Filed 1/16/07 P. v. Pineda CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VIVIANO IBARRA PINEDA, Defendant and Appellant.	F049498 (Super. Ct. No. MCR018755) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Jennifer R. S. Detjen, Judge.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Charles A. French and David Andrew Eldridge, Deputy Attorneys General, for Plaintiff and Respondent.

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PROCEDURAL AND FACTUAL HISTORIES

Appellant Viviano Ibarra Pineda was convicted by jury trial of four counts of second degree robbery (Pen. Code,[1] § 211, counts 1, 3-5) and one count of commercial burglary (§ 459, count 2). In a bifurcated proceeding, the trial court found true the alleged prior prison-term enhancement. (§ 667.5, subd. (b).) Appellant was sentenced to an aggregate term of nine years as follows: the upper term of five years on count 1, plus a consecutive one-year term (1/3 the mid-term) for counts 3 through 5, and one year for the prior prison-term enhancement. The sentence on count 2 was stayed pursuant to section 654.

Counts 1 and 2

On June 7, 2004, appellant entered the La Oaxacana jewelry store in Madera and asked the owner, Antonia Herrera, to show him wedding rings. Herrera recognized appellant as the man who had a few days earlier offered to sell her CDs. When appellant had previously visited the store, he was driving a white Ford Tempo. When Herrera opened the glass case to show appellant the rings, appellant pointed a gun at Herrera and ordered her to put everything in a bag quickly. Herrera screamed and grabbed her young child, who was also at the store. She tried to escape out a front door and, in doing so, turned over a glass case, breaking the glass. Appellant grabbed bracelets and watches and ran out.

Counts 3 and 4

On May 27, 2004, appellant entered the Hugo's Fructose store in Madera. Hortencia Padilla and Hilda Hernandez were working that day. Appellant walked up to the counter and asked Padilla if she could change a $10 bill. Hernandez was standing three feet away. When Padilla went to give the change, appellant pointed a gun at Padilla

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[1]All further references are to the Penal Code unless other noted.

and demanded that she give him all the money she had. Padilla put money on the counter, and appellant left with the bills. Hernandez recognized appellant as a former customer.

Count 5

On May 26, 2004, appellant watched Diego Pascual pay for a purchase with a $100 bill. When Pascual left the store, appellant approached him in a red Camaro-like car. Appellant got out of the car and pointed a gun at Pascual demanding first his money and then his watch.

All of the victims identified appellant as the robber in photo lineups and at trial. Appellant was arrested near the jewelry store. He was wearing three gold bracelets taken from the store and had a hypodermic syringe in his pants pocket. He said he was a drug user. He also had $66 in cash. When the officers seized the money, appellant said, "Why are you taking my money? They are not part of the robbery. Only the bracelets are part of the robbery, not the money." Appellant also told police the woman at the jewelry store could verify that no money was taken in the jewelry store robbery. Appellant said he used a toy gun, not a real gun. Appellant was the registered owner of a white Ford Taurus. His wife is the registered owner of a red Ford Probe. A tray of CDs and a toy gun were found in the white Ford. Appellant's wife was in possession of a bracelet and a watch stolen from the jewelry store. Appellant's forearms were scarred with track marks, which were clearly visible when he was arrested.

Defense

At trial, appellant claimed he did not rob any of the victims. He said he bought the watch and bracelets from a street vendor who was tattooed. Both Hernandez and Padilla said the robber had a tattoo on his left forearm. Appellant displayed his arms to the jurors showing that he had no tattoos.

DISCUSSION

I. Admission of drug evidence

It is fundamental that only relevant evidence is admissible. (Cal. Const., art. I, § 28(d); Evid. Code, § 351.) "Evidence is relevant if it has any tendency in reason to prove a disputed material fact. (Evid. Code, § 210.)" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.) The trial court has broad discretion in determining the relevance of evidence. (*Ibid*.) Evidence Code section 352 precludes admission of evidence, which, although relevant, is more prejudicial than probative. It is designed for situations in which evidence of little evidentiary impact evokes an emotional bias. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) A trial court's decision pursuant to Evidence Code section 352 is also subject to an abuse-of-discretion analysis. (*People v. Ramirez* (2006) 39 Cal.4th 398, 453-454.) A trial court's decision to admit evidence under either of these sections will be reversed only upon a clear showing of abuse. (*Ibid*; *People v. Turner* (1990) 50 Cal.3d 668, 703-705.)

