Filed 3/30/06 P. v. Hughes CA2/6

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. LEROY HUGHES, EDWIN LEONARD OGLESBY AN KENNETH MELVIN BATTLE, Defendants and Appellants.	2d Crim. No. B180272 (Super. Ct. No. TA 075386) (Los Angeles County)

Leroy Hughes, Edwin L. Oglesby, and Kenneth M. Battle appeal from the judgment entered against them following a jury trial. The jury found Hughes guilty of two counts of second degree robbery (Pen. Code, § 211)[1] and one count of brandishing a firearm at a person in a motor vehicle. (§ 417.3.) As to both robberies, the jury found true an allegation that Hughes had personally used a firearm (§ 12022.53, subd. (b)) and it found Battle guilty of two counts of second degree robbery. As to all of the robberies committed by Oglesby and Battle, the jury found true an allegation that a principal in the offense had been armed with a firearm. (§ 12022, subd. (a)(1).) The trial court found true an allegation that Oglesby had been convicted of a serious or violent felony within the

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

meaning of California's "Three Strikes" law. (§§ 1170.12, subds.(a)-(d), 667, subds. (b)-(i).) The "strike" was a prior juvenile court adjudication for robbery. The trial court sentenced appellants to prison as follows: Hughes - 17 years, 4 months; Oglesby - 11 years, 8 months; Battle - 7 years, 4 months.

All appellants were convicted of the robbery of Cesar Carlos as charged in count 6 of the information. Hughes and Oglesby contend that the evidence is insufficient to support this conviction because Carlos was not in actual or constructive possession of the property taken during the robbery.[2] Battle contends that his robbery convictions must be reversed because the trial court erroneously restricted cross-examination of Augustin Hernandez, the victim of the robbery charged in count 5 of the information. Battle also argues that he was sentenced to the upper term on count 5 in violation of *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (hereafter *Blakely*). We affirm.

Evidence

Hernandez owned a recycling center on East 89th Street in Los Angeles. In the morning on June 29, 2004, he was working there with his employee, Cesar Carlos. Appellants entered the center and Hughes "started chasing" Hernandez toward the back of the premises. Hughes pointed a revolver at Hernandez and threatened to shoot him. Hernandez saw that Carlos was "right there next to [him.]" Oglesby and Battle threw Hernandez and Carlos to the ground. Oglesby asked Hernandez for the keys to the container where he kept his money. Hernandez gave Oglesby the wrong keys. When Oglesby found that they did not open the container, he threatened to shoot Hernandez.

[2] Respondent asserts that Hughes also contends that the trial court erroneously denied his section 995 motion to set aside count 6 of the information. Hughes made this contention in his original opening brief filed on May 10, 2005. We granted Hughes's motion to withdraw the original brief and to file a superseding brief. The superseding opening brief, filed on May 18, 2005, omits the contention that the section 995 motion was erroneously denied. We therefore deem this contention to have been abandoned and do not consider it.

Hernandez then gave Oglesby the correct keys "because [Carlos] told [him] to give them the keys otherwise they going to kill us here . . . ." Oglesby gave the keys to Hughes, who opened the container. Hughes said that he had found "lots of money," and all of the appellants "took off running."

Hernandez and Carlos ran after appellants but lost track of them. Hernandez saw a blue van without license plates "going to the same place [appellants] were going." Between $3,600 and $3,800 in cash was taken from the container.

Hernandez owned a second recycling center about three blocks away from where he had been robbed on June 29. On July 1, 2004, he received a radio call from his nephew at the second center. The nephew said that three persons were there and that they may have been involved in the June 29 robbery.

Hernandez went to the second center and saw appellants walking toward the location. Hernandez also saw the same blue van that he had seen on June 29. A patrol car drove by with its siren blaring. Appellants entered the blue van, which drove away.

Hernandez, who was inside his vehicle, chased the blue van. During the chase, Hughes put his hand out of the window. He was holding a firearm.

Hernandez telephoned the police. The police stopped the van, and Hernandez identified appellants as the three persons who had robbed him on June 29. The police recovered a revolver and semiautomatic pistol from the van. Both weapons were loaded.

