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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

BENJAMIN HALL et al.,

Defendants and Appellants.

C048424

(Super. Ct. Nos.
SF086818B, SF083618A)

Defendants Benjamin Hall and Andre Bernard White robbed a bank. Shots were fired at a Stockton police officer during the ensuing pursuit.

A jury convicted defendant White of assault with a firearm on a police officer (Pen. Code, § 245, subd. (d)(1)--count 1; unspecified section references that follow are to the Penal Code), robbery (§ 211--count 2), and being a felon in possession of a firearm (§ 12021, subd. (a)--count 3.) The jury also found that defendant White personally used a firearm in the commission of the assault and robbery. (§ 12022.53, subd. (b).) The jury

acquitted defendant Hall of the assault charge but convicted him of robbery and found he used a firearm in the commission of that offense. The jury found defendants not guilty of gang-related charges.

The trial court found prior convictions and prison term allegations against defendant White to be true, and imposed an aggregate prison sentence of 83 years to life. The court sentenced defendant Hall to a prison term of 15 years.

Both defendants appeal. Defendant White asserts that there is insufficient evidence to support the jury's finding that he personally used a firearm in the commission of the assault. Both defendants contend that the trial court erred in refusing to permit a rereading of counsel's closing arguments. And, citing *Cunningham v. California* (2007) 549 U.S. ____ [166 L.Ed.2d 856] (*Cunningham*), both defendants also assert that the imposition of upper-term sentences violated their rights to jury trial and due process. We disagree with each of these claims and affirm the judgment.

DISCUSSION

Given the nature of defendants' claims on appeal, we forego a factual recitation of the underlying offenses and instead incorporate relevant facts in our discussion.

I

Sufficiency of the Evidence

Defendant White contends that there is insufficient evidence to support the jury's finding that he personally used a

firearm in the commission of count 1, assault on the peace officer. We disagree.

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

A reasonable inference "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." [Citation.] (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones, supra*, 51 Cal.3d at p. 314.)

At trial, Stockton Police Officer Matthew Golden testified that he was near the bank when he heard the radio broadcast

about the robbery in progress. Golden spotted the suspects' vehicle and its three occupants: the driver, a passenger in the front seat, and a passenger in the rear. As he pursued the vehicle at high speeds, one of the passengers put his left arm out of the car and fired six shots toward Golden from the right hand side of the car. Fortunately, Golden was not hit.

Testing revealed that defendant White had gun shot residue on the web of his left hand, between his thumb and index finger. A criminalist explained that residue is usually found in an area within 2-1/2 feet of where a gun is discharged. In windy conditions, residue is more likely to be found close to the source of firing. The criminalist outlined four reasonable explanations for finding residue on defendant White's hand: (1) White fired the gun, (2) White's left hand was within 2-1/2 feet of where the gun was discharged, (3) White handled a firearm that had previously been discharged, or (4) someone who had handled a firearm had touched White. He acknowledged that a police officer with gunshot residue on his hands could transfer residue to a suspect during handcuffing, but he also said it would be unusual to find residue on only one hand under those circumstances. No guns had been fired inside the bank.

On appeal, defendant White asserts that "the presence of a few particles of gunshot residue on his left hand is [insufficient] to establish firearm use," i.e., to establish that he was the person who shot at Officer Golden. But that is not the only evidence that was presented. Not only was there evidence that defendant White had gunshot residue on his left

hand, but Officer Golden also testified that the person who fired the gun did so with his left hand. No gunshot residue was found on codefendant Hall's hands. Given this evidence, the jury could reasonably conclude that it was defendant White who fired the shots at Officer Golden. Substantial evidence supports that determination.

II

Rereading of Closing Arguments

During its deliberations, the jury asked for a rereading of witness testimony and closing arguments. The court allowed the requested witness testimony to be re-read to the jury. However, the court said that it generally did not allow a rereading of arguments because they are not evidence, and also noted that a rereading of counsels' arguments would take nearly one full day. The court stated it was not inclined to grant the jury's request unless all of the attorneys agreed. Both defense attorneys expressed their preference for rereading the arguments, but the prosecutor disagreed. The court therefore did not permit the arguments to be reread.

On appeal, defendants Hall and White assert that the trial court abused its discretion in making this ruling. We do not agree.

A jury has the right to rehear evidence and instructions on request. "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the

case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." (§ 1138.)

However, because the arguments of counsel are not evidence, section 1138 does not give the jury an absolute right to rehear argument. Instead, such a request is left to the sound discretion of the trial court. (*People v. Gurule* (2002) 28 Cal.4th 557, 649; *People v. Pride* (1992) 3 Cal.4th 195, 266-267; *People v. Gordon* (1990) 50 Cal.3d 1223, 1259-1260, disapproved on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

Here, the trial court acted well within its discretion in refusing to reread counsel's closing arguments. The court noted that arguments are not evidence and that the arguments took a full day of court time. The trial had already exceeded the time estimates initially given to the jurors. Under these circumstances, the court's ruling was not unreasonable.

Citing *People v. Gordon, supra*, 50 Cal.3d at p. 1260, defendants assert that the court's decision "undermined the overall fairness of [defendants'] trial because no witness had identified [defendants] as . . . the robbers. The jury could resolve the identity issue only by comparing the closing arguments of counsel." That simply is not the case. The jury could resolve the identity issue by examining the evidence introduced at trial. That evidence included security tapes of

the robbery, eyewitness descriptions of the robbers, and the descriptions of defendants' attire when arrested.

