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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANA MARIA RAYMOND,

Defendant and Appellant.

B189046

(Los Angeles County
Super. Ct. No. TA081540)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven C. Suzukawa, Judge. Affirmed.

Michael John Shultz, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Adrian Tigmo, Deputy Attorney General, for Plaintiff and Respondent.

Ana Raymond appeals from the judgment entered following a jury trial in which she was convicted of attempted carjacking with a finding that she used a deadly weapon in the commission of the offense, assault with a deadly weapon, and dissuading a witness by force or threat. She contends the trial court erred in rejecting her argument that, after initially waiving *Miranda*,¹ she invoked her right to remain silent when she failed to respond to a specific question, thereby precluding any comment on her silence. Defendant further contends that imposition of an upper term sentence violated *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856] (*Cunningham*). We affirm.

FACTS

Between 4:00 and 5:00 a.m. on October 8, 2005, Jose Miranda was delivering newspapers to a newsstand in Compton when defendant approached from the direction of a Jack-in-the-Box restaurant across the street, holding a metal pipe in her hand. Miranda asked defendant if she was lost. Defendant did not answer. Instead, she got into the driver's seat of Miranda's van, which was idling nearby. Seeing this, Miranda got into the passenger seat of the van and struggled with defendant for the keys. Defendant shifted the van into "drive," but it was not working properly and did not move. Miranda gained control of the keys and defendant picked up a knife that Miranda kept between the front seats of the van. Miranda also grabbed for the knife and struggled with defendant for control. At one point during the struggle, the knife came five to six inches away from Miranda's stomach, but he was not injured. Miranda was successful in taking the knife from defendant, following which he and defendant got out of the van.

Defendant next proceeded to use her metal pipe to smash the windows of the van. Miranda walked away and flagged down Los Angeles County Sheriff's Deputies Patrick Neal and Alfonzo Rodriguez, who were passing by in their patrol car. Miranda accompanied the deputies, who soon located defendant not far from the Jack-in-the-Box.

¹ *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602] (*Miranda*).

As the deputies approached, defendant seem agitated and started yelling at Miranda in Spanish, which the deputies did not understand. The deputies told defendant what Miranda had reported, and defendant responded that the accusations were false. Defendant was then transported back to the Jack-in-the-Box. There, she was arrested and waived her *Miranda* rights, admitting that she broke the windows of Miranda's van. As defendant was being transferred from one patrol car to another, she continued to yell at Miranda, including threatening that if Miranda came to court, her home boys would kill him.

Testifying in her own behalf, defendant said she lived in a nearby apartment with her three children and had come to the Jack-in-the-Box to apply for a job at its 6:00 a.m. opening time. She saw Miranda at the newsstand and he asked defendant how she was. Because the area was known for prostitution, defendant thought that Miranda was propositioning her. Defendant responded that she was looking for a job. Miranda asked her to help him deliver newspapers and gave her \$20.00 in advance to do so. At Miranda's instruction, she went to the driver's side of the van to retrieve some papers. Miranda then reached in from the passenger's side, fondled defendant's breasts, and tried to grab her. Defendant, who was three months pregnant at the time, took a knife that was in the van to protect herself. She then fled from the van and Miranda followed, screaming and calling her a "whore." Defendant further testified that because she was angry, she picked up a pole that was on the ground and smashed the windows of the van. Defendant denied having threatened Miranda while sitting in the patrol car.

ISSUES

1. *Miranda* Rulings

a. Background

In defendant's opening statement at trial, counsel asserted that Miranda had tried to rape defendant.

Three sheriff's deputies who were at the scene testified in the prosecution's case-in-chief. The first deputy to testify, Joseph Sumner, had been called to assist and provide Spanish translation. On direct examination the prosecutor asked if Sumner had heard

defendant say anything about rape or being attacked by Miranda. Sumner responded in the negative.

Deputy Neal testified next and was asked on cross-examination what course of action he would take if he suspected that defendant had been sexually assaulted. Neal responded that he “would have done a sexual assault investigation,” but that defendant never said anything to indicate that was warranted. Defense counsel next asked, “When you arrested her, you told her she had the right to remain silent?” Neal responded that Deputy Rodriguez had “advised her per *Miranda*.” Counsel then asked, “The fact that she said nothing doesn’t mean that it didn’t happen, right?” The prosecutor objected to the question as calling for speculation, and the objection was sustained.

Deputy Rodriguez was the third police witness and testified on direct examination that he advised defendant of her *Miranda* rights. Defendant responded that she understood the rights and was willing to talk. Defendant told Rodriguez that “the only thing that she did was break [Miranda’s] windows. She said she didn’t do anything else.” The direct examination continued:

“Q. Did you ask [defendant] why she had broken [Miranda’s] windows?