Sufficiency of the Evidence

"Section 211 . . . limits victims of robbery to those persons in either actual or constructive possession of the property taken." (*People v. Nguyen* (2000) 24 Cal.4th 756, 764.) Hughes and Oglesby contend that the evidence is insufficient to support the conviction for the robbery of Carlos (count 6) because Carlos was not in actual or constructive possession of the cash taken during the robbery. Carlos was an employee of Hernandez, the business owner who had the keys to the cash container.[3]

[3] Hughes contends that Carlos "was not even described as an employee of the recycling center." This contention is erroneous. Hernandez was asked whether he had "any

In *People v. Jones* (2000) 82 Cal.App.4th 485, the court reviewed the relevant caselaw concerning constructive possession by employees during a robbery. The court observed: "All the decisions discussed above determined that business employees - whatever their function - have sufficient representative capacity to their employer so as to be in possession of property stolen from the business owner." (*Id*., at p. 491) Thus, the court concluded that "California follows the long-standing rule that the employees of a business constructively possess the business owner's property during a robbery." (*Id*., at p. 490.)

Applying this rule to the facts before it, the *Jones* court decided that the defendant had been properly convicted of the attempted robbery of the following Kmart employees: a personnel manager, a sales associate, a pantry clerk, and an inventory control clerk. The defendant had sought entry into the Kmart cash room, but none of these employees had the keys. The court reasoned: "Although none of these employees had Kmart cash within their immediate control or possession, this is not a critical factor. The four employees had a representative capacity to Kmart and a sufficient possessory interest in their employer's property to be the victims of appellant's attempted robbery." (*Id*., at pp. 491-492)

In *People v. Frazer* (2003) 106 Cal.App.4th 1105, 1114, the court disagreed with the conclusion in *Jones* "that employee status, regardless of function, is alone enough to confer constructive possession." The *Frazer* court stated: "[W]e conclude a fact-based inquiry regarding constructive possession by an employee victim is appropriate. That is, we conclude the proper standard to determine whether a robbery conviction can be sustained as to an employee who does not have actual possession of the stolen property is whether the circumstances indicate the employee has sufficient representative capacity with respect to the owner of the property, so as to have express or implied authority over

---

employees" working with him at the recycling center on June 29, 2004. Hernandez responded, "Yes. There was one who helped me . . . ." Hernandez identified that person as Carlos.

the property. Under this standard, employee status does not alone as a matter of law establish constructive possession. Rather, the record must show indicia of express or implied authority under the particular circumstances of the case." (*Id*., at p. 1115.)

The defendant in *Frazer* contended that six nonmanagerial employees did not have constructive possession of money stolen during robberies at two stores. The *Frazer* court concluded that these employees were part of a "retail team" that "could reasonably be viewed as having implied authority over whatever property was necessary to handle the sales," including the stolen money. (*People v. Frazer, supra*, 106 Cal.App.4th at p. 1119.) Thus, the court held that, "[b]ased on the evidence in the record that all the . . . employees worked together as a retail team, there is sufficient evidence to support a jury finding beyond a reasonable doubt that all the employees had implied authority over, and therefore constructively possessed, the money that was stolen." (*Id*., at p. 1120.)

According to *Frazer's* analysis, the evidence is insufficient to show that Carlos had constructive possession of the cash taken during the robbery. Carlos did not testify, and Hernandez was never questioned about Carlos's employment functions and responsibilities. Thus, the record does not "show indicia of express or implied authority under the particular circumstances of the case." (*People v. Frazer, supra,* 106 Cal.App.4th at p. 1115.) .

We reject respondent's contention that, pursuant to *Frazer's* analysis, Carlos had constructive possession of the stolen money because he "told his boss to give the robbers the 'real' key to the money container . . . ." Carlos made this statement because he was afraid that, if Hernandez withheld the correct key, the robbers would kill both of them. Hernandez testified that he gave the robbers the correct key "because [Carlos] told [him] to give them the keys otherwise they going to kill us here . . . ." Carlos's statement to Hernandez merely reflected the reality of their dire situation; it did not show that he exercised implied authority over the cash inside the container.