Appellant claims the evidence that he was a drug user, possessed a hypodermic syringe, and had track marks was irrelevant because there is no evidence that a drug user is more likely than others to commit robberies. Evidence that a defendant has a drug habit requiring expenditures beyond his apparent means may be relevant to prove a motive to commit a theft-related offense if there is evidence establishing the extent of the drug habit, how expensive the individual habit is, and what drugs were used and how often. (*People v. Valentine* (1988) 207 Cal.App.3d 697, 703; *People v. Reid* (1982) 133 Cal.App.3d 354, 362-363.)

Here, we do not have to decide whether the evidence about appellant's drug use is sufficient to infer that appellant was motivated to commit the robbery. It was relevant for another purpose—to explain statements made by victims Padilla and Hernandez. Both told police that the robber had a tattoo on his left forearm; however, appellant has no

tattoos on his arms. The defense theory seized on this evidence to argue that appellant had been misidentified. The defense attorney attempted to impeach Padilla's and Hernandez's identification of appellant as the robber by focusing on their earlier statements to police that appellant had a tattoo. In order to rebut this attack on their credibility, the prosecution offered evidence of appellant's intravenous drug use and the track marks on his arms. Under these circumstances, this evidence was highly relevant to explain the discrepancy between the victims' description of the robber and their identification of appellant as the robber at trial. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 946 [evidence is relevant if it helps jury decide whether eyewitnesses identification is credible].) It was well within the discretion of the trial court to find this evidence to be more probative than prejudicial, as required by Evidence Code section 352.

Further, even if there was error, we would conclude that it is not reasonably probable that the exclusion of the evidence would have resulted in a verdict more favorable to appellant. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) There was strong evidence of guilt. Appellant was identified by each of the victims, all of whom had observed him in some capacity before the robbery. When arrested, appellant was in possession of several items from the jewelry store robbery. His wife owned a red car, matching the description given by Pascual. Appellant owned a white car, and a toy gun was found in the car, along with a box of CDs, which corroborated Herrera's identification. Appellant made incriminating statements to law enforcement when he was arrested. It is highly unlikely the jury would have returned a more favorable verdict had the court excluded the evidence of appellant's drug use.

II. Sufficiency of evidence on count 3

Appellant claims there is no evidence to show that Hernandez had constructive possession of the store's property. We disagree.

To evaluate a challenge to the sufficiency of the evidence on appeal, we evaluate the entire record and draw all reasonable inferences in support of the judgment to determine whether there is evidence that is reasonable, credible, and of solid value from which a trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Padilla testified that her job at Hugo's Fructose was to take care of customers and make the natural juices and diced fruit sold at the business. The store is small—about eight feet square. Padilla described Hernandez as a "co-worker." Both Hernandez and Padilla were working when the robbery occurred. Appellant entered the store and asked Padilla if she could change a $10 bill. Hernandez was with Padilla when appellant pulled out a gun and ordered Padilla to give him all the money, which she did. Padilla said she waited on appellant, but Hernandez was standing just three feet away. Both were behind the counter. Hernandez testified, "I couldn't believe it because that had never happened to us."

This is sufficient evidence to establish that Hernandez had constructive possession of the money stolen. Robbery is an offense against the person. California courts have consistently held that a store employee may be the victim of a robbery, even though he or she is not the store's owner and not at the moment in immediate control of the stolen property, if he or she is in constructive possession of the store's property. (*People v. Nguyen* (2000) 24 Cal.4th 756, 761-762; *People v. Miller* (1977) 18 Cal.3d 873, 880.) Section 211 is "applicable to any servant or servants left in sole occupation of the premises or particular part thereof by the employer." (*People v. Downs* (1952) 114 Cal.App.2d 758, 766.)

