Filed 9/29/06 P. v. Evans CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GENE EVANS,

Defendant and Appellant.

F047507

(Super. Ct. No. 109279)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. William Silveira, Jr., Judge.

Deanna F. Lamb, 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, Stephen G. Herndon and Maureen A. Daly, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

PROCEDURAL HISTORY

Appellant Gene Evans was charged with 11 felony counts, including kidnapping to commit rape, forcible rape, two counts of forcible oral copulation, forcible penetration with a foreign object, carjacking, second degree robbery, assault with a deadly weapon, auto theft, and two counts of false imprisonment by violence. The counts all arose out of an attack on Maria Q., whom appellant forced off the road in the early morning hours of October 8, 2000, in a rural area of Tulare County. The jury found appellant guilty of all 11 counts. The jury also found true numerous special allegations of the information, including allegations of aggravated sexual assault (Pen. Code,[1] § 667.61, One Strike law) and kidnapping for sexual purposes (§ 667.8). In a bifurcated proceeding, the trial court found appellant had been convicted of five prior convictions of section 245, subdivision (c); eight prior serious felonies within the meaning of section 667, subdivision (a)(1); had suffered 11 prior strike convictions within the meaning of section 667, subdivisions (b) through (i), and section 1170.12; and had served 11 prior prison terms (§ 667.5). Appellant was sentenced to a total prison term of 301 years to life.

FACTUAL SUMMARY

On the evening of October 7, 2000, Maria Q. had a date to go to the Fresno Fair. After visiting the fair, Maria and her boyfriend had consensual sex near Reedley College where Maria had earlier left her car. Maria then left in her car to drive home to Orange Cove. A large SUV began tailgating her and ultimately struck Maria's Saturn, forcing her off the road. Appellant approached the Saturn, pulled Maria out of the vehicle, struck her with a pair of bolt cutters and forced Maria into the SUV. Although Maria begged appellant to let her go, appellant said he would only after they had "fun." Appellant

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

stopped in an orange orchard. There, he forced Maria to orally copulate him, forcibly penetrated her vagina with his fingers, and raped Maria. He did not ejaculate.

Appellant tied Maria's hands in front of her using her blouse and bra. He drove away from the orchard and returned to Maria's Saturn. He forced Maria to give him her keys, forced her into the Saturn and then drove away to another location where he again forced Maria to orally copulate him. This time appellant ejaculated. Appellant then untied Maria's hands and wrapped the blouse around Maria's neck, choking her. He then drove Maria to a different location, where he tried to push the car, with Maria inside, into the canal. Maria begged appellant not to kill her. Appellant drove them to another location. Maria tried to escape but was not successful. Appellant broke the dome light in Maria's car and took $80 from Maria's purse. Appellant finally decided to let Maria go. She got out of the car and hid in a nearby field. Appellant returned but was unable to find her. After appellant left, Maria walked to a house and sought assistance.

Maria was taken to the hospital where she was examined and provided a statement to officers. Her injuries were consistent with her statement. She described her assailant. Several possible suspects were investigated. At various times, Maria said she was 95 percent sure that one or more of these possible suspects were her attacker. After appellant was identified as a possible suspect, he was included in a photographic lineup shown to Maria. Maria said appellant resembled her attacker, but she was unable to give a positive identification.

DNA evidence was collected. The DNA markers collected from Maria's vagina were attributable only to Maria and her consensual sexual partner. There were nine semen stains found on Maria's blouse. Those stains contained DNA consistent with appellant's DNA. Expert testimony established that, statistically, the chance of finding the same genetic profile at random is one in 2.1 trillion for the African-American population, one in 380 billion for the Caucasian population, and one in 820 billion for the

Hispanic population. Appellant is a Caucasian. Given that there are only six billion people on earth, the expert concluded that the semen was attributable to appellant.

The SUV was not found and no SUV was tied to appellant. Maria's Saturn was later found in the Friant-Kern Canal. Other evidence was collected at the various attack sites substantiating Maria's report, but there was no further physical evidence tying appellant to the attacks. Maria's bra was found under the seat tied in a knot.

Appellant was a chronic paranoid schizophrenic, with a low IQ, and who had not been taking his medication regularly. At the time of the offense, appellant lived with his mother near Reedley College.

DISCUSSION

I. Denial of mistrial

Appellant contends the trial court erred when it refused to grant a mistrial after a prosecution witness referred to appellant's parole status in violation of a pretrial court order. We disagree.