We cannot resolve the conflict between *Jones* and *Frazer*. The best we can do is to "weigh in" on the issue. This issue is pending before our Supreme Court in *People v.*

Scott, C044964 (unpublished opinion filed July 16, 2005), review granted November 16, 2005, S136498. The Supreme Court limited review to the following matters: "Did the trial court err in instructing the jury that all employees have constructive possession of their employer's property during a robbery, and, if so, what is the proper standard for determining whether an employee has constructive possession of the employer's property during a robbery?" (Supreme Ct. Mins., November 16, 2005.)

We agree with the *Jones* opinion and believe it to be the better reasoned case. "California follows the long-standing rule that the employees of a business constructively possess the business owner's property during a robbery." (*People v. Jones, supra*, 82 Cal.App.4th at p. 490.) In *People v. Nguyen*, *supra*, 24 Cal.4th at p. 762, our Supreme Court recognized in dictum that "the theory of constructive possession has been used to expand the concept of possession to include employees and others as robbery victims . . . ." The Supreme Court noted: "In *People v. Miller* (1977) 18 Cal.3d 873 [135 Cal.Rptr. 654, 558 P.2d 552], we held that a security guard had constructive possession of property taken from the jewelry store in which he was employed and, thus, properly could have been alleged as a victim of the robbery: ' "Robbery is an offense against the person; thus a store employee may be the victim of a robbery even though he is not its owner and not at the moment in immediate control of the stolen property." [Citation.] Robbery convictions have been upheld against contentions that janitors and night watchmen did not have a sufficient possessory interest in their employer's personal property to qualify as victims. [Citations.]' " (*Id*., at p. 761, quoting from *People v. Miller, supra*, 18 Cal.3d at p. 880. *Miller* was overruled on another ground as recognized in *People v. Oates* (2004) 32 Cal.4th 1048, 1068, fn. 8.)

In *Nguyen* the Supreme Court cited a number of cases involving employees who had qualified as robbery victims through constructive possession of the property stolen. (*People v. Nguyen*, *supra*, 24 Cal.4th at p. 761.) These cases include *People v. Jones* (1996) 42 Cal.App.4th 1047. (This case, hereafter referred to as *Jones I*, is unrelated to the previously cited *Jones* case, *People v. Jones, supra*, 82 Cal.App.4th 485, hereafter

referred to as *Jones II*.) In *Jones I* the robbers took money from a safe in the cash room of a store. An assistant manager unlocked the cash room and the safe. The *Jones I* court concluded that a truck driver present during the robbery had constructive possession of the stolen property and, therefore, qualified as a victim. The driver was a store employee who "was ordered to the ground by the robbers and kicked and forced into the break room with the customers and store employees. He was not a witness at the trial and there was no testimony the robbers removed any of his personal property from his possession during the robbery." (*Id*., at p. 1053.) The *Jones I* court did not conduct "a fact-based inquiry regarding constructive possession" to determine whether the record showed "indicia of express or implied authority under the particular circumstances of the case." (*People v. Frazer, supra,* 106 Cal.App.4th at p. 1115.) Instead, the *Jones I* court assumed that "employees such as the store truck driver here . . . have sufficient representative capacity with respect to the owner of the property to be the victim of robbery." (*Jones I, supra,* 42 Cal.App.4th at p. 1054.)

Another case cited by the Supreme Court in *Nguyen* is *People v. Arline* (1970) 13 Cal.App.3d 200, disapproved on another ground in *People v. Hall* (1986) 41 Cal.3d 826. In *Arline* the robbers took money from the cash box at a gasoline service station. Two employees (Jackson and Gomez) were working at the time of the robbery, but only Gomez had the key to the cash box. The *Arline* court rejected the defendant's contention that, because Gomez had the key, he was the only victim. The court reasoned: "Both Gomez and Jackson were employees of the station, and both were threatened by the robbers. All of the acts specified in the information occurred in Jackson's actual physical presence. The items taken were within his constructive possession as well as the constructive possession of Gomez. It is established that an attendant or employee may be the victim of a robbery even though he is not in charge or in immediate control of the items stolen at the moment. [Citations.]" (*People v. Arline, supra,* 13 Cal.App.3d at p. 202.) As in *Jones I*, the court did not conduct the fact-based inquiry concerning constructive possession required by *Frazer*.

