Filed 5/24/07 P. v. Walker CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>RAYMOND WALKER,<br>Defendant and Appellant. | C051926<br>(Super. Ct. No. SF093973A) |

A jury found defendant Raymond Walker guilty of first degree murder and attempted second degree robbery, finding true the special circumstance that defendant committed the murder during the commission of the attempted robbery, and also finding true the special allegations that he personally used a firearm with respect to both counts. The court sentenced defendant to an aggregate term of 10 years plus life in prison without the possibility of parole.

On appeal, defendant contends reversal of judgment as to both counts is required because (1) without defendant's

statement to police, there was insufficient evidence to establish the corpus delicti for attempted robbery, and (2) his statement to police was the result of coercion and therefore inadmissible. Defendant also contends the trial court's imposition of the upper term as to the gun use enhancement for counts 1 and 2 violated his Sixth Amendment rights under *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856; 166 L.Ed.2d 856] (*Cunningham*). We shall affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

On the evening of November 11, 2004, defendant left his apartment after having a fight with his live-in girlfriend, Dominic Laws (with whom he had a child), about "bills and money and [defendant's] reluctance to help out with support of their child." He returned early the next morning, intoxicated and "ranting and raving," and continued to argue with Laws about money. After pacing back and forth for awhile, defendant left wearing a dark hooded sweatshirt and dark pants.

That same morning, Chandrika Dip, a taxicab driver, left for work at approximately 6:15 a.m. His wife gave him about $4, which he added to the $3 already in his wallet. He had no injuries to his face when he left for work that morning.

Sometime before 7:15 a.m., Dip picked the defendant up outside the bus station across the street from defendant's apartment. Defendant asked to be taken to Conway, but had Dip take several detours along the way. He eventually told Dip to stop on Kansas Street, a short distance from a school. Dip

asked for the cab fare, but defendant did not have any money to pay it. Instead, defendant pulled a gun from the front pocket of his sweatshirt, pointed it at Dip and said something like, "give me your money." Dip told defendant he did not have any money. When Dip reached for the gun, defendant shot him, hitting him in the forehead and killing him.

Defendant got out of the cab, walked around to the driver's side and shook Dip, trying to "wake him up." He checked Dip's pants pockets for money, causing several small pieces of paper to fall out of Dip's left front pocket. He did not check the pockets of Dip's coat.[1] Not finding any money, he put the car in park, turned the engine off, closed the door and left.

Defendant arrived at the home of his sister, Shaneen Walker, sometime between 7:00 and 8:00 a.m. that morning. He was jittery and smelled of alcohol, and looked like he had been up all night. Defendant was still wearing the hooded sweatshirt he had put on earlier that day. He told his sister he accidentally shot a cab driver over by the school, telling her he struggled with the driver for the gun and it went off "on accident." When his sister asked if he was trying to rob the cab driver, defendant said, "No," and told her he thought,

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[1] During the police interview, defendant was asked whether he searched Dip's shoes for money. Defendant responded, "I don't know." It also appears that he may have made an inaudible response denying that same question earlier in the interview.

“maybe the cab driver thought I was trying to rob him.” Shaneen urged defendant to turn himself in.

After changing into some clothes his sister gave him, defendant made two phone calls, one to an individual later identified as Kenta Banks. He told Banks that he shot a cab driver. Banks showed up at Shaneen’s house approximately 40 minutes later and, after staying another half-hour or so, left with the defendant, who took his clothes and the gun and told Shaneen he was going to get rid of them. Banks took defendant to the levee and defendant threw the gun in the water.

Approximately 7:15 a.m. that morning, several young girls walking to school noticed the taxicab parked on Kansas Street. Thinking it was unusual that the headlights were on and the windshield wipers were part way up, they went to take a closer look. The girls saw Dip slumped in the driver’s seat with his head and body leaning towards the passenger side of the car. There was blood on the passenger seat. One of the girls called 911 while the others ran to school and reported what they saw to school officials.

Emergency personnel arrived on the scene approximately 7:30 a.m. and removed Dip’s body from the car. There was a significant amount of blood on the center console, as well as the passenger seat. The keys were still in the ignition and the meter was still running. Several small pieces of paper were found on the floorboard on the driver’s side of the cab. Sheriff’s deputies found 91 cents in Dip’s pocket.

