Filed 5/25/07 P. v. Takizawa CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DEREK TAKIZAWA,<br><br>Defendant and Appellant. | B187374<br><br>(Los Angeles County<br>Super. Ct. No. BA241860) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Derek Takizawa appeals from the judgment entered following a jury trial in which he was convicted of voluntary manslaughter and found separately to have used both a hammer and a knife in the commission of the offense. He was also convicted of robbery. Defendant contends that the trial court prejudicially erred in instructing with CALJIC No. 2.28 (Failure to Timely Produce Evidence) and that he is entitled to a resentencing hearing as a result of the United States Supreme Court's opinion in *Cunningham v. California* (2007) ___U.S. ___ [127 S.Ct. 856] (*Cunningham*). We affirm.

**BACKGROUND**

Defendant was charged with special circumstances murder (committed while engaged in burglary, robbery, and lying in wait), burglary, and residential robbery. It was further alleged that defendant used a hammer and a knife in the commission of the offenses.

Trial evidence established that defendant and Aaronn Wilson, both in their teens, were regular visitors to the Hollywood apartment of Chad Larson. A friend of Larson's described him as a "queen" whose relationships with men included sadomasochism and bondage. Defendant and Wilson sometimes did chores and modeled clothing that Larson designed in exchange for money, methamphetamine, and other drugs.

Larson was last seen alive on January 3, 2003. On January 6, Larson's body was found in his apartment. Larson had died from blunt force trauma to the head and several deep stab wounds to the neck. Police investigation led to defendant, Wilson, and two girls, Amy Lugo and Aja Mohammed.

In an interview with police detectives, Lugo stated that she and Mohammed had driven with defendant and Wilson to Larson's apartment. The boys said that they were going to rob and kill Larson while the girls waited in the car. Defendant had a hammer with which he said he would hit Larson. When defendant and Wilson returned to the car, they had a bag that contained jewelry. Defendant told Lugo that he had hit Larson in the head with a hammer and stabbed him in the neck with Wilson's knife. Defendant also said he had been molested as a child and that Larson was a child molester and rapist who had tried to force defendant to have sex.

Defendant later gave a statement to the police. He admitted that he had brought a hammer and a knife to the apartment, asserting that he and Wilson planned to attack Larson if Larson sexually assaulted them. Defendant further told officers that he and Wilson took jewelry from an open safe in the apartment and sold some of it.

Testifying in his own defense at trial, defendant stated that Larson had wanted him to model for gay pornography. Defendant initially declined, but later changed his mind because he needed the money. Larson also supplied defendant with alcohol, methamphetamine, and other drugs. During one photo session, Larson gave defendant a drug which caused him to lose control of his body. Larson then raped defendant. Defendant returned to Larson's apartment on the night of the incident because Larson owed him money. Defendant took a hammer and a knife for protection. While there, defendant and Wilson smoked methamphetamine with Larson. Defendant, who was still angry with Larson for having raped him, lost control of himself when Larson put his hand on defendant's inner thigh. He then killed Larson by hitting him in the head with the hammer and stabbing him in the neck with the knife. Defendant next decided that the incident should be made to look like a robbery, and he and Wilson took jewelry and cash.

The defense presented a police detective who had examined computers that were in Larson's apartment. The detective found, among other things, a video file depicting three males engaging in sex acts and a document entitled, "The Male-Male Rape Handbook."

Psychiatrist Ronald Markman also testified for the defense. Dr. Markman diagnosed defendant as suffering from post-traumatic stress disorder (PTSD), caused by defendant having been molested when he was eight years old. Defendant had attempted suicide, engaged in self-mutilation, and was a heavy user of drugs, all of which could be related to his PTSD. Markman had also administered a Minnesota Multiphasic Personality Inventory (MMPI) examination to defendant, and it did not appear that defendant had tried to manipulate the examination.

The prosecutor argued to the jury that defendant had committed first degree murder under theories of premeditation, lying in wait, and felony murder in conjunction

with burglary and robbery. He further urged that the jury should find true the special circumstances of murder committed during a burglary, a robbery, and by lying in wait, and find the weapon use allegations to be true. The prosecutor also argued for convictions of burglary and robbery.

Defense counsel argued that the material found in Larson's apartment lent credibility to defendant's assertion that Larson had drugged and raped defendant. Counsel further noted Markman's testimony that defendant had not manipulated the MMPI. Counsel asked the jury to convict defendant of voluntary manslaughter as a lesser offense of murder based on heat of passion. He further argued that the jury should convict defendant of grand theft as a lesser offense of robbery based on the theory that defendant's intent to steal was formulated only after the homicide had been committed. Finally, counsel requested that defendant be acquitted of burglary.

