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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. BOBBY WINDELL LEE, Defendant and Appellant.	2d Crim. No. B166204 (Super. Ct. No. 2002010272) (Ventura County)

Shortly after defendant commits an assault with a deadly weapon, police officers tape record an interview with two witnesses to the crime. The witnesses' statements are damaging to the defendant. Under *Crawford v. Washington* (2004) __ U.S. __ [124 S.Ct. 1354], the statements are testimonial hearsay and may not be received into evidence over defense objection.

Bobby Windell Lee appeals a judgment after conviction of kidnapping (Pen. Code,[1] § 207, subd. (a) [count one]) and assault with a deadly weapon by force likely to produce great bodily injury (§ 245, subd. (a)(1) [count two]). Because Lee fell within the purview of the Three Strikes law with two prior strike offenses, he received a sentence of 25 years to life. [[The trial court added an

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are identified as those portions between double brackets, e.g., [[/]].

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

aggregate determinate sentence of thirteen years, based on two five-year consecutive terms for the two priors (§ 667, subd. (a)(1)) and three one-year terms for three prior prison terms (§ 667.5, subd. (b)).

We conclude, among other things, that Lee's 1994 prior for making a terrorist threat (§ 422) is a strike within the Three Strikes law, the trial court properly admitted evidence about Lee's prior acts of violence against women acquaintances and correctly instructed the jury with CALJIC No. 2.50.]] We conclude the court erred in admitting a tape recording of police interviews of two available witnesses who did not appear and testify. (*Crawford v. Washington, supra,* __ U.S. __ [124 S.Ct. 1354].) We reverse the judgment as to count two and affirm as to count one.

FACTS

Belinda Washington, Lee's friend, drove to his house where they got high on rock cocaine and alcohol. Washington then drove Lee to another house where Lee fought with a man. Washington left the house, but could not find her car keys. Lee came out and said, "I got your keys." He grabbed Washington's arm and said, "Just get in the car" and then "smacked [her] . . . ." She complied because she "didn't have a choice."

Lee drove for 15 minutes and made remarks that frightened Washington. She asked to be let out of the car. Lee threatened that she "better not move . . . [or] say a word." At first, Washington did not yell for help because she "was scared to death" and knew Lee had a knife. Later, she saw her cousin and "screamed," but Lee "smacked [her]."

She testified Lee told her, "'I will take us through this brick wall,' and he floored my car, and we went sailing down Third Street towards the wall." She said that after Lee stopped at an intersection, "I jumped out of the car, and ran for my life." She jumped on the hood of another car because she was afraid Lee would try to run her over." Lee got out of the car, pulled Washington off the hood, hit her, and dragged her by her hair back to the car.

Lee drove Washington to the home of his ex-wife, Andrea Sevilla. There, he hit Washington with a large brick or rock and knocked her unconscious.

Sevilla testified that Washington and Lee came to her home. She did not see Lee hit Washington with a rock. Washington had no injuries. She was not bleeding or crying. Sevilla said Washington was under the influence of drugs.

Lee testified that when Washington was in the car he did not hit or threaten her. After Washington jumped out, he "put his hands on her" to "help her" back into the car as she was disoriented and "overhallucinating." At Sevilla's home, he did not hit Washington with a rock or any object. He said Washington "was high on drugs big time . . . ."

[[*Pre-Trial Hearing on Lee's Prior Acts of Violence*

Lee objected to the prosecution's request to introduce evidence of seven prior acts of violence Lee committed against other women with whom he had relationships. The court ruled, "the probative value of some of these incidents far outweighs the prejudicial effect." It reduced the number of incidents the prosecution could admit from seven to four.

Trial Testimony About Lee's Prior Acts

Emily Mondesi testified that she had lived with Lee who was the father of her three children. In July of 1994 Lee forced her into a car by making threats that if she did not get into the car he would beat her son. She and her son entered the car and Lee began to drive "[f]ast, [and] reckless." Lee threatened Mondesi saying she was "gonna pay." They saw police cars. She said Lee "started taking off, and I jumped out of the car."

Andrea Sevilla testified that she married Lee. In August of 1997 Lee slapped her causing an eye injury. He had slapped her on several other occasions. In 2001, three months before the incident with Washington, Lee slapped Sevilla causing her to fall.

Monica Vasquez, a prosecution rebuttal witness, testified that on February 11, 1999, she saw Lee dragging Sevilla by the hair and beating her with his fist.]]

Pretrial Hearing on Admissibility of Police Interview Tapes

Lee objected to the evidence of police-taped interviews of witnesses to the events at Sevilla's home. He claimed it violated his right to confront and cross-examine witnesses who were available to testify.