A third case cited in *Nguyen* is *People v. Masters* (1982) 134 Cal.App.3d 509. In *Masters* the defendant committed a robbery at a restaurant. While holding a gun, he "pointed to the cook to come out from behind the cook's area." (*Id*., at p. 519.) The cook sat next to the cash register while the defendant's companion opened it and removed the cash drawer. The named victim of the robbery was not the cook but an employee who was working at the counter: Miss Challender. The defendant contended that, "since the cook was next to the stolen item, he, and not Miss Challender, should properly have been the named victim – despite [Miss Challender's] presence nearby in the room." (*Ibid*.) The *Masters* court rejected this contention: "To contend that the cook rather than Miss Challender should have been named as victim is merely to cavil. The property was taken from the constructive possession of both." (*Ibid*.) Once again, the court did not conduct the fact-based inquiry required by *People v. Frazer, supra,* 106 Cal.App.4th 1105.

In *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, decided after *Nguyen*, the robbery victims were two janitors employed by an independent contractor to clean and maintain a Food 4 Less store. The robbers forced the assistant manager of the store to open the safe and put its cash contents into a bag. The appellate court determined that the janitors "had a special relationship with Food 4 Less that made them akin to employees." (*Id*., at p. 523.) Thus, they "were servants or agents of Food 4 Less for the purpose of the robbery." (*Ibid*.) The court concluded that the janitors had constructive possession of the stolen property and that it was "irrelevant that [they] had no responsibility for handling the cash. In this regard, they were in a position similar to the truck driver in [*Jones I*]." (*Id*., at p. 523.)

If the janitors in *Gilbeaux* were deemed to have constructive possession of the cash stolen from the safe, it follows that Carlos had constructive possession of the cash stolen from the container at Hernandez's business. Unlike the janitors, Carlos was an employee of the business owner, not an employee of an independent contractor.

We are aware of only one California case in which an appellate court has determined that an employee present during a robbery did not have constructive

possession of the property stolen: *People v. Guerin* (1972) 22 Cal.App.3d 775, disapproved on other grounds in *People v. Ramos* (1982) 30 Cal.3d 553, 589, fn. 16. In *Guerin* the court held that a market box boy did not have constructive possession of cash stolen from two cash registers because nothing in the record suggested "that he had any dominion or control whatsoever over any money." (*Id*., at p. 782.)

The *Jones I* court concluded that "*Guerin* is wrong and even a market box boy has sufficient representative capacity vis-a-vis the owner so as to be in 'possession' of the property stolen from the store owner." (*Jones I, supra,* 42 Cal.App.4th at p. 1055.) The *Jones II* court characterized *Guerin* as "an anomaly in light of evolving case authority broadening the permissible range of robbery victims." (*Jones II, supra,* 82 Cal.App.4th at p. 491.)

Carlos was not merely present during the robbery: he was thrown to the ground by the robbers. We conclude that, because of Carlos's status as an employee and irrespective of his employment functions and responsibilities, as a matter of law the evidence is sufficient to support the jury's implied finding that Carlos had constructive possession of the cash stolen during the robbery. (*Jones II, supra,* 82 Cal.App.4th at p. 491.)

Cross-Examination

Battle argues that his robbery convictions must be reversed because the trial court erroneously restricted the cross-examination of Hernandez concerning prior robberies at the recycling center on East 89th Street. During cross-examination, Oglesby's counsel asked Hernandez if he had been robbed at this location before June 29, 2004. The prosecutor objected on relevance grounds. Oglesby's counsel argued that the objection should be overruled because the question "goes to [Hernandez's] perception that he may be confusing these facts and these people." In response to the trial court's request for an offer of proof, Battle's counsel said that he had spoken to Hernandez's landlord. The landlord told him that the recycling center "had been robbed three times before the incident . . . ." The most recent prior robbery had occurred "[w]ithin six months" of the incident. The trial court sustained the relevance objection. It noted that, if the most

recent prior robbery had occurred within "a week or two, we might have some confusion."

"Only relevant evidence is admissible [citations], and, except as otherwise provided by statute, all relevant evidence is admissible [citations]. Relevant evidence, defined in Evidence Code section 210 as evidence ' "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action," ' tends ' "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]' [Citation.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 132.) " 'Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact . . . .' [Citations.]" (*People v. Babbitt* (1988) 45 Cal.3d 660, 681-682.) "The trial court has broad discretion in determining the relevance of evidence. [Citation.] We review for abuse of discretion a trial court's rulings on the admissibility of evidence. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 337.)