Robbery convictions have been upheld where the victim holds a variety of job functions: employees servicing customers, as well as those stocking shelves; night watchmen as well as janitorial staff. (*People v. Frazer* (2003) 106 Cal.App.4th 1105, 1119-1120; *People v. Jones* (2000) 82 Cal.App.4th 485, 491.) Appellant is correct that the California Supreme Court has granted review in a case where the appellants claimed

the trial court misinstructed the jury on the law of constructive possession in the context of a restaurant robbery. In that case, the Supreme Court has delineated the issues as, "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?" (*People v. Scott* (review granted Nov. 16, 2005, S136498) [nonpub. opn.]; 2005 Calif. Daily Op. Service 9813.) This is not the instruction given to the jury in this case, however. The jury here was instructed with CALJIC No. 9.40.3, which states, "Constructive possession does not require actual possession, but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons." The instruction also explains that "[o]ne person may have possession alone, or two or more persons together may share actual or constructive possession. [An [employee] … exercises control or the right to control store property if the employee under the circumstances has either express or implied authority over the store property.] [¶] A [store employee] … may be the victim of a robbery even though he or she is not the owner and not at the moment in immediate control of the allegedly stolen property, so long as that employee is in constructive possession of the property at the time of the taking." (CALJIC No. 9.40.3 (2004 rev.).) In *Scott*, unlike the case currently under review, the jury was told that employees of a business are in constructive possession of the business's property during a robbery. Here, the jury was not told that employee status alone is sufficient to establish constructive trust as a matter of law.

Regarding the second prong of the issues under review in *Scott*, appellant, citing *People v. Jones* (1996) 42 Cal.App.4th 1047, 1054 and *People v. Frazer, supra,* 106 Cal.App.4th at page 1115, argues that there must be substantial evidence that the employee has actual possession or acts in some representative capacity with respect to the owner of the property and must have express or implied authority over the property

taken. The decisions in *Jones* and *Frazer* provide no assistance to appellant. First, the robbery convictions in *Jones* and *Frazer* were affirmed—*Jones* as to a truck driver present in a store at the time of a robbery, and *Frazer* as to the entire staffs at two auto parts stores. (*People v. Jones, supra*, 42 Cal.App.4th at pp. 1054-1055; *People v. Frazer, supra,* 106 Cal.App.4th at pp. 1119-1120.) Second, regardless of the standard applied, there is substantial evidence to support the robbery conviction relating to Hernandez.

A reasonable inference can be drawn from the evidence that both Padilla and Hernandez shared the same job functions. The store is very small and both were behind the counter. They were co-workers, and Padilla made a point of stating that, although it was she who waited on appellant, Hernandez was "there with us." Given the nature of the business, and Hernandez's close proximity to Padilla behind the counter during the robbery, the evidence supports a finding that Hernandez and Padilla were both available to serve customers, and it was only a matter of chance that Padilla waited on appellant rather than Hernandez. Under these circumstances, the evidence supports a finding that both had constructive possession of the money stolen from Hugo's Fructose. (See *People v. Ramos* (1982) 30 Cal.3d 553, 589 [when two or more persons are in joint possession of single item of property, each may be a separate victim of the same taking]; *People v. Miller, supra*, 18 Cal.3d 873, 881 [more than one employee may be in constructive possession of store's property at same time].)

III. Sufficient evidence to support the prior-prison-term finding

Appellant claims the California Law Enforcement Telecommunications System (CLETS) rap sheet submitted as proof of his prior conviction was insufficient to prove the enhancement allegation that he had served a prison term after being convicted of second degree burglary in April 2001 and had failed to remain out of custody. (§ 667.5, subd. (b).) Appellant argues that the common method of proving a prior conviction is to introduce the record of conviction certified by an official custodian.