Laws returned home that evening sometime after 5:00 p.m. Defendant was already there when she arrived; however, he was wearing different clothes than those he had been wearing when he left the apartment that morning. Defendant told Laws he shot a cab driver, but repeated over and over that it was an accident, saying nothing about robbing or attempting to rob the driver.

An autopsy revealed that Dip died of a single gunshot wound to the right forehead. He had minor injuries to his face (abrasions of the forehead and a tiny cut on his chin) suffered either before or contemporaneously with the gunshot wound. The coroner concluded the gunshot was most likely fired two to six inches away from Dip's head.

A police criminalist examined the cab and noted, among other things, that (1) the glove compartment did not appear to have been "rifled" through, (2) the center console did not appear to have been opened after the blood was deposited on it, and (3) Dip's wallet was still in the center console.

Police received phone calls on November 17 and 18, 2004, from an unidentified female, identifying defendant as a suspect and providing information as to his whereabouts. Defendant was arrested at his home and taken into custody without incident.

The information charged defendant with first degree felony murder in violation of Penal Code section 187[2] (count 1) and

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[2] Hereafter, undesignated statutory references are to the Penal Code.

attempted second degree robbery in violation of sections 664 and 211 (count 2). A special circumstance was also charged as to count 1, alleging that the murder was committed while defendant was attempting to commit the crime of robbery within the meaning of section 190.2, subdivision (a)(17)(i).[3] Firearm enhancements were alleged as to both counts -- intentional and personal discharge of a firearm causing great bodily injury in violation of section 12022.53, subdivision (d) as to count 1, and personal use of a firearm in violation of section 12022.5, subdivision (a) as to count 2.

Prior to trial, defendant filed a motion to dismiss count 2 pursuant to section 995. The motion was denied.

Following a jury trial, defendant was found guilty of both counts. The jury found true the special circumstance allegation, as well as the allegation of use of a firearm as to both counts.[4]

Prior to sentencing, defendant filed a motion, pursuant to section 1181 for new trial and modification of the verdict, arguing there was insufficient evidence to support the jury's

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[3] In reviewing the probation report at sentencing, the parties agreed that the reference to section 190.2, subdivision (a)(17)(*i*) (regarding "train wrecking") in both the information and the probation report was incorrect, and further agreed to revise the probation report to reflect the corrected reference as section 190.2, subdivision (a)(17)(*A*) (regarding "robbery").

[4] By agreement of the parties, the gun use allegation as to count 1 was changed to allege section 12022.5, subdivision (a) in order to accurately reflect the jury's verdict.

verdict that he committed the killing in order to carry out or advance the commission of the robbery. The section 1181 motion was denied.

The court sentenced defendant to a term of life without the possibility of parole as to count 1, plus the upper term of 10 years for the gun use enhancement. The court also imposed the midterm sentence of two years for count 2, plus 10 years for the gun use enhancement, both of which were stayed pursuant to section 654.

Defendant filed a timely notice of appeal.

## DISCUSSION

### I.

### *Independent Proof of the Corpus Delicti of Attempted Robbery*

Defendant contends that the evidence at trial was insufficient to establish the corpus delicti of attempted robbery. He also challenges the constitutionality of section 190.41 (proof of special circumstance by defendant's extrajudicial statement) as it applies to felony-based special-circumstance allegations. We disagree with the first contention and therefore need not address the second.

"In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself--i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying exclusively upon the extrajudicial statements, confessions, or

admissions of the defendant. [Citations.] Though mandated by no statute, and never deemed a constitutional guaranty, the rule requiring some independent proof of the corpus delicti has roots in the common law. [Citation.] California decisions have applied it at least since the 1860's. [Citation.] [¶] Virtually all American jurisdictions have some form of rule against convictions for criminal conduct not proven except by the uncorroborated extrajudicial statements of the accused. [Citations.] This rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened. [Citations.] [¶] . . . [¶] The independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. [Citations.] There is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. [Citation.] In every case, once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues. [Citations.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169, 1171, fn. omitted.)

"[T]he corpus delicti of a felony-based special circumstance enumerated in paragraph (17) of subdivision (a) of

Section 190.2 need not be proved independently of a defendant's extrajudicial statement." (§ 190.41.)