Prior to the start of trial, the court ordered the prosecutor to instruct her witnesses not to refer to appellant's prior custody status. During trial, the prosecutor called investigating officer Detective Arnold, who was asked whether he had been told that appellant matched the description of the suspect in this case. The detective answered that he had been. He was then asked whether, as a result of this information, he had created a photographic lineup to show the victim. The detective answered, "Yes. I obtained [a picture] from his parole officer." Defense counsel immediately objected and moved for a mistrial, reminding the court of the pretrial order. The motion was denied. After the court denied the motion for mistrial, defense counsel asked that the court admonish the jury. The court agreed to do so and instructed the jury as follows:

> "Ladies and gentlemen, Detective Arnold testified as to a source of a photograph that he used in preparing a photo line-up, which was -- he said he had gotten from a parole officer. [¶] You are not to speculate as to

> whether the defendant was or wasn't on parole, or if he was, what the reason for it was. That whole issue must not in any way affect your judgment in this case or be of the slightest consideration to you in any manner."

"We review the denial of a motion for mistrial under the deferential abuse of discretion standard. [Citations.] 'A motion for mistrial is directed to the sound discretion of the trial court. We have explained that "[a] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions."' [Citations.]" (*People v. Cox* (2003) 30 Cal.4th 916, 953.)

It was not an abuse of discretion to conclude that the single, isolated reference to appellant's parole status would not lead to such incurable prejudice as to justify a mistrial. An unsolicited reference to a defendant's past criminal behavior might unduly prejudice a jury against a defendant under some circumstances, but not in this case. (See Evid. Code, § 1101, subd. (a) [evidence of uncharged crimes to prove a defendant's propensity to commit similar crimes generally not admissible]; *People v. Bracamonte* (1981) 119 Cal.App.3d 644, 650-651 [evidence of prior crimes, including evidence of two prior identical burglaries, prejudiced defendant], disapproved on other grounds in *People v. Calderon* (1994) 9 Cal.4th 69.) The single reference gave no information about the nature of appellant's prior offenses, and there was no connection made between appellant's parole status and the offenses charged. There was nothing to suggest a propensity to commit the type of offenses charged. The jury was properly and immediately instructed to disregard the reference and not to consider it when deliberating the case. We will presume the jury followed the court's admonition. (*People v. Panah* (2005) 35 Cal.4th 395, 454; see also *People v. Valdez* (2004) 32 Cal.4th 73, 125 [isolated reference to prohibited matter not so grave that a curative instruction would not have mitigated any possible prejudice to defendant].) "A trial court should grant a mistrial

only when a party's chances of receiving a fair trial have been irreparably damaged …." (*People v. Bolden* (2002) 29 Cal.4th 515, 555 [standard not met where fleeting reference to parole status insignificant in light of strong evidence of guilt].)

Regarding appellant's claim that the prosecutor engaged in misconduct by failing "in her duty to guard against inadmissible testimony," we find no record support for appellant's assertion. A prosecutor engages in misconduct by intentionally eliciting inadmissible testimony. (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) The prosecutor assured the court that she had talked to the detective before trial about the court's admonitions. She did not intentionally solicit the officer's reference to appellant's parole status, but asked if he had created a photo line-up with appellant in it. (See *People v. Valdez, supra,* 32 Cal.4th 73, 125 [no misconduct where prosecutor did not intentionally solicit impermissible reference].)

In any event, even if we were to find either trial court error or prosecutorial misconduct, there is no prejudice to appellant requiring reversal. In light of the strong evidence of guilt, the essentially irrefutable DNA evidence tying appellant to the semen stains on Maria's blouse, and no other possible explanation for the stains being there, the isolated brief reference to appellant's parole status would not have resulted in a decision more favorable to appellant. (*People v. Dominguez* (1981) 121 Cal.App.3d 481, 501 [no prejudice because other substantial evidence points to defendant's guilt, thus not reasonably probable he would have obtained a more favorable result had remarks about his parole status not been made].)

We are not persuaded by appellant's argument that, because Maria could not identify her attacker and appellant offered alibis for his weekends in October 2000, the evidence of guilt was weak. Appellant's residence was within a mile of Reedley College where Maria left her boyfriend to drive home to Orange Cove. Appellant's alibi testimony was nearly nonexistent. Appellant's sister testified only that she lived in Fresno in October 2000 and visited her brother and mother in Reedley every weekend.

She testified, "I can't tell you if I was or if I wasn't [with appellant on either October 7 or 8]. But more than likely I was …." She did not say that she was personally with him during the time of the attack. Although Maria could not positively identify her attacker, she did describe him, and appellant fit her description. The other inconsistencies in the evidence noted by appellant are small in light of the strength of the DNA evidence.