Defendants' claim that the denying a readback of arguments "affected defense counsel's ability to participate in the fact finding process" is likewise without merit. Defense counsel effectively presented and argued their cases. Their ability to participate fully in the trial was not impacted by the trial court's decision. (See *People v. Gurule*, *supra*, 28 Cal.4th at p. 649.)

For similar reasons, we also reject defendants' claim that the case was so complex that a readback was necessary to give defendants the full benefit of the adversarial process. Defendants overstate the complexity of the case. Issues centered on questions of identity, and defense counsel effectively emphasized the lack of definitive identification. (See *People v. Sims* (1993) 5 Cal.4th 405, 453.)

Finally, defendants suggest that an extended Labor Day holiday break between the conclusion of arguments and the beginning of deliberations necessitated a readback of the attorneys' arguments. Nothing in the record indicates that this delay caused any problems for the jurors. In fact, the jury's request for a readback of arguments did not occur until its second day of deliberations.

In short, the court acted well within its discretion in refusing to read back the arguments of counsel. There was no error.

III

Sentencing Error

Citing *Cunningham*, defendants contend that the imposition of the upper term violated their right to jury trial on the aggravating factors used to enhance their sentences. Resentencing is not required in this case.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*), the Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v. Washington* (2004) 542 U.S. 296, 303-305 [159 L.Ed.2d 403, 413-414] (*Blakely*).)

In *Cunningham*, the Supreme Court held that by "assign[ing] to the trial judge, not the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (549 U.S. at p. ____ [166 L.Ed.2d at p. 864], overruling *People v. Black* (2005) 35 Cal.4th 1238 on this point,

vacated in *Black v. California* (Feb. 20, 2007) ___ U.S. ___ [167 L.Ed.2d 36].)

Here, the People contend defendants forfeited any claim of sentencing error by failing to object in the trial court. That is not the case. Defendants invoked *Blakely* before trial began and again at sentencing.

Although defendants preserved their contention for appeal, it is not persuasive.

In sentencing defendant White, the trial court stated that this case "clearly calls for an upper term." The court found a number of aggravating factors described in California Rules of Court, rule 4.421 to be applicable: (1) the number of guns used in the robbery increased the dangerousness of the crime, (2) defendants displayed callousness toward the victims, (3) the robbery involved a higher than average degree of planning, and (4) a relatively large amount of money was taken.

After enumerating these aggravating factors, the court said, "And *regardless of any of those factors*, and frankly, I think, notwithstanding *Blakely*, no matter it's held to apply to California sentencing or not, Mr. White, of course, has a prior prison term under [rule] 4.421 subsection (b)(3). And obviously, his prior prison term and his prior convictions were almost identical to the same to what he did here, so he obviously didn't learn anything from the prior convictions that he had." (Italics added.) The court imposed an aggregate prison term of 83 years to life.

In this case, while the court cited factors that were not found true by the jury, it emphasized defendant White's prior prison term and convictions. Given these explicit comments, we are satisfied beyond a reasonable doubt that the court would have imposed the upper term based solely on defendant's record. Any error in considering other factors was harmless.

The same is true for the sentence imposed for defendant Hall. The probation report noted that defendant admitted serving a Nevada prison sentence in 2000-2001 for a felony charge of possession of stolen property. Between 1994 and 1997, defendant had juvenile petitions sustained in California courts for numerous felonies, including grand theft, discharging a firearm at a dwelling, use of firearm, assault with a deadly weapon on a public transit employee, and two robberies. These offenses were in addition to other sustained petitions involving five misdemeanor offenses.

In sentencing defendant Hall to a prison term of 15 years, the court stated "if ever there was a case that called for the upper term this is certainly one of them." Citing the California Rules of Court, it noted that three loaded guns were used in the robbery, the crime involved several victims, one of the victims was slapped, the robbery involved planning, and a large amount of money was taken. As already noted, these factors were not necessarily found to be true by the jury.

However, the court then commented: "In addition to that, and even separately from the *Blakely* situation--*Blakely*, I don't think is ever going to apply, at least the way it's--the case

was written anyway--does not apply to the finding of priors in this case for the purpose of determining sentencing. [¶] And in this case, the defendant Benjamin Hall has two prior robberies and a 245 as a juvenile and the use of a gun. And so based upon that, I think that that alone is sufficient for the imposition of the upper term in this case."

As in the case of defendant White, the trial court placed primary emphasis on defendant Hall's record of recidivism. The prior conviction exception of *Apprendi*, *Blakely* and *Cunningham*, applies not only to the fact of a prior conviction, but also to "an issue of recidivism which enhances a sentence and is unrelated to an element of a crime." (*People v. Thomas* (2001) 91 Cal.App.4th 212, 223.) Defendant Hall had numerous prior criminal juvenile adjudications and he admitted serving a recent felony prison sentence. Given this history, the trial court could properly impose an aggravated sentence without violating defendant's right to jury trial. The trial court's explicit comments make it clear that that is what it intended to do.

Contrary to defendant's suggestion, the court's erroneous reference to a "245" in one of the juvenile petitions is immaterial. The sustained petition actually involved section 245.2, assault with a deadly weapon committed against a public transit employee, not section 245. The critical fact is that both statutes are assaults; section 245.2 is simply a specific statute that applies to a particular class of victims. This distinction is of no benefit to defendant.

Given the court's statements regarding defendant's record, any error in considering other factors was harmless beyond a reasonable doubt. Resentencing is not required.

DISPOSITION

The judgment is affirmed.

_____ HULL _____, J.

We concur:

_____ NICHOLSON _____, Acting P.J.

_____ MORRISON _____, J.