The jury received instructions and was provided with verdict forms on the theories argued by both sides. As noted above, defendant was convicted of voluntary manslaughter and robbery and found to have used deadly weapons. Defendant's sentence is discussed below.

## DISCUSSION

### 1. CALJIC No. 2.28

As Dr. Markman was about to testify for the defense, a discussion took place outside the presence of the jury in which it was established that although Markman had administered the MMPI during the course of his evaluation of defendant, neither the results of that exam nor any notes arising from the evaluation had been provided to the prosecution in discovery. The prosecutor requested the sanction of barring Markman from testifying on the ground that the failure of discovery had adversely affected the People's trial preparation. Defendant argued that he was not obligated to turn over the MMPI test results because Markman did not rely on the MMPI in concluding that defendant suffered from PTSD. Defendant further explained that the MMPI indicated defendant had a borderline personality disorder, which was irrelevant to the voluntary manslaughter defense. In addition, as part of the proceedings on the sanctions issue,

Markman testified that he had made the PTSD diagnosis before administering the MMPI, but that the MMPI "does support that diagnosis."

The court ruled that Markman could testify and that the jury would be instructed that information about the MMPI had not been produced by the defense in a timely manner.[1]

Defendant contends that, with respect to his conviction of robbery, the instruction constituted prejudicial error. We disagree.

Penal Code section 1054.3, subdivision (a), requires a defendant to disclose "[t]he names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports of statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at trial."

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[1] The jury was instructed pursuant to CALJIC No. 2.28 as follows:

"The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence.

"Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the defense failed to timely disclose the following evidence: that Dr. Markman had administered the MMPI test to the defendant and the results of that test, and Dr. Markman's notes of his contacts with the defendant.

"Although the defense's failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial.

"The weight and significance of any delayed disclosures are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial or subject matters already established by other credible evidence."

In support of his argument, defendant relies primarily on the distinction between this case and *Woods v. Superior Court* (1994) 25 Cal.App.4th 178. In the latter, disclosure was required of standardized tests administered by a defense psychologist that were relied on in forming an opinion regarding the defendant. (*Id*. at p. 181.) But the discussion in *Woods*, which was decided a few years after Proposition 115 established reciprocal discovery obligations for criminal defendants, was not focused on whether the reports had been relied upon. Rather, *Woods* concluded that Proposition 115 did not exempt words spoken or written by a defendant, nor did it violate a defendant's constitutional rights. (25 Cal.App.4th at pp. 184–186.)

A mental examination is one of the discoverable items specifically mentioned in Penal Code section 1054.3, subdivision (a), and Dr. Markman testified that the MMPI that he administered to defendant supported the PTSD diagnosis. Nothing in *Woods* justifies defendant's position that he should have been allowed to withhold evidence of the MMPI simply because its results merely supported, rather than provided a primary basis for the PTSD diagnosis.

With respect to instruction under CALJIC No. 2.28, we note that recent cases have criticized its use where a defendant has failed to disclose evidence in a timely manner, reasoning that the instruction provides little guidance on the consequences of the failure to disclose and might lead the jury to conclude that the defendant can be found guilty based solely on failure to comply with the discovery statute. (See *People v. Bell* (2004) 118 Cal.App.4th 249, 255–256; *People v. Cabral* (2004) 121 Cal.App.4th 748, 751–752; *People v. Saucedo* (2004) 121 Cal.App.4th 937, 942–943.) Nevertheless, assuming CALJIC No. 2.28 should not have been given, defendant here was not prejudiced. (See *People v. Bell*, *supra*, 118 Cal.App.4th at p. 257, and *People v. Cabral*,

*supra*, 121 Cal.App.4th at p. 753 [analyzing prejudice under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, to CALJIC No. 2.28].)[2]

At trial, Markman testified that he reached his diagnosis of PTSD before receiving the results of the MMPI, and that nothing about the MMPI's results caused him to change his mind. Markman further testified it did not appear that defendant was trying to manipulate the MMPI examination. Accordingly, utilizing the language of the last paragraph of CALJIC No. 2.28, evidence of the MMPI was not "a fact of importance," but rather was "something trivial" and involved a "subject matter[] already established by other credible evidence."

We further note that there was no basis upon which the jury could find defendant guilty of voluntary manslaughter other than through acceptance of his PTSD-heat of passion defense, which was reliant on Markman's diagnosis. It is true that under defendant's theory of the case the voluntary manslaughter determination should have also yielded a verdict of grand theft rather than robbery. But as is often the situation with an apparently inconsistent verdict, we can only speculate as to the reasons for the discrepancy.