The trial court did not abuse its discretion in excluding evidence of prior robberies of the recycling center. From this evidence, Battle sought to draw the inference that Hernandez had confused the charged robberies with the prior robberies. " 'The inference which defendant sought to have drawn from the [proffered evidence] is clearly speculative, and evidence which produces only *speculative* inferences is *irrelevant* evidence.' [Citation.]" (*People v. Babbitt, supra,* 45 Cal.3d at p. 682.)

For the first time on appeal, Battle contends that the prior robberies were relevant to show Hernandez's "motivation to identify [Battle] and the other defendants as being the individuals who robbed him on June 29th based on the fact that he had been robbed repeatedly in the past." Because Battle failed to advance this theory of relevance in the trial court, he has waived the issue. (*People v. Woodward* (2004) 116 Cal.App.4th 821, 832.) In any event, the alleged inference concerning Hernandez's motivation is entirely speculative.

Since the trial court did not abuse its discretion, we reject Battle's contention that the restriction of cross-examination denied him his constitutional rights to confrontation, to due process, and to present a defense.

Blakely Issue

For Battle's robbery of Hernandez as charged in count 5 of the information, the trial court imposed the upper term of five years. Battle contends that he was denied his constitutional right to have a jury determine beyond a reasonable doubt the existence of each of the aggravating factors justifying imposition of the upper term. Battle relies on *Blakely*, *supra*, 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]. His contention was rejected by our Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

I concur:

GILBERT, P.J.

PERREN, J. - DISSENTING

I respectfully dissent from that portion of the opinion affirming the convictions of appellants Hughes and Oglesby for the robbery charged in count 6.

Relying upon the opinion in *People v. Jones* (2000) 82 Cal.App.4th 485, 490-492, the majority conclude that being an employee alone is sufficient for proof that the alleged victim had the express or implied authority necessary to establish the element of constructive possession of property for proof of a robbery. In other words, if all of the other elements to establish a robbery are present, the alleged employee will, as a matter of law, be deemed to be in at least constructive possession of the owner's property. In effect, being an employee is, in and of itself, sufficient to establish constructive possession of property of the employer. I do not believe this to be the law.

Rather, I believe that Justice Haller's opinion in *People v. Frazer* (2003) 106 Cal.App.4th 1105, 1111-1115, correctly requires that "the proper standard to determine whether a robbery conviction can be sustained as to an employee who does not have actual possession of the stolen property is whether the circumstances indicate the employee has sufficient representative capacity with respect to the owner of the property, so as to have express or implied authority over the property. Under this standard, employee status does not alone as a matter of law establish constructive possession."

In the instant case, all that we know of the alleged victim is that he was an employee who "helped" the owner in some unspecified way. We know nothing of his responsibilities or of his duties. We do know that he did not have access to the stolen money because he had to beg the owner to give the keys to appellants so that they could steal it. (See *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 525 (dis. opn. of Mosk, J.).) To conclude that, under these facts, Mr. Carlos is the victim of a robbery would be a de facto elimination of the need to prove constructive possession.[1] Mere presence of any

[1] This is not to say that Mr. Carlos is not a victim of other offenses such as assault with a deadly weapon (Pen. Code, § 245). (*People v. Nguyen* (2000) 24 Cal.4th 756, 762-763, fn. 3.)

employee irrespective of the scope of employment is, under the majority's formulation, sufficient.

While I agree with the majority when it states that the present state of the law is unclear, I disagree with its conclusion that employment is enough to prove possession. Accordingly, I would reverse defendants' convictions of robbery on count 6.

NOT TO BE PUBLISHED.

PERREN, J.

Jack W. Morgan, Judge

Superior Court County of Los Angeles

Marylou Hillsberg, under appointment by the Court of Appeal, for Leroy Hughes, Defendant and Appellant.

A. William Bartz, Jr., under appointment by the Court of Appeal, for Edwin Oglesby, Defendant and Appellant.

Gregory L.Cannon, under appointment by the Court of Appeal, for Kenneth Melvin Battle, Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Ellen Birnbaum Kehr, Deputy Attorney General, for Plaintiff and Respondent.