Filed 8/22/02 P. v. Williams CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY MAURICE WILLIAMS, Defendant and Appellant.	D038602 (Super. Ct. No. SCE207131)

APPEAL from a judgment of the Superior Court of San Diego County, Allan J. Preckel, Judge. Affirmed.

A jury convicted Anthony Maurice Williams of forcible rape in concert, oral copulation in concert, and sodomy in concert, and found the allegations that he had two "strike" priors and two serious felony priors were true. Williams was sentenced to a total of 35 years to life in prison — 25 years to life under the Three Strikes legislation, plus two 5-year enhancements for having two serious felony priors under Penal Code section

667, subdivision (a)(1). (All statutory references are to the Penal Code unless otherwise indicated.)

Williams appeals, contending (1) his conviction must be reversed because the trial court erred in (a) admitting the date and time stamp contained on a store surveillance tape, which showed him on the premises before the offenses occurred, (b) allowing a police officer to testify that he thought the suspects were familiar with the park where the crimes occurred, and (c) instructing the jury with a modified version of CALJIC No. 1.05 regarding the reading back of testimony; and (2) the matter must be remanded for resentencing because (a) the court's use of a juvenile adjudication as a strike was unconstitutional, (b) the court should have exercised its discretion to dismiss one or two of his strike priors, and (c) the imposition of two 5-year serious felony enhancements was unauthorized. We find Williams's contentions to be unavailing for the reasons set forth below and affirm the judgment.

FACTS AND PRIOR PROCEEDINGS

On the evening of July 25, 2000, the victim, T. H., came to San Diego to find a place to live. She got on the trolley in downtown San Diego, but went the wrong direction. About 9:00 p.m., while T. H. was waiting to catch another trolley, Williams approached her and started a conversation. T. H. talked to Williams for about 20 minutes, and then Leotis Harrison came up and joined the conversation. Williams was wearing a black T-shirt and cream colored corduroys, and his hair was in braids; Harrison was wearing a red plaid shirt and red pants. When the trolley arrived, T. H., Williams, Harrison, and two other men who had been with their group, boarded it and road to the

Lemon Grove station. From there, T. H., Williams, Harrison, and a man later identified as Cory, went to a liquor store near an AM/PM minimarket. T. H. testified that Cory was bald and wearing a gray, stained mechanics jumpsuit. Williams and Cory went into the liquor store and bought orange juice and a bottle of gin, while T. H. waited with Harrison. The four then went across the street to an apartment complex, sat down at some picnic benches and started drinking. During this time, Cory told T. H. she was cute and asked to see her body. T. H. refused. Williams then started asking questions like "So, can we see your body?" and started to lift up her shirt. T. H. said no, asked him to stop and pulled down her shirt. At that point, Cory got up and left, saying he had to go to work in the morning.

Williams, Harrison and T. H. then went to a small park (known as Kunkle Park) close to the apartment complex. T. H. started to feel the effects of the alcohol, and the three sat down on some benches. Williams said to T. H., "Are you going to suck my dick tonight?" and she responded, "No, please don't come at me like that." T. H. started to leave, and Williams came up, hit her on the side of the face and yelled, "Bitch, I don't give a fuck. I asked you to suck my dick. That's what you're going to do tonight." Williams and Harrison then dragged her back to the benches, ripped off her clothes and forced her to orally copulate them and beat, raped and sodomized her. Neither Williams nor Harrison ejaculated, so they "decided to go on and let [T. H.] go." They told her to get in a trash can; Williams said he would fire a gun three times and then she could get out. When T. H. was in the trash can, Williams and Harrison stomped on her head, urinated on her and then left.

A few minutes later, T. H. covered herself with a garbage bag and ran across the street to the apartment complex. She stopped a motorist who lived at the complex, and he gave her some clothes and called the police.

The police found T. H. bruised, swollen and upset. She told them what had happened, described the two suspects, and said the name of one of them was Maurice or Marquise (Williams went by his middle name, Maurice). The police searched Kunkle Park and found T. H.'s clothing and her purse. A palm print was lifted from the bench where the assault took place that was later identified as Williams's. In the days after the assault, sheriff's deputies twice interviewed Williams because he matched T. H.'s description and frequented the trolley line, the Lemon Grove station and Kunkle Park. The second time a deputy spotted Williams, he was with Harrison; both men ran when they saw the deputy's marked patrol car.