II. Biblical reference

Appellant next contends that the trial court denied him effective assistance of counsel when it admonished the jury that defense counsel's biblical reference in closing argument was "an analogy." We will decide the issue on the merits despite respondent's contention that the issue has been waived for failure to object.

During closing argument, defense counsel made reference to the biblical account of Doubting Thomas. He explained that Thomas told Christ that he could believe Christ had risen from the grave only if he could put his fist into Christ's side and his fingers through the holes in Christ's hands. Defense counsel argued that the jury likewise must question everything in deciding the case, including the DNA evidence presented. When instructing the jury, the trial court admonished them as follows:

> "Yesterday in his argument Mr. Terry made an analogy to something from the scriptures regarding Thomas. And I want to caution you that when you are deliberating on the evidence that your deliberations must be about the evidence in light of the instructions I am giving you, and that you shouldn't be quoting scripture back to each other or recalling the rest of what was contained in the scripture or anything of that nature. [¶] It was an analogy. It was used as an example. And while scripture certainly has its place in your spiritual lives, this case must be decided on the evidence and the law that I give to you in these instructions."

First, there was nothing improper about defense counsel's argument. The trial court never said there was anything wrong with it. "'The primary vice in referring to the Bible and other religious authority is that such argument may "diminish the jury's sense of responsibility for its verdict and … imply that another, higher law should be applied in

capital cases, displacing the law in the court's instructions."' [Citations.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 389.) Here, the biblical reference was brief, was not calculated to appeal to the jury's religious passions or prejudices, and was not offered as higher authority but was offered to direct the jury to its task of weighing all the evidence and argument presented. (See *People v. Williams* (1988) 45 Cal.3d 1268, 1325 [rejecting claim of misconduct involving prosecutor's brief and neutral quotation from Book of Exodus]; see also *People v. Gionis* (1995) 9 Cal.4th 1196, 1219-1220 [no prejudice when prosecutor's reading of biblical passage simply served to redirect the jury's attention to the evidence and its duty to convict or acquit defendant based on that evidence].) Second, the trial court's instruction was a correct statement of the law and served only to remind the jury that it could not look to scriptures for guidance in deciding the case, but that it was bound to follow the instructions given by the court. (*People v. Harrison* (2005) 35 Cal.4th 208, 247 [religious input has no legitimate role to play in jury deliberation process].) It did not undermine, criticize, or impair defense counsel's argument. It did not, as appellant has represented, instruct the jury to "ignore a portion of the defense argument in deliberations …." If anything, it highlighted the argument, explaining that it was an analogy and to be considered an example. The only restrictions imposed on the jury's deliberations were those found in the established law of this state. Those same restrictions are stated clearly in the instructions given to the jury,[2] which have not been challenged on appeal.

---

[2]Immediately following the admonition, the court told the jury, "I have not intended by anything I have done or by any question that I may have asked or by any ruling I have made to intimate or suggest what you should find to be the facts …." The jury was also instructed that it must determine the facts from the evidence received at trial and not from any other source. It was told it must follow the law as the court stated it, regardless of whether the jurors agreed with it, and "[i]f anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with [the court's] instructions on the law," the jurors are required to follow the law as given. The jury was also told that both the prosecution and the defendant have a right to expect

There was nothing improper about the court's comments and we can conceive of no possibility, under any standard of review, that the comments impaired appellant's right to effective assistance of counsel.

III. Blakely error

Appellant contends he was denied his Sixth Amendment right to a jury trial when the court imposed full, consecutive life sentences on the forcible sex offenses, pursuant to section 667.6, subdivision (d),[3] citing *Blakely v. Washington* (2004) 542 U.S. 296 and *Apprendi v. New Jersey* (2000) 530 U.S. 466. By statute, the trial court at sentencing is empowered to determine whether multiple sexual offenses occurred on separate occasions for purposes of imposing full consecutive terms. (See § 667.6, subd. (d); Cal. Rules of Court, rule 4.426(a)(2).) We reject appellant's argument because our state Supreme Court has upheld the imposition of consecutive sentences based on facts determined by the trial court, not admitted by appellant or found by a jury. These sentences do 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, 1254; see also *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230 [following *Black* analysis where imposition of mandatory consecutive sentencing based on trial court finding that sexual offenses occurred on separate occasions].) As an intermediate appellate court, we are bound to follow *Black.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) (We are aware that the United States Supreme Court has agreed to review the question of the applicability of *Blakely* to California sentencing in *People v. Cunningham* (Apr. 18,

---

that the jury "will conscientiously [consider] and weigh the evidence, apply the law, and reach a just verdict [regardless] of the consequences."