The tape contained interviews with Dawon Mitchell and Wayola Mitchell (for convenience, Dawon and Wayola). The prosecutor argued that Dawon's preliminary hearing testimony was inconsistent with his interview. At the preliminary hearing, Dawon acknowledged he told police in his taped interview that Lee hit Washington with a rock, but testified he did not see Lee hit her, but only assumed it happened because of a sound. The prosecutor did not want to call Dawon as a trial witness because Dawon said that his taped statement was incorrect. The court ruled that the prosecution could introduce the tapes without calling Dawon and Wayola.

Taped Interviews Introduced At Trial

Police Officer Edwardo Miranda testified that he went to Sevilla's home and talked to Wayola and Dawon who also lived there. He testified that Wayola was less "willing" to provide information than Dawon. Miranda taped his interview with them. The prosecution played it for the jury.

At the beginning of the interview, Wayola told Miranda, "I don't know what happened." But later Miranda asked her, "Bobby Lee dragged a lady out here?" She replied, "He beat that lady."

Dawon, 14 years old, told Miranda, "I saw the lady drop to the ground over there." He said, "Cause she hit, he hit her like that thing, that black thing." Miranda said, "He hit her with a rock?" Dawon replied, "Yeah, in the face and then she fell." Later Miranda asked, "she fell down here then he hit her over here with

this rock? Dawon replied, "Yeah." Miranda asked whether Lee hit Washington in the left or right side of the face. Dawon responded, "I don't know."

The Prosecutor's Closing Argument

The prosecutor told the jury, "Washington is the person who knows everything that happened on this night . . . ." "And truth be as it may, I would submit that this case probably would have never been filed. You folks would probably not believe Belinda Washington if she was the only person who came on this stand and told you what happened." "Thank God there were witnesses . . . who corroborate her." Referring to Dawon she said, "He looked out the window. You heard his tape . . . . You also have the transcript. . . . He saw this defendant with a rock in his hand hit her in the head . . . . That's your assault with a deadly weapon . . . ."

DISCUSSION

[[I. *Admission of Lee's Prior Acts*

Lee contends the court erred by admitting evidence of his prior acts of violence against women with whom he had relationships. He claims they were only "spontaneous" and "unplanned" actions. We disagree.

These prior acts are admissible if his "uncharged misconduct shares sufficient common features with the charged offenses to support the inference that both . . . [were] manifestations of a common design." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403; Evid Code, § 1101, subd. (b).) "' . . . We have long recognized "that if a person acts similarly in similar situations, he probably harbors the same intent in each instance" . . . and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent . . . .'" (*People v. Gallego* (1990) 52 Cal.3d 115, 171.) A trial court's ruling on the admissibility of such evidence "will not be disturbed on appeal absent a showing of an abuse of discretion." (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.)

Here the prior acts showed that Lee controlled women through a similar pattern of violence and threats. He had dragged Sevilla and Washington by their hair and slapped them. He drove erratically when driving Washington and Mondesi and made threats to force or keep them in the cars. Each woman jumped from the car. This was highly probative evidence supporting Washington's testimony and rebutting Lee's claims that he put his hands on her with no malicious intent. (*People v. Gallego, supra*, 52 Cal.3d at p. 171.) The potential for prejudice was decreased because "[t]he testimony describing [Lee's] uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offenses." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 405.) Moreover, the court, sensitive to the possibility of prejudice, limited the evidence of prior violent acts to four incidents. Lee has not shown an abuse of discretion.

II. *CALJIC No. 2.50*

Lee contends the court erred by instructing the jury with CALJIC No. 2.50. We disagree.

The court instructed: "Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial. Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show: A characteristic method, plan or scheme in the commission of the criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent, which is a necessary element of the crime charged, or a clear connection between the other offense and the one which the defendant is accused so that it may be inferred that if the defendant committed the other offense, the defendant also committed the crimes charged in this case. [¶] . . . You are not permitted to consider such evidence for any other purpose."

Lee contends the instruction misleads jurors. But "CALJIC 2.50 . . . is a correct statement of the law." (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1615.) It "tells the jury what inferences could be drawn" and properly admonishes "that the evidence [is] admitted for a limited purpose." (*Ibid*.) Lee contends jurors have a "natural inclination to misuse evidence of prior acts." But we presume the jurors "faithfully follow" the instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) Lee has not shown that they did not comply with their duty.