About a week after the attack, Detective Jerry Hartman compiled a photographic lineup of possible suspects that included Williams and Harrison. He brought T. H. in to view the lineup, but before he could show it to her, another detective asked him a question and he turned away, leaving 10 to 15 loose photographs on his desk. T. H. saw the photographs, became visibly shaken, and asked another detective to get Hartman's attention. When Hartman turned around, T. H. pointed to Williams's picture and said: "That's him. That's one of them." Hartman then showed her the actual lineup and she identified Williams and Harrison as her attackers. Sheriff's deputies notified transit enforcement officers to look for Williams and Harrison on the trolley and at the stations; both were apprehended at the Lemon Grove trolley station the next day.

Defense Evidence

Williams testified on his own behalf and admitted that he, Harrison and Cory met T. H. at the trolley station the evening of July 25, 2000, and talked with her at length. Then he and Cory went to the liquor store and bought gin and orange juice, while Harrison and T. H. waited outside. He remembers there was concern as to whether the liquor store would still be open. Williams testified they all went to the apartment complex to drink in the picnic area, but that he first stopped at a friend's apartment to ask to use the phone because his fiancée, Kimberly Scott, had paged him and left him a message that she had just left work and would see him at home. Williams stated the four of them drank the liquor and talked, and then he and Cory left. Williams denied any involvement in the sexual assault, and testified he went to Scott's house and had been there about five minutes when she returned home. He confirmed T. H.'s description of the clothes Harrison and Cory had been wearing — that Harrison had on a black and red shirt and red pants, while Cory had on a gray, stained mechanics jumpsuit.

Scott testified she got home from her job at Sea World that night at 11:20 p.m. and Williams was there. On cross-examination Scott was shown payroll documents from Sea World for July 24 to July 28 and acknowledged the records indicated she had not worked on July 25. She also admitted she had told Hartman after Williams was arrested that she did not see Williams on the night of the attack. Scott testified that she and Williams spoke to his mother on the night of July 25, and then went to sleep. Williams's mother testified she spoke to him on the phone that night, but admitted on cross-examination that

she could not remember the date she made the phone calls, but she thought it was the night of the incident because Scott told her she had called that night.

Rebuttal Evidence

Hartman testified that when he interviewed Scott on August 16, 2000, she told him she was home the evening of July 25, and that Williams did not come over. She also said she did not work that day, which she confirmed by looking at her calendar.

DISCUSSION

ADMISSION OF THE TIME/DATE STAMP ON THE AM/PM MINIMARKET SURVEILLANCE TAPE

Hartman, having information that the suspects may have gone into the AM/PM minimarket the night of the attack, obtained the store's surveillance video from July 25. Four pictures generated from the video showed Williams in the store. One of the photographs had the date, July 25, 2000, and the time, 10:18 p.m., imprinted on it. Hartman estimated the time indicated to be 17 minutes slow based on his observation of the time indicated on the surveillance equipment during live footage as compared with the time shown on his watch. Thus, he testified he determined that the videotape was taken of Williams at approximately 10:35 p.m.

Williams contends the court erred in admitting evidence of the time/date stamp on the surveillance tape because there was not sufficient evidence it was accurate, and such evidence was hearsay and did not qualify under the business records exception. He maintains the judgment must be reversed because this error violated his right to confrontation and cross-examination and was not harmless beyond a reasonable doubt.

His theory is that Scott's testimony that Williams was home when she returned from work indicated he could not have been in the minimarket as late as the tape indicated, and admission of the time/date stamp undermined his alibi. He suggests that Cory could have been the other attacker and argues that because the case "depended entirely upon the testimony of one eyewitness," and courts have "repeatedly questioned the reliability of eyewitness testimony," the error was likely to be prejudicial.

