Filed 4/30/07 P. v. Gonzalez CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ENRIQUE GONZALEZ, Defendant and Appellant.	2d Crim. No. B186733 (Super. Ct. No. SA051323) (Los Angeles County)

Enrique Gonzalez appeals his convictions for assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)),[1] discharge of a firearm with gross negligence (§ 246.3), carrying a loaded firearm with a prior misdemeanor conviction (§ 12031, subds. (a)(1) & (a)(2)(A)), second degree robbery (§ 211), and exhibiting a firearm in public (§ 417, subd. (a)(2)). The jury found true allegations that he personally used a firearm in the assault (§ 12022.5), and in the robbery (§ 12022.53, subd. (b)). Gonzalez contends that admission into evidence of hearsay portions of a videotaped police interrogation violated his right to a fair trial. He also challenges the imposition of an upper term sentence based on aggravating factors that were not found true by the jury. We affirm the judgment, but remand for resentencing.

[1] All statutory references are to the Penal Code unless otherwise stated.

FACTS

Gonzalez met two women in a bar in Hawthorne, California. While playing pool together, one of the women felt a gun in Gonzalez's pocket. The women left the bar and went across the street into a restaurant. Gonzalez followed them. In the restaurant, a man identified as a "tall, black man" had a bottle of vodka. When he offered to sell Gonzalez some vodka, Gonzalez got angry and the two men got into an argument. Gonzalez took the vodka bottle from the other man and threw it at him. The other man ran out of the restaurant and Gonzalez pursued him. Gonzalez reached for his gun which was wrapped in a sock, and fired several shots at the "tall, black man" as Gonzalez chased him down the street.

Gonzalez encountered a teenager riding a bicycle and threatened to kill the teenager if he did not give Gonzalez the bicycle. A security guard who had run towards Gonzalez pulled out his weapon and confronted Gonzalez. Gonzalez hit the teenager and got on the bicycle. The security guard grabbed Gonzalez from behind and the two men struggled on the ground. Gonzalez got away from the guard but was apprehended shortly thereafter. The gun used by Gonzalez was found behind the license plate of a car.

DISCUSSION

No Error in Admission of Interrogation Videotape

Gonzalez contends that he was deprived of a fair trial by the trial court's erroneous admission of portions of a videotaped police interrogation consisting of his responses to accusatory statements by a police officer. (U.S. Const., 5th & 14th Amends.) He argues that the officer's statements were prejudicial and irrelevant hearsay and, contrary to the trial court's ruling, did not qualify as the predicate for an adoptive admission under Evidence Code section 1221. We disagree.

"Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) An adoptive admission requires certain foundational facts.

The defendant must understand the nature of the accusatory statement and its circumstances must permit and normally call for a response. If those predicate or foundational facts exist, the accusatory statement is admissible for the purpose of interpreting the defendant's response, and any response by the defendant adopting the statement as true is admissible as an admission. (*People v. Combs* (2004) 34 Cal.4th 821, 843; *People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

As with other rulings on the admission of evidence, we will uphold the admission of a statement as the predicate for an adoptive admission unless the trial court has abused its discretion. (See *People v. Waidla* (2000) 22 Cal.4th 690, 725.) In addition, even the erroneous admission of evidence violates due process only if it renders the trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Partida* (2005) 37 Cal.4th 428, 439.) We conclude that there was no abuse of discretion in this case.

During the interrogation, the police officer recited some of the facts obtained during his investigation. He stated to Gonzalez that, after drinking in a bar, Gonzalez and two women walked to a restaurant.[2] When a man tried to sell him vodka,

---

[2] The exchange in its entirety is: "[Officer:] From all of our accounts, what happened was, you were at The Den, and meeting two females. [¶] And uh, your wife's going to find out eventually, anyway, because she's going to be going into trial with you[.] One of the black girls you kind of take a liking to. You kept trying to kiss her and get close to her, and then eventually, you guys walked across the street to KFC. She goes to the restroom at KFC, you kind of tried to follow her in there, get a little lovin' in the restroom. She says, no, no, no. She comes back out, she goes in, comes back out. [¶] You guys go up to the front, order food. This victim comes in—the black guy—uh, tries to sell a bottle of vodka. And you give him a dollar bill and tell him to get on his way. He gives it back and says he doesn't want your sympathy or pity. You guys get in a big ole' argument. You have a beer, chuck it at him, you miss, it smashes. Then you pull out your gun in the video and you point it at him, and he kind of backs out like this, out the door. And you, just fucking go right after him. [¶] And you start shooting at him and it looks like your gun gets jammed or something, do you remember any of this?