Lee contends that drawing propensity inferences from other acts evidence is historically impermissible and violates due process. But our Supreme Court has rejected this contention. (*People v. Falsetta* (1999) 21 Cal.4th 903, 915; *People v. Gallego, supra*, 52 Cal.3d at p. 171.)

He also claims that CALJIC No. 2.50, combined with other instructions, led jurors to believe that they could find him guilty of the charged offense using a lower standard of proof. We disagree. The court instructed that the prosecution had the burden of proof beyond a reasonable doubt. (CALJIC No. 2.90.) It defined that standard. (*Ibid*.) It advised them that the prior acts may be proven by a preponderance of the evidence. (CALJIC No. 2.50.1.) It defined the term "preponderance." (CALJIC No. 2.50.2.) It instructed not to "consider this evidence for any purpose except the limited purpose for which it was admitted." (CALJIC. No. 2.09.) It gave three additional instructions involving the charged offenses which advised that the "beyond a reasonable doubt" standard applied. (CALJIC Nos. 9.58, 17.01 & 17.12.)

These instructions did not make it "reasonably likely [that] a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof." (*People v. Reliford* (2003) 29 Cal.4th 1007, 1016; *People v. Pescador* (2004) 119 Cal.App.4th 252, 262; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1397-1398; *People v. O'Neal* (2000) 78 Cal.App.4th 1065, 1078; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 147-148 [instructions

advising jury to use preponderance of evidence standard for prior offenses do not undermine proof beyond a reasonable doubt instruction for charged offense].) The trial court did not have a sua sponte duty to provide additional instructions. (*People v. Linkenauger, supra*, 32 CalApp.4th at p. 1614.)]]

III. *Lee's Confrontation Clause Rights*

Lee contends that evidence of the police interviews with Dawon and Wayola were inadmissible because: 1) they were "testimonial hearsay," 2) the prosecution did not show that the witnesses were unavailable, and 3) he had no opportunity to cross-examine them. He claims his conviction on count two must be reversed because their out-of-court statements involved the most significant evidence against him. We agree.

In *Crawford v. Washington, supra,* 124 S.Ct. 1354, 1369, 1374, the prosecution introduced a tape of a police interview with a witness who did not testify at trial. The United States Supreme Court reversed the judgment. It held that such out-of court "testimonial" hearsay is barred by the Confrontation Clause unless the witnesses are unavailable and the defendant had the opportunity to cross-examine them. It said, "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" (*Id*., at p. 1374.) But "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Ibid*.)

Here the prosecution did not show that Dawon and Wayola were unavailable and Lee, like Crawford, had not cross-examined them. The police interviews elicited testimonial hearsay. "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Crawford v. Washington, supra*, 124 S.Ct. at p. 1364.) "Statements taken by police officers in the course of interrogations are also testimonial . . . ." (*Ibid.*) "The statements are not *sworn* testimony, but the absence of oath [is] not dispositive." (*Ibid*.)

The Attorney General notes that one state court recently held that a crime victim's statements made shortly after she was rescued by police are not "testimonial" hearsay under *Crawford*. (*State v. Forrest* (N.C. 2004) 596 S.E.2d 22, 27.) Another ruled that a crime victim's 911 call is not testimonial. (*People v. Moscat* (2004) 3 Misc. 3d 739 [777 N.Y.S.2d 875].)

Forrest and *Moscat* exclude categories of statements from the definition of testimonial hearsay and the scope of the Confrontation Clause. But *Crawford* did not go that far. It said, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." (*Crawford v. Washington, supra*, 124 S.Ct. at p. 1365.) *Crawford* sets forth a broad objective standard to determine if statements are testimonial. A court must decide if they ". . . were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Id*. at p. 1364.) Some 911 calls fall within that definition. (See, e.g., § 653x, subd. (a).) But whether a particular 911 call falls outside of *Crawford's* definition of testimonial hearsay is not before us here.

Moscat criticizes *Crawford* for not developing exceptions to the Sixth Amendment that are relevant to "the 21st century." But the Supreme Court said, "we . . . reject the view that the Confrontation Clause['s] . . . application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'" (*Crawford v. Washington, supra*, 124 S.Ct at p. 1364.) "[*E*]*x parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them." (*Ibid*.)