There is sufficient evidence, separate from defendant's statement to investigators, that Dip was killed during the course of an attempted robbery. Defendant's girlfriend, Laws, told investigators she had a fight with defendant over money the evening prior to the shooting, and that they continued the fight in the early morning hours just before the shooting. It is reasonable to infer that defendant, having left the apartment angry about his fight with Laws, saw an opportunity to cure his financial problems when he boarded Dip's taxi at the bus station across the street and directed him to an area where witnesses were not likely to see or interfere. There is no indication the interior of the cab was disheveled, yet police found several small papers on the driver's side floorboard, as well as Dip's shoes, raising an inference that the killer also rummaged through Dip's pockets, and perhaps his shoes, for money. The location of the cab on the side of Kansas Street, the shot to Dip's right forehead fired from close range and the cuts and abrasions to his face all suggest Dip stopped the cab and turned to speak with his passenger, and may have struggled with him, prior to being shot. Further, when the cab was discovered, the lights were on and the meter was still running suggesting Dip's last passenger led Dip to believe that he was a legitimate fare-paying rider. As such, the passenger was able to coax Dip to a more remote area in order to rob him of his money. Indeed,

these facts tend to rule out any inference that the killing was nothing more than a random act of violence or the result of a personal vendetta against Dip.

We find these facts sufficient to establish prima facie evidence of attempted robbery. We are not persuaded by the fact that Dip's wallet was found inside the center console, given the testimony from numerous witnesses that the console was covered with a significant amount of blood which, if disturbed, would likely have left evidence of the identity of the killer. Given that the beginning of the school day was fast approaching, it is also likely the perpetrator was in a hurry and gave up the search for money after checking Dip's pockets and coming up empty. As for the presence of Dip's shoes on the driver's side floorboard, there is no evidence the emergency responders took them off when they removed Dip's body from the cab. While it is true it may have been Dip's habit to drive without shoes, it is equally possible, and reasonable to infer, that his shoes were removed by the killer in search of money.

Defendant attempts to distinguish the facts of this case from those in *People v. Ray* (1996) 13 Cal.4th 313 (*Ray*), a case relied upon by the trial court in its denial of defendant's motion for new trial. In *Ray*, two armed strangers wearing fatigues approached Mark Doss and Kathy Hyde late at night in a parking lot outside a bar. Doss and Hyde were ordered to "retreat to a darker, less visible area." Doss was shot when he resisted, but survived. Hyde was shot when she attempted to run

away and died several days later at the hospital. (*Id.* at pp. 326-327.) Among other things, the jury found the defendant guilty of first degree murder of Hyde and attempted robbery of both Hyde and Doss, and found true the special-circumstance allegation that Hyde was murdered during the commission or attempted commission of a robbery. (*Id.* at p. 325.) The case was automatically appealed to the California Supreme Court following the trial court's imposition of the death sentence. (*Ibid.*)

On appeal, defendant urged that, apart from his pretrial confession, there was no evidence from which the jury could conclude that Hyde was murdered during the course of an attempted robbery. (*Ray, supra,* 13 Cal.4th at pp. 341-342.) This state's high court disagreed, finding evidence of an attempted robbery based on "a strong inference that the victims were selected at random," the fact that "the gunmen behaved in a purposeful fashion and immediately ordered the victims to retreat to a more obscure area of the parking lot," and the fact that both Doss and Hyde were shot when they resisted. (*Id.* at p. 342.) "Since the jury could reasonably conclude the perpetrators intended to steal the victims' property at gunpoint," the court ruled, "the corpus delicti rule is satisfied insofar as it required independent proof of attempted robbery." (*Ibid.*)

Defendant argues his case is different because taxicabs are "usually randomly selected for any purpose," and the cab was

found directly across from a public school between 6:15 and 7:20 a.m. We are not persuaded. The fact that cabs are "usually randomly selected for any purpose" only drives home the point that defendant randomly chose Dip's cab for the purpose of robbing the driver, whoever it was, and did not have some other motive (e.g., a personal vendetta against Dip) for killing him. As in *Ray*, where the perpetrators purposefully moved the victims to a more obscure area, defendant had Dip stop not in front of defendant's sister house or the home of a friend, but rather in front of a school not yet open for morning classes, insuring there would be less of a chance that someone would witness the crime.