We conclude that any error in admitting the time/date stamp evidence was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) T. H.'s identification of Williams was not the result of a brief viewing; on the contrary, it was based on her extended contact with him, and her testimony was precise, detailed and substantiated by other evidence. Indeed, Williams admitted talking with T. H. at length that night and drinking with her just across from the park in which she was assaulted. Right after the attack, T. H. gave police a description of the suspect that matched Williams and told them his name was either Maurice or Marquise. (Williams went by the name Maurice.) His palm print was also found on the bench where the attack occurred. T. H. was able to describe what Williams, Harrison and Cory were wearing — while Williams had on a black T-shirt and cream colored corduroys, Cory had on a gray, stained mechanics jumpsuit, which Williams confirmed. It is not at all likely that T. H. mistook Williams for Cory as the other attacker. Indeed, when T. H. saw Williams's picture among a group of 10 to 15 on Hartman's desk, she became visibly upset and immediately asked another detective to get his attention. Given the overwhelming evidence against Williams, the time/date stamp on the surveillance tape was of no moment. The jury believed T. H.'s

testimony because it was credible and corroborated by Williams himself, law enforcement personnel, and physical evidence. In contrast, Williams's alibi evidence was not credible and was exposed as such on cross-examination.

HARTMAN'S TESTIMONY REGARDING KUNKLE PARK

Hartman testified that the location of the assault limited his investigation because Kunkle Park was located inside an apartment complex and was "out of the way." Hartman stated he had been on patrol in that area for five years and did not know the park was inside the apartment complex, and thus, he thought T. H.'s attackers might be familiar with that complex. Williams contends this testimony was speculative and thus, inadmissible lay opinion testimony. We disagree. Evidence Code section 800 allows opinion testimony by lay witnesses where such is rationally based on the perception of the witness and helpful to a clear understanding of his or her testimony. (*Id.*, subds. (a) & (b).) Hartman's testimony was based on his own observations and helpful to a clear understanding of why he limited his investigation. Therefore, it was admissible. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1307-1308.)

THE TRIAL COURT DID NOT ERR IN GIVING A MODIFIED VERSION OF CALJIC NO. 1.05 REGARDING THE READING BACK OF TESTIMONY

The trial court instructed the jury regarding the reading back of testimony with a modified version of CALJIC No. 1.05, as follows:

> "When a read back of the trial testimony of one or more witnesses is requested by the jury, the customary practice is for the court reporter to read back the reporter's notes in the jury room. The reporter cannot excerpt particular portions of a witness's testimony, but must read back the testimony of any specified witness in its entirety. During such read back, there is to be no discussion in the court

> reporter's presence, and the court reporter cannot respond to questions.
>
> "*A request for a read back of any portion of the trial testimony should be made only after careful consideration and deliberations. Such requests may [be] accommodated, but they do entail considerable delay and potential disruption of other court proceedings.*" (Emphasis added.)

Williams contends the modification of CALJIC No. 1.05, set forth above in italics, improperly violated his and/or the jury's right to have a rereading of testimony under section 1138, which provides that during deliberations "if there be any disagreement between [the jury] as to the testimony," the court must give the jury the "information required." This contention is unavailing. The trial court accurately informed the jury that read backs of testimony involve delay and can disrupt other court proceedings; it never indicated that requests for read backs would not be honored. The court's informing the jury that it should carefully consider such requests did not amount to impermissible jury coercion or otherwise violate the jury's or Williams's right to have the jury provided with read backs of testimony on request. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 506-507; *People v. Anjell* (1979) 100 Cal.App.3d 189, 202-203, disapproved of on other grounds in *People v. Mason* (1991) 52 Cal.3d 909, 942-943.) The court merely stated the obvious, that read backs entail delay and can disrupt other court proceedings; telling the jury such facts does not amount to coercion.

USE OF WILLIAMS'S PRIOR JUVENILE ADJUDICATION AS A STRIKE

667, subdivision (d)(3) authorizes the use of certain juvenile adjudications as strikes. In 1995, the juvenile court sustained a petition against Williams alleging assault

with a firearm with personal use of a firearm, which was used as one of his strike priors in the instant case.