Moreover, after *Crawford,* other courts have broadly interpreted "testimonial hearsay" to include: (1) police questioning that occurs outside a custodial setting (*United States v. Saner* (S.D. Ind. 2004) 313 F.Supp.2d 896, 901); (2) "field investigation of witnesses" (*Moody v. State* (2004) 277 Ga. 676, 680, fn. 6 [594 S.E.2d. 350, 354, fn. 6]); (3) questioning of witnesses by people who are not

police officers (*People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1403); and (4) statements by witnesses made during searches (*United States v. Nielsen* (9th Cir. 2004) 371 F.3d 574). One court has noted that *Crawford* "stated that the term 'interrogation' should not be taken in the technical legal sense, and provided other clear indications that its holding was a broad one." (*Saner*, at p. 901.)

But even if we apply *Forrest* and *Moscat*, the result is the same. In each case the victim "initiated" the contact with police. (*State v. Forrest*, *supra*, 596 S.E.2d at p. 27.) The statements were made "immediately," with "no time for reflection or thought" and were not the product of a police interrogation. (*Ibid*.) They were equivalent to "a loud cry" to "be rescued from immediate peril." (*People v. Moscat*, supra, 777 N.Y.S.2d 875, 879-880.)

Here, Wayola and Dawon were not crime victims seeking help. The police went to their residence after obtaining information from a witness who made a 911 call. By that time Lee and Washington had left. Officer Miranda's tape recorded interrogation fills 17 pages of transcript. The "recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition" of testimonial hearsay. (*Crawford v. Washington, supra*, 124 S. Ct. at p. 1365, fn. 4; see also *Moody v. State, supra,* 594 S.E.2d. 350, 354, fn. 6 [statements obtained by police officer's "field investigation of witnesses" were inadmissible as testimonial hearsay].)

In addition, Dawon's incriminating remarks were in response to Officer Miranda's leading questions. (*People v. Poggi* (1988) 45 Cal.3d 306, 320 [police officer's leading questions may "deprive a response of spontaneity by effectively placing words into the declarant's mouth"].) Wayola had time for reflection. She initially told the police she did not know what happened. Later, after questioning, she made statements incriminating Lee.

But Lee had the right to know why she changed her story and incriminated him. (*Crawford v. Washington, supra*, 124 S.Ct. at p. 1373.) "Only cross-examination could reveal that." (*Ibid*.) Moreover, the prosecutor did not

want to call Dawon as a trial witness because she was afraid he would contradict statements he made during the interview. But Lee's right of confrontation overrides the prosecution's preference to introduce only a tape that Lee cannot cross-examine. (*Ibid*.)

"Where, as in this case, there has been a violation of an appellant's constitutional right to confrontation, reversal is required unless we can conclude that the error was harmless beyond a reasonable doubt." (*People v. Archer* (2000) 82 Cal.App.4th 1380, 1394.) But it is not harmless because the hearsay is highly prejudicial. The evidence conflicts whether Lee committed an assault with a deadly weapon. Without the tapes, the prosecution would have had to rely on Washington's testimony. The prosecution conceded that Washington's credibility had been impeached. She had been high on drugs. The prosecution told the jury that without Dawon's statements, Lee might not have been prosecuted on count two. Moreover, had the prosecution called Dawon to testify at trial, he would have contradicted what he had said on that tape.

[[IV. *Sentencing*

Lee raises several sentencing issues. Some are moot because of our reversal of the judgment as to count two. Others involve issues of sentencing discretion such as whether the court erred by not striking priors. But the trial court rejected Lee's request to strike priors after he had been convicted on counts one and two. Our reversal may have an impact on that issue. The trial court will have to consider whether to strike priors again at a new sentencing hearing after the ultimate disposition of count two. (*People v. Williams* (1998) 17 Cal.4th 148, 161, italics added [decision as to whether to strike priors is based on "the nature and circumstances of the defendant's *present felonies"*].) Moreover, the court shall reconsider its consecutive sentence on Lee's prior convictions and prior prison terms in light of *People v. Jones* (1993) 5 Cal.4th 1142.

Lee argues that on March 8, 2000, Proposition 21 added terrorist threats under section 422 as a prior strike under the Three Strikes law. (§ 1192.7,

subd. (c).) He contends that his 1994 conviction for making such a threat is not a strike within the intent of Proposition 21. We disagree. This same contention was rejected in *People v. James* (2001) 91 Cal.App.4th 1147, 1151. Because Lee's "current offense was committed on or after March 8, 2000, a determination whether a prior conviction alleged as a serious felony is a prior strike must be based on whether the prior offense . . . was a serious felony within the meaning of the three strikes law on March 8, 2000." (*Ibid*.) It was, and is a strike.]]

Whether or not the people elect to retry count two, the court shall resentence on count one. We express no opinion concerning the sentence. The judgment is reversed as to Count II.

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GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Herbert Curtis III, Judge

Superior Court County of Ventura

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