Defendant also argues that, because there is no evidence anything was actually taken from Dip, there is no evidence to prove that the "charged crime actually happened." Not so. Although defendant attempted to rob Dip, there was nothing to be had, save 91 cents in Dip's pocket and $7 in a wallet inside of a blood-covered console. Having already discussed why it is likely the wallet was not taken from the console, we turn to the 91 cents and, with little effort, imagine that a would-be robber, having just shot and killed the cab driver in an attempt to take whatever fares he had earned that day, would not likely be enticed by pocket change.

We find there is sufficient evidence to make a prima facie showing of attempted robbery. Having done so, we need not address defendant's constitutional challenge to section 190.41.

## II.

### *Admissibility of Defendant's Statement to Police*

Defendant contends his statement to the police was obtained through coercion and is therefore inadmissible. In particular, defendant urges that, "[t]here was an implied promise that if he said he got into the cab and the driver was wary and paranoid, leading to a struggle in which the gun accidently [*sic*] fired he would not be charged." The argument is not supported by the record.

Admission of involuntary statements violates a defendant's constitutional right to due process. (*Jackson v. Denno* (1964) 378 U.S. 368, 376 [12 L.Ed.2d 908, 915]; U.S. Const., 5th & 14th Amends.) "A defendant's admission . . . challenged as involuntary may not be introduced into evidence at trial unless the prosecution proves by a preponderance of the evidence that it was voluntary. (*Lego v. Twomey* (1972) 404 U.S. 477, 489 [30 L.Ed.2d 618]; *People v. Markham* (1989) 49 Cal.3d 63, 71.) A confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercive police activity. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167 [93 L.Ed.2d 473]; [citation].)" (*People v. Williams* (1997) 16 Cal.4th 635, 659 (*Williams*).) "[T]he terms 'coerced' and 'involuntary' confessions [are used] interchangeably to refer to confessions obtained by physical or psychological coercion, by promises of leniency or benefit, or when the 'totality of circumstances' indicates the confession was not a product of the

defendant's 'free and rational choice.'" (*People v. Cahill* (1993) 5 Cal.4th 478, 482, fn. 1.) "[W]here a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law." (*People v. Boyde* (1988) 46 Cal.3d 212, 238.)

"On appeal, we review independently the trial court's determination on the ultimate legal issue of voluntariness. [Citation.] But any factual findings by the trial court as to the circumstances surrounding an admission or confession, including '"the characteristics of the accused and the details of the interrogation" [citation],' are subject to review under the deferential substantial evidence standard. [Citation.]" (*Williams, supra*, 16 Cal.4th at pp. 659-660.)

Defendant aptly notes that the use of deception "has long been approved as a means to interrogate and obtain information." "Police trickery that occurs in the process of a criminal interrogation does not, by itself, render a confession involuntary and violate the state or federal due process clause. [Citation.] Why? Because subterfuge is not necessarily coercive in nature. [Citation.] And unless the police engage in conduct which coerces a suspect into confessing, no finding of involuntariness can be made. [Citations.] [¶] So long as a police officer's misrepresentations or omissions are not of a kind likely to produce a *false* confession, confessions prompted

by deception are admissible in evidence. [Citations.]" (*People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280; see *In re Walker* (1974) 10 Cal.3d 764, 777 [statement of wounded defendant admissible even though elicited by false statement that he might die before he reached the hospital and should talk to close the record] and *People v. Watkins* (1970) 6 Cal.App.3d 119, 125 [statement of defendant who was falsely told his fingerprints had been found on the getaway car nonetheless admissible because the deception was unlikely to produce an untrue confession].)

Defendant also properly concedes that exhortations to tell the truth unaccompanied by threats or promises do not in and of themselves show overreaching, and that officers are not precluded from discussing any advantage or other consequence that will naturally accrue in the event defendant speaks truthfully about the crime. (*People v. Jackson* (1980) 28 Cal.3d 264, 299, disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) Nonetheless, he argues that implicit in the detectives' deceptive statements, exhortations to tell the truth and stories of other accidental shootings was a promise that he would not be charged *at all* if he told police the killing was an accident.

