court's ruling promoted the dignity of the proceedings by punishing Gomez for his refusal to come to court and deterring such refusals in the future, appellant notes, as he did in appellant's opening brief, that the trial court had other options at its disposal which would not have undermined the presumption of innocence or affected the presentation of the case to the jury in any way. (AOB 220, fn. 68.) As the trial court itself understood, it could have issued a standing extraction order to ensure that if Gomez did not voluntarily leave his cell to go to court, he would be forcibly extracted. (See 10RT 1611; see also 1RT 196-198.)

A standing extraction order (which the court eventually issued), would be a proper response to the problem of Gomez's refusal to come to court, just as shackling, in some cases, has been held to be a proper response to a threat posed by the defendant's misbehavior in the courtroom.

But shackling is not properly imposed to punish the defendant for an affront to the court by informing jurors of his custodial status; none of the Supreme Court cases addressing this issue remotely suggest as much. Likewise, of course, a court may not make an evidentiary ruling to punish the defendant for an affront to the court's dignity. Neither *Deck*, nor *Allen,* nor any other Supreme Court precedent in any way suggests that trial judges should introduce evidence of the security conditions in which the defendant is held at the jail in order to maintain the dignity of the proceedings.

In sum, respondent fails to offer any authority for the proposition that a trial court may mete out evidentiary rulings as punishment for a defendant's unruly behavior towards the court — much less for the proposition that wielding its judicial power in this manner somehow fosters the "dignity of the judicial process." (SRB 8-9.)

C. This error requires reversal.

Respondent contends that this error was harmless beyond a reasonable doubt. (SRB 11.) Respondent's only argument, however, is that the evidence "did not portray [Gomez] as particularly dangerous and [was] hardly inflammatory when compared to the charged crimes." (SRB 11.)

Respondent's assertion that the evidence did not portray Gomez as particularly dangerous has been addressed above. It is no more compelling

in the context of respondent's prejudice analysis than it is in the context of the error analysis itself.

As for respondent's contention that Ganarial's testimony was not inflammatory when compared to the charged crimes, Mr. Gomez notes that the issue before the jury, particularly with respect to the Luna and Patel cases, was whether he committed the charged crimes. The question before the Court is whether the erroneous admission of testimony about the security conditions in which he was held in the jail might have affected the verdicts. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *People v. Mil* (2012) 53 Cal.4th 400, 417-418; *Deck v. Missouri, supra,* 544 U.S. at p. 635 [where defendant is visibly shackled without justification, he or she "need not demonstrate actual prejudice to make out a due process violation"; the state must prove beyond a reasonable doubt that the "error complained of did not contribute to the verdict obtained"].)

Under respondent's reasoning, anything short of evidence of another murder could not be prejudicial. Such reasoning, of course, misapplies *Chapman* because it fails to examine whether it can be concluded beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Chapman v. California* (1967) 386 U.S. 18, 24-26.)

Deck makes respondent's error clear. In *Deck v. Missouri, supra,* 544

U.S. at p. 624, the defendant had been convicted of robbing and killing an elderly couple — undeniably an inflammatory crime. Yet the Supreme Court held that because shackling is inherently prejudicial (though that prejudice may be difficult to assess from a trial transcript), the defendant need not demonstrate actual prejudice to make out a due process violation, and the state must satisfy its burden under *Chapman* of proving beyond a reasonable doubt that the error did not contribute to the verdict. (*Id.* at p. 635.) The Supreme Court in no way suggested that the error would not be prejudicial because the defendant had been charged with (and in that case, even, convicted of) inflammatory crimes. (*Ibid.*)

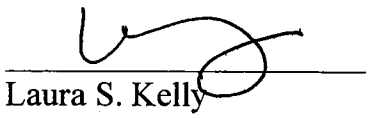
For all the reasons set forth above, in appellant's supplemental opening brief, and in appellant's opening and reply briefs, respondent cannot prove this error harmless beyond a reasonable doubt; indeed, it is not harmless under any standard. Reversal is required.

Conclusion

For the reasons set forth above and in appellant's opening brief, appellant's reply brief, and appellant's supplemental opening brief, Mr. Gomez respectfully asks this Court to reverse the judgment.

Dated: June 2, 2015

LYNNE S. COFFIN
Counsel for Mr. Gomez



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Appellant's supplemental reply brief

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I declare under penalty of perjury that the foregoing is true and correct.

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