Williams does not contend the court erred under the statute in using his prior juvenile adjudication as a strike. Rather, he contends that doing so was unconstitutional because juvenile court proceedings have a different focus than adult proceedings and do not afford a right to a jury trial. The court in *People v. Fowler* (1999) 72 Cal.App.4th 581, 584-587, rejected such a contention, noting that a prior adjudication of a section 667 subdivision (d)(3) offense demonstrates beyond a reasonable doubt that a defendant has engaged in serious criminal behavior in the past, which would justify a longer sentence under the three strikes law if he or she reoffends. (*People v. Fowler*, *supra*, at pp. 584-585.) Although the California Supreme Court has not yet addressed this issue, we conclude it would reject Williams's constitutional challenge. The court has noted that prior juvenile adjudications can be used to enhance adult sentencing, and, in other contexts, it has affirmed the use of prior juvenile adjudications as strikes under section 667, subdivision (d)(3). (See *People v. Lucky* (1988) 45 Cal.3d 259, 295-296, fn. 24; *People v. Davis* (1997) 15 Cal.4th 1096, 1100-1103.) Accordingly, we find Williams's contention to be unavailing.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO STRIKE ONE OR MORE OF WILLIAMS'S STRIKE PRIORS

Williams contends the trial court abused its discretion under section 1385 in declining to dismiss one or more of his prior strikes, because he submitted evidence that he was mentally

and emotionally impaired and had never been to prison, and there was gross disparity between his sentence and Harrison's sentence (pursuant to a negotiated plea) of nine years.

We conclude the court was well within its discretion in deciding not to dismiss one or more of Williams's strike priors. (In doing so, we necessarily reject the Attorney General's suggestion that we cannot review a trial court's decision not exercise its discretion under section 1385 to dismiss a prior strike conviction or adjudication. (See *People v. Cole* (2001) 88 Cal.App.4th 850, 873, and cases cited therein.).) The trial court considered the mitigating factors presented by Williams, as well as the sentence imposed on Harrison and Harrison's record. However, it concluded that dismissing one or more of Williams's prior strikes would be inappropriate because Williams's criminal history was lengthy, serious and continuous; he had "conducted himself as a predator upon the community at large"; and the instant crimes were serious and violent. We concur. Indeed, Williams has a lengthy, virtually uninterrupted juvenile record that became increasingly serious and violent. Soon after reaching adulthood in 1997, Williams was convicted of robbery, and as a result, was sentenced to three years probation with 365 days in jail. He failed to remain law abiding on probation, committing burglary in May 1999. Finally, the instant crimes are particularly heinous and demonstrate Williams's increased and continued violent, predatory behavior.

IMPOSITION OF TWO 5-YEAR ENHANCEMENTS
FOR WILLIAMS'S TWO SERIOUS FELONY PRIORS

On the same day that Williams was sentenced in this case, he was sentenced on his burglary conviction in SCE197202, and the court imposed two 5-year enhancements under section 667, subdivision (a)(1) based on William's having suffered two serious

felony priors. In the instant case, the trial court imposed two 5-year serious felony enhancements based on the same two priors. The court declined to stay imposition of the two 5-year enhancements, concluding they could be imposed in both cases, and ordered the sentence in this case to run consecutively to the sentence imposed in SCE197202.

Williams contends that since two 5-year enhancements were imposed in SCE197202, the imposition in the instant case of two 5-year enhancements based on the same priors was unauthorized because under section 1170.1, subdivision (a), serious prior felony priors charged under section 667 "go to the offender, not the offense." He maintains that had the prosecution joined the burglary and sexual assault charges in one proceeding and the jury convicted him on all counts, the court could only have imposed a single 5-year enhancement for each of his two serious felony priors. We disagree. Section 1170.1 does not apply to defendants, such as Williams, who have two prior strikes. (*People v. Nguyen* (1999) 21 Cal.4th 197, 205; *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1380.) In sentencing three strikes defendants, the calculation of the minimum term (here, 35 years, including the two 5-year enhancements under section 667, subdivision (a)(1)), is performed separately for each new *offense*, whether or not sentence on the various counts is imposed consecutively. (See *People v. Nguyen*, *supra*, at p. 205; *People v. Byrd*, *supra*, at p. 1380.) Thus, the trial court correctly included the two 5-year enhancements in sentencing Williams in the instant case. (*People v. Byrd*, *supra*, at p. 1380.)

DISPOSITION

The judgment is affirmed.

McINTYRE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

McCONNELL, J.