A CLETS record is admissible to prove a prior conviction. (See *People v. Martinez* (2000) 22 Cal.4th 106, 116 (*Martinez*); *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1471-1481 (*Dunlap*) [Evid. Code, § 1280 permits admission of official record without evidence of identity and mode of preparation if court takes judicial notice or if sufficient independent evidence shows it was prepared to assure trustworthiness].) In *Dunlap*, we pointed out the significance of a document which, on its face, showed it is an official record. (*Dunlap, supra,* at p. 1481 [face of printout indicates it was generated by CLETS system (leave article in statutorily authorized program) and is certified as being received from CLETS].) As we observed in *Dunlap*, there is a difference between going outside the record of conviction to establish the nature of a prior conviction and simply proving the existence of a prior conviction and its subsequent prison term. (*Id*. at p. 1476.) We noted that other types of evidence, other than the record of conviction, could be used to establish a prior conviction, assuming the applicable rules for admissibility have been met, even though these other types of evidence (e.g., official records such as CLETS printouts) could not be used to establish the nature of the prior conviction. (*Ibid.*)

Appellant attempts to distinguish *Dunlap* by arguing that in *Dunlap*, and also in *Martinez*, there was additional evidence to establish the prior conviction (in *Dunlap*, abstracts of judgment, and in *Martinez*, testimony from a paralegal in the District Attorney's office and testimony of a deputy sheriff to whom defendant made admissions regarding his criminal history). This challenge to the evidence, however, is not one to the sufficiency of the CLETS document itself, but to its admissibility (foundation) as an official record, which goes to the issue of trustworthiness. (*Dunlap, supra,* 18 Cal.App.4th at p. 1479.) Appellant did not object to the authenticity of the document or its status as an official record at the trial court. He raised no objection at all. Any objection to the admission of the CLETS document on these grounds is waived by a failure to raise the objection in the trial court. (Evid. Code, § 353; *People v. Visciotti*

(1992) 2 Cal.4th 1, 53, fn. 19.) Even if the objection had not been waived, appellant's argument still fails. The document is certified by the Madera County District Attorney's Office as the true and official document received from CLETS. The procedure is similar to the certification provided in the *Dunlap* case. (*Dunlap, supra,* 18 Cal.App.4th at p. 1472.)

The CLETS rap sheet shows that appellant was convicted of second degree burglary in Orange County case No. 00CF3161 and sentenced to three years in state prison. He was placed in the custody of the "CDC" on April 25, 2001, at "CORR WASCO." The report shows that he was transferred to "USIS Sacramento" on July 22, 2002, on a "8 1227 US-DEPORTABLE ALIENS." The next entry is for June 9, 2004, showing his arrest for the underlying offenses. These entries support the trial court's finding that appellant "was received at the Department of Corrections state prison on April 25, 2001, for second degree felony burglary on a three-year state prison sentence" and that he "was then transferred into federal custody on July 22nd, 2002, for [an] immigration issue and sometime between July 22nd, 2002, and June 9th, 2004, he was then out of custody again because [the CLETS document] shows an arrest on June 9th, 2004, for this case, which is less than five years." There is sufficient evidence to support the prior prison term enhancement. (§ 667.5, subd. (b).)

IV. Blakely

Appellant contends that imposing the upper term on count 1 and the consecutive terms on counts 4 and 5 based on factors including the use of a weapon, the number and increasing seriousness of his prior convictions, and unsatisfactory behavior on probation, violated his Sixth and Fourteenth Amendment rights to a jury trial and proof beyond a reasonable doubt. He cites to *Blakely v. Washington* (2004) 542 U.S. 296.

The California Supreme Court has now resolved the *Blakely* issue and rejected the arguments made by appellant. The imposition of a consecutive sentence based on facts determined by the trial court, not admitted by appellant or found by a jury, does not

deprive appellant of his constitutional right to a jury trial or his rights to have all facts legally essential to his sentence proved beyond a reasonable doubt. (*People v. Black* (2005) 35 Cal.4th 1238, 1244, 1265.) No further discussion is required. (We are aware that the United States Supreme Court is reviewing the question of the applicability of *Blakely* to California sentencing in *People v. Cunningham* (Apr. 18, 2005, A103501), cert. granted *sub nom. Cunningham v. California* (2006) 126 S.Ct. 1329.

DISPOSITION

The judgment is affirmed.

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Wiseman, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Gomes, J.