“A. Yes. She said he had told her something, and it made her mad.

“Q. Did you ask her what it was that he told her?

“A. I did, and I got no reply.

“Q. As you were there and detained her . . . did you see any injuries at all?

“A. No.

“Q. Did [defendant] mention anything to you about Mr. Miranda trying to attack her or rape her?”

At that point defense counsel objected on grounds of “post-arrest silence” and a sidebar conference was called.

At sidebar, defense counsel argued that defendant had invoked her *Miranda* rights by not answering Rodriguez’s question about what Miranda had said that made her mad, and that any reference to defendant’s failure to accuse Miranda of rape or assault therefore violated *Doyle v. Ohio* (1976) 426 U.S. 610 [96 S.Ct. 2240] (*Doyle*). The court

overruled defendant's objection, stating: "Whatever *Doyle* rules, it would have to suggest the deputy would have to be clairvoyant. The fact she didn't say something means she was invoking *Miranda*, that is not fair. She has to say, 'I am standing on my right to remain silent. I do not wish to speak any longer,' or something like that. Merely not volunteering information is not invocation."

When proceedings resumed before the jury, Rodriguez was asked if, while speaking to defendant, defendant had said anything about being attacked, raped, or molested by Miranda. Rodriguez responded in the negative.

During the defense case, defendant testified on direct examination that Deputy Neal had previously arrested her, ultimately leading to her having entered a guilty plea to joyriding. She did not tell the deputies what happened when she was arrested in this case because she did not trust them, and "didn't feel anything [she] said would even matter to the point that [Neal] had arrested me before, so I just kept silent."

During defense counsel's closing argument, the following ensued:

"[Defense Counsel]: And then she tells you — and the People are going to argue: Why didn't she say something to the Sheriff's deputy. Why didn't she say, 'You don't understand'; you know, 'He tried to pull me into the van. He was going to rape me. He was going to hurt me. I didn't know what he was going to do with me.' [¶] Ladies and gentlemen, she was read her rights; and one of the rights is you have the right to remain silent; and when you exercise the right to remain silent, it means just that, you cannot use that against the defendant.

"[The Prosecutor]: I would object. That misstates the law.

"The Court: Sustained. No. You can discuss it out of the presence of the jury.

"[Defense Counsel]: She invoked her right to remain silent by saying nothing.

"[The Prosecutor]: Again, your Honor, objection.

"The Court: Sustained. There is no evidence that the defendant ever invoked her *Miranda* rights.

"[Defense Counsel]: She said nothing. You decide what that means, but she got on the stand, and she told you she did not trust Deputy Neal. That's what she said. At

that point when you're under arrest and you had a prior contact with that deputy, it's not a comfortable relationship anymore. It is adversarial.”

During the prosecutor's rebuttal, in the context of questioning defendant's credibility about looking for a job and staying around to smash the windows of Miranda's car rather than trying to get away from him, the prosecutor suggested to the jurors, “Ask yourself: ‘Do I believe the story she is trying to sell, this story that she didn't give out at the time?’ She wouldn't tell the deputies what had happened. She said she wasn't even raped, this rape guilt trauma.”

b. Discussion

Defendant contends that her constitutional rights under *Doyle, supra*, 426 U.S. 610, and *Wainwright v. Greenfield* (1986) 474 U.S. 284 [106 S.Ct. 634] were violated when the trial court overruled her objection to the prosecutor's questions to Deputy Neal about defendant's failure to mention that she had been sexually assaulted, sustained the prosecutor's objection to defense counsel's argument that defendant was exercising her right to remain silent, and stated in front of the jury that there was no evidence of defendant invoking her *Miranda* rights. Because the trial court was correct in ruling that defendant did not invoke her *Miranda* rights, we reject defendant's contention.

“*Doyle* holds that the prosecution violates due process if it uses the postarrest silence of a suspect who was given *Miranda* warnings to impeach an exculpatory explanation subsequently offered at trial.” (*People v. Evans* (1994) 25 Cal.App.4th 358, 367.) *Wainwright v. Greenfield, supra*, 474 U.S. 284, applies *Doyle* to use of post-*Miranda* silence on substantive issues.

People v. Evans, supra, 25 Cal.App.4th 358, on which defendant relies, involved a charged sexual assault. The defendant invoked his *Miranda* rights when questioned by the police and later testified at trial on cross-examination that the interrogating officer appeared angry when he did so. The prosecutor then asked if defendant told the officer that he had done nothing wrong. (*Evans*, at p. 367.) The *Evans* court concluded that this question constituted *Doyle* error. (*Evans*, at p. 369.)

Here, in contrast to *Evans*, defendant waived her *Miranda* rights and did not thereafter explicitly invoke them. Thus, defendant's reliance on *Evans* is misplaced. Defendant nevertheless claims an implied invocation when she did not reply to Deputy Rodriguez's question about what Miranda had told her to make her mad. Defendant's position is not supported by law.