Here, perhaps the jury was confused about the robbery instructions. Or perhaps the voluntary manslaughter verdict was an act of leniency on the jury's part, reflecting distaste for the victim and his lifestyle. But regardless of the cause of the seeming inconsistency, there is no basis on which to distinguish rationally between the effect of the PTSD diagnosis on the murder and the robbery allegations, and therefore no basis upon which to distinguish rationally between the impact of CALJIC No. 2.28 on the two charges. As CALJIC No. 2.28 did not prevent the jury from finding voluntary

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[2] Prejudice was found under *Watson* in both *Bell*, *supra*, 118 Cal.App.4th at page 257, and *Cabral*, *supra*, 121 Cal.App.4th at page 753. In *People v. Saucedo*, *supra*, 121 Cal.App.4th at pages 943–944, the court did not specify what standard of prejudice it was using and found the instruction harmless.

manslaughter as a lesser offense of murder, the instruction was manifestly harmless on the robbery allegation.

**2. *Cunningham* Issue**

At sentencing, defendant moved for a new trial, requesting that the robbery conviction be reduced to grand theft. He further requested that he be granted probation. The prosecutor opposed both requests. Defendant was sentenced in pertinent part as follows:

"[T]he court rejects the argument that this is an appropriate case for probation. [¶] The defendant went to the victim's residence armed with a hammer and a codefendant who carried a knife. The defendant beat the victim with a hammer and when the victim was incapacitated but not yet dead the defendant killed him with the knife. [¶] The defendant's actions were clearly intentional and extremely violent. And the court deems this is not an appropriate case for probation. [¶] As to count 1 the conviction for voluntary manslaughter, the court finds that there are mitigating circumstances in that the defendant had a minor criminal history. [¶] As for aggravating circumstances, the court finds that the crime involved great violence, viciousness and callousness. After bashing the victim with the hammer the defendant continued the assault by using the knife to finish him off. I believe the aggravating circumstances outweigh the mitigating circumstances and the court imposes the high term of 11 years." Defendant was then sentenced to an additional year for the weapon use enhancement, and imposition of sentence for robbery was stayed under Penal Code section 654.

Defendant contends that imposition of the upper term for voluntary manslaughter violated his right to a jury determination of aggravating factors beyond a reasonable doubt under *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531] (*Blakely*) and *Cunningham, supra,* 127 S.Ct. 856. We disagree.

In *Cunningham*, the United States Supreme Court reaffirmed *Blakely*, overruled *People v. Black, supra,* 35 Cal.4th 1238, and held that California's Determinate Sentencing Law violates a defendant's constitutional right to a jury trial to the extent it authorizes the trial judge to find facts that expose a defendant to an upper term sentence

by a preponderance of the evidence.[3] (*Cunningham, supra*, 127 S.Ct. at pp. 863–864.) "Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [Citation.]" (*Id.* at p. 868.)

The Attorney General asserts that defendant forfeited his right to a *Cunningham* claim because he failed to raise the issue in the trial court. But unlike the defendant in *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103, on which the Attorney General relies, defendant here was sentenced after the California Supreme Court decided *People v. Black* (2005) 35 Cal.4th 1238.[4] Thus, objection under *Blakely* would have been futile and defendant's *Cunningham* claim has not been forfeited. (*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5.)

The trial court's statement of reasons for imposing sentence was at first couched in established language regarding aggravating circumstances, namely, that "the crime involved great violence, viciousness and callousness." (See Cal. Rules of Court, rule 4.421(a)(1).) But the court went on to elucidate that "[a]fter bashing the victim with the hammer the defendant continued the assault by using the knife to finish him off." As noted above, the jury found separately that defendant had used both the hammer and the knife (and defendant was sentenced on only one of these findings.) Thus, imposition of the upper term was predicated on facts that had been submitted to, and found by, the jury, thereby satisfying the requirements of *Blakely* and *Cunningham*. Finally, even if those requirements were violated, the error in this case would be harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824].)

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[3] On February 20, 2007, the United States Supreme Court vacated the judgment in *People v. Black*, *supra*, 35 Cal.4th 1238, and remanded the case to the California Supreme Court for further consideration in light of *Cunningham*, *supra*, 127 S.Ct. 856.

[4] *Black* was decided on June 20, 2005. Defendant was sentenced on September 9, 2005.

## DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

VOGEL, J.

ROTHSCHILD, J.