Our review of the record, and particularly the transcript of Seraypheap and Rodriguez's interview of defendant, reveals that there was never any promise, express or implied, of leniency, let alone a promise that defendant would not be charged *with any crime* if he told police the killing was

accidental. While there is no doubt that Seraypheap and Rodriguez made a number of deceptive statements during the interview -- that they had defendant's fingerprints in the cab, that children saw defendant exiting the cab, that the victim was known to carry a weapon, that what took place was an accident, that defendant had been picked out of a photo lineup, that police had been looking for defendant "for some time" to talk to him about the incident, and that the taxicab was wired for audio recordings -- those false statements were not likely to produce a false confession. They simply gave the impression that the police had more evidence implicating defendant than they actually did.

Defendant began the interview by denying having ever gotten into the cab. Apparently believing police had evidence to the contrary, he admitted he was in the cab, at which point Seraypheap urged him to tell the truth about what happened. The detectives suggested it might have been an accident, but also suggested there could be other plausible explanations, such as a fight. In short, defendant was led to believe the police had evidence they did not have, and was given the opportunity to be truthful. He responded to that opportunity by ultimately confessing that he got into the cab angry after a fight with his girlfriend and, after demanding money from Dip, "accidentally" shot and killed Dip when they struggled for the gun.

Defendant urges that, by telling him about other instances in which accidental shootings did not result in criminal charges

being filed, the detectives implied that defendant would similarly not be charged if he admitted the shooting was accidental. Not so. When defendant asked if he was "being charged with murder," Seraypheap replied, "Well it depends, it depends what happened inside the cab," telling defendant, "You need to explain yourself, what happened," and suggesting there could be any number of possible explanations for what occurred, including an accident or a fight. Defendant was not told that accidental shootings never result in criminal charges, nor was he told or led to believe that he would not be charged if he admitted the shooting was unintentional. Indeed, defendant demonstrated that he understood that the contrary was true when detectives asked him if it was an accident and he replied, "Either way I go man, is, is a murder. I'm . . . that's life all off the top." We find no implied promise of leniency in this record.

**III.**

***Imposition of Upper Term for Gun Use Enhancements***

Defendant contends imposition of the upper term as to the gun use enhancements was unconstitutional in the absence of a jury's finding of the aggravating circumstances beyond a reasonable doubt.

The People first argue that defendant has forfeited the issue because he did not raise it in the trial court. We disagree.

Defendant was sentenced on January 23, 2006. Before that, on June 20, 2005, our Supreme Court had decided *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), which held that a defendant does not have a right to have a jury determine aggravating factors used to impose the upper term. (*Id.* at p. 1244.) Because *Black* was controlling law at the time of defendant's sentencing, he was not required to make a futile objection at that time. It is pointless to require a defendant to ask a trial court to overrule a decision of the California Supreme Court. (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 292, fn. 1.)

Next, the People argue the sentence does not violate the rule of *Cunningham* given the trial court's reliance on factors to which no right to jury trial attaches.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*), the Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi, supra*, at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v.*

*Washington* (2004) 542 U.S. 296, 303-305 [159 L.Ed.2d 403, 413-414] (*Blakely*).)

In *Cunningham*, the Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law (DSL) "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Cunningham, supra,* 549 U.S. at p. ___ [166 L.Ed.2d at p. 864], overruling *Black, supra,* 35 Cal.4th 1238 on this point, vacated in *Black v. California* (Feb. 20, 2007) ___ U.S. ___ [167 L.Ed.2d 36].)

Here, however, the trial court cited as a basis for imposing the upper term the fact that "defendant has numerous prior convictions as an adult and sustained juvenile petitions as a juvenile," as well as the fact that defendant served a prior prison term and that he was on parole when he committed the murder in this case.[5]

The imposition of the upper term based on these facts did not violate the rule of *Apprendi*, *Blakely*, and *Cunningham* because that rule does not apply to an aggravated sentence based on a defendant's prior convictions. (*Apprendi, supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].)

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[5] The court also cited, as additional aggravating factors, defendant's unsatisfactory prior performance on probation and parole, and that defendant "was a convicted felon and was legally prohibited from possessing a firearm."

One valid aggravating factor is sufficient to expose defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) Here, there were three valid aggravating factors relating to his prior criminal adjudications and convictions. We are satisfied beyond a reasonable doubt that the trial court would have imposed the upper term based on those three valid factors alone and, indeed, on the sole fact of defendant's prior criminal convictions. Therefore, any error in considering that defendant was a convicted felon in possession of a firearm and that his prior performance on probation and parole had been unsatisfactory was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710].)

**DISPOSITION**

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P.J.

MORRISON, J.