"If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to cut off questioning, that he wishes to remain silent, the interrogation must cease." (*Miranda, supra*, 384 U.S. at pp. 473–474, fn. omitted.) "[N]o particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent [citation]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 129.) A suspect's invocation of Fifth Amendment rights under *Miranda* is governed by an objective standard. (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1124, citing *Davis v. United States* (1994) 512 U.S. 452 [114 S.Ct. 2350].) Whether a defendant invoked *Miranda* rights is a factual question to be decided in light of all the circumstances. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238.)

We agree with the trial court that that the deputies would have to be clairvoyant to interpret defendant's failure to respond to the question of what she was mad about as an invocation of *Miranda*. In *People v. Silva* (1988) 45 Cal.3d 604, 629, the defendant waived his *Miranda* rights and spoke with detectives, declining only to talk about some aspects of the incident being investigated. The Supreme Court concluded that *Miranda* had not been invoked, noting that "[a] defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate 'an interrogation already in progress.' [Citation.]" (*People v. Silva, supra*, 45 Cal.3d at pp. 629–630; accord, *People v. Hurd* (1998) 62 Cal.4th 1084, 1090–1091.) *United States v. Branson* (9th Cir. 1985) 756 F.2d 752, 753, on which defendant also relies, involved the distinguishable situation of a defendant convicted of passing counterfeit United States currency who had refused to answer questions about the source of the currency when first approached by Secret Service agents and continued to maintain his silence when he was later arrested and given his *Miranda* rights.

Based on the foregoing, defendant's claims of error regarding her failure to invoke *Miranda* must be rejected.

2. Sentencing

The probation officer's report considered by the trial court at sentencing indicated that defendant had been convicted of theft in 2003 and sentenced to 90 days in jail. She had also been convicted of vehicle theft (which defendant admitted during her testimony) in 2005 and placed on probation, for which defendant failed to report and was deemed to have deserted. The court, which recognized that *Cunningham* was then pending before the United States Supreme Court, sentenced defendant as follows:

"I will find the following circumstances in aggravation: [¶] Number one, the defendant's prior — convictions are becoming of increasing seriousness. [¶] Number two, the defendant's prior performance on probation was unsatisfactory. [¶] Number three, at the time the crime was committed, the defendant was under a grant of formal probation. [¶] Number four, the defendant threatened the witness/victim in this particular case. [¶] I find no circumstances in mitigation. [¶] Based on the fact that the defendant was on probation and her record is becoming more serious, I think the high term is warranted."

Defendant was then sentenced to the high term of 4 years 6 months for attempted carjacking with a 3-year enhancement for weapon use. A concurrent sentence was imposed for dissuading a witness and sentence for assault was stayed under Penal Code section 654.

Defendant contends that the trial court's imposition of the upper term violated her right to a jury determination of aggravating factors beyond a reasonable doubt under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348] (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531], and *Cunningham, supra*, 127 S.Ct. 856. We disagree.

Cunningham held that California's Determinate Sentencing Law violates a defendant's right to a jury trial to the extent it permits a trial court to impose an upper term sentence based on facts found by the court under the preponderance-of-the-evidence

standard rather than by a jury beyond a reasonable doubt. (*Cunningham, supra*, 127 S.Ct. at pp. 868–871, disapproving *People v. Black* (2005) 35 Cal.4th 1238, 1244.)

Nevertheless, the United States Supreme Court has made clear these requirements do not apply to an increased sentence based on “the fact of a prior conviction.” (*Apprendi, supra*, 530 U.S. at p. 490, relying on *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219] (*Almendarez-Torres*)). The prior conviction exception to the *Apprendi* rule has been construed broadly to apply factors based on a defendant’s recidivism. (See *People v. Earley* (2004) 122 Cal.App.4th 542, 549–550; *People v. Thomas* (2001) 91 Cal.App.4th 212, 221–222.)

The trial court here imposed the upper term sentence based on factors arising from defendant’s recidivism and her conviction of threatening Miranda in an attempt to dissuade him from testifying. The court found no factors in mitigation. Accordingly, there was no *Cunningham* violation.²

² On February 7, 2007, the Supreme Court ordered supplemental briefing in *People v. Towne* (review granted July 14, 2004, S125677) on issues including whether *Cunningham* and *Almendarez-Torres* permit an upper term sentence based on the aggravating factors of defendant’s prior convictions being numerous and of increasing seriousness, the defendant having served a prior prison term, the defendant being on parole at the time of the offense, and the defendant having performed unsatisfactorily on probation or parole.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

ROTHSCHILD, J.

JACKSON, J.*

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.