[3]Although neither party raises the issue, the abstract of judgment fails to record that the consecutive sentences were imposed pursuant to section 667.6, even though it is clear the court did so. The abstract should note this at line 8.

2005, A103501), cert. granted *sub nom. Cunningham v. California* (2006) 126 S.Ct. 1329.)

IV. Three Strikes sentence on count one

Appellant also challenges the sentence imposed on count one, kidnap for purposes of rape. After finding true the special allegations attached to count one, making the offense eligible for sentencing under California's Three Strikes law, the court imposed a term of 75 years to life. This was error, as respondent concedes. Since the minimum parole eligibility for the offense is seven years (§ 3046), the correct sentence on count one is 25 years to life, plus enhancements. (*People v. Acosta* (2002) 29 Cal.4th 105, 115; *People v. Jefferson* (1999) 21 Cal.4th 86, 99.) The total term should be reduced to 251 years to life.

V. Section 1465.8 security fee

Lastly, appellant contends that the trial court erred in ordering him to pay a security fee pursuant to section 1465.8, subdivision (a)(1), because his crimes were committed before the effective date of the statute. Section 1465.8 was enacted on August 2, 2003, and became effective August 17, 2003 (Stats. 2003, ch. 159, § 25). It reads as follows: "(a)(1) To ensure and maintain adequate funding for court security, a fee of twenty dollars ($20) shall be imposed on every conviction for a criminal offense …." Appellant relies on an opinion issued in *People v. Carmichael* (2006) 135 Cal.App.4th 937, review granted May 10, 2006, S141415. The court in *Carmichael* held that imposition of the security fee after conviction, where the conduct underlying the conviction was completed prior to the effective date of the statute, necessarily adds to the legal consequences of the conduct and the retroactive application of the statute is improper under section 3. Section 3 provides that none of the provisions of California's Penal Code are retroactive unless expressly so declared.

The same issue was addressed in *People v. Alford* (2006) 137 Cal.App.4th 612, 619, review granted May 10, 2006, S142508, which reached the opposite conclusion,

concluding that, although the offense was committed before the statute was effective, the proceedings for which the fee was collected took place after the statute's effective date. The court found that the imposition of the $20 fee did not carry with it a propensity for unfairness disfavoring retroactive application and that the fee was not punitive so as to invoke the ex post facto prohibition of the United States Constitution.[4] As noted, the California Supreme Court has granted review in both cases.

Both sides of the coin have been sufficiently identified in these two cases. Recognizing that the issue will be decided by the California Supreme Court, we conclude at this juncture the analysis and conclusion reached in *Alford* to be more persuasive. "In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date. [Citations.] Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. [Citations.] A law is not retroactive 'merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.' [Citation.]" (*People v. Grant* (1999) 20 Cal.4th 150, 157.) The purpose of section 1465.8 is "[t]o ensure and maintain adequate funding for court security," i.e., to fund general trial court operations. (See § 1465.8, subds. (a)(1) & (d); Gov. Code, § 68085.) It is a fee, not a fine. A fee is a charge for using services or facilities. (See American Heritage College Dict. (3d ed. 2000) pp. 511, 500 [a fine as a "sum of money to be paid as a penalty for an offense,"

---

[4]The ex post facto issue appears to be settled. (See *People v. Wallace* (2004) 120 Cal.App.4th 867, 878 [$20 court security fee is part of an extensive statutory scheme designed to fund court security and does not promote traditional aims of punishment, thus ex post facto clause is not applicable].) Appellant's argument is limited to the retroactivity argument. He does not argue that the fee constitutes punishment within the meaning of the ex post facto clause.

and a fee as a "fixed sum charged, as by an institution or by law, for a privilege"].) The statute fixes the point at which the fee is imposed as the point of "conviction," i.e., upon the entry of a plea or adjudication of guilt. (*Egar v. Superior Court* (2004) 120 Cal.App.4th 1306 [conviction generally is the result of a criminal trial ending in a judgment or sentence that accused is guilty as charged].) Here, the jury found appellant guilty of the charged offenses on November 16, 2004, a date occurring well after the effective date of the statute. The fee was correctly imposed.

DISPOSITION

The judgment of conviction is affirmed. The sentence imposed on count one is reduced to 25 years to life plus the section 667, subdivision (a)(1) (five years), and section 667.5 (one year) enhancements, for a total term of 251 years to life. The trial court shall prepare an abstract of judgment with this correction, as well as noting that appellant was sentenced in accordance with section 667.6, subdivision (d), and distribute revised copies of the abstract to the appropriate authorities.

_____
Wiseman, J.

WE CONCUR:

_____
Harris, Acting P.J.

_____
Cornell, J.