"[Gonzalez:] I don't [followed by inaudible words].

"[Officer:] You clear it, and you chase him, he runs. Eventually you walk down the street, and there's some little kid on a bike, and you point the gun at the kid, you tell him to get the fuck off his bike . . . . He's getting off—or you'll kill him you say, or shoot him, you say. 'I'll kill you, get off the bike.' [¶] He gets off; you take the bike. The security guard sees this. He comes and tackles you. You guys struggle. During the struggle you must have put the gun behind the thing, behind the license plate. And then you're struggling with him with his gun—that's the gun you remember seeing. [¶] Eventually

Gonzalez chased the other man down the street "shooting at him." The officer then asked, "do you remember any of this," and Gonzalez responded: "I don't [followed by inaudible words]." The officer resumed by stating, among other things, that Gonzalez was tackled by a security guard after taking a bicycle from a boy. The officer ended by stating: "And that's a nutshell of what happened." Gonzalez said: "Yeah."

At trial, Gonzalez objected to admission of the statement that Gonzalez chased the other man down the street, and the officer's statement during another portion of the interrogation that intoxication was legally irrelevant to the charges. Gonzalez did not object that any statement by the officer failed to qualify as a predicate for an adoptive admission. Defense counsel also was silent when the court treated the Gonzalez objections as being based on Evidence Code section 352, and overruled the objections on that ground.

Based on this record, we conclude that Gonzalez waived the adoptive admission issue by failing to object at trial. Evidentiary objections must specify the ground for objection being raised on appeal. (Evid. Code, § 353, subd. (a); *People v. Waidla, supra*, 22 Cal.4th at p. 717.) Gonzalez did not object to the entire exchange with the officer or otherwise challenge admission of the evidence as part of an adoptive admission.

Even if the issue had been preserved on appeal, there was no error. Gonzalez's responses could be interpreted reasonably as an adoption of the officer's accusations as true. Although he claimed memory loss due to intoxication, the record shows that Gonzalez understood the critical statements made by the interrogating officer and the need for a response.

---

another guy comes in, out of the restaurant, pulls the gun out and takes it; and you escape and run down the street where you're caught by police. And that's a nutshell of what happened.

"[Gonzalez:] Yeah."

Moreover, the trial court told the jurors to listen to the tape and decide for themselves what was being said and by whom. Thus, it was up to the jury to decide what words defendant spoke and whether through his words or silence he adopted the comments by the interrogating officer. In doing so, the jury could have considered factors such as tone of voice and body language that are not reflected in the transcript. (See *People v. Edelbacher* (1989) 47 Cal.3d 983, 1011[whether a defendant's words and conduct constitute an admission is a question for the jury].)

Gonzalez argues that it is fundamentally unfair to use the officer's statements as the basis for adoptive admissions because the statements were in the form of a long narrative of multiple facts that reasonably could not be admitted or denied on a point-by-point basis. In so doing, he relies on *People v. Sanders* (1970) 75 Cal.App.3d 501. In *Sanders,* the trial court allowed the jury to review a 36-page transcript of a police interrogation including damaging admissions by the defendant. The transcript contained long narrative passages of facts obtained by the police during their investigation. (*Id.,* at pp. 507-508.)

The court concluded that it was "fundamentally unfair to expect point-by-point denials of long narrative statements, containing several facts as well as theories and inferences--particularly where the statements are not in question form." (*People v. Sanders, supra,* 75 Cal.App.3d at p. 508.) The court explained that the statements enabled the People to restate its case through double hearsay, and rehabilitate "badly impeached witnesses." (*Ibid.*) Nevertheless, the court declined to rule that admission of the statements was prejudicial error apart from an instructional error which the court called a "worse problem." (*Id.,* at pp. 508, 511-512.)

The *Sanders* case is readily distinguishable. The instant case involved no instructional error, all of the statements by the interrogating officers were supported by witness testimony, and there were no "badly impeached witnesses" who needed rehabilitation. In addition, although including multiple facts not in question form, the accusatory statements in the instant case were much shorter and to the point than the

narrative in *Sanders*. They also did not include the inflammatory conclusions that were a significant part of the *Sanders* narrative.

Gonzalez also argues that the trial court improperly admitted a statement by the police officer regarding the effect of his intoxication. In commenting on Gonzalez's claim that he was too drunk to remember, the officer stated: "[W]hether you were drunk or whether you were stone sober, it doesn't matter. . . . Intoxication isn't an excuse . . . ." Although not entirely correct as a matter of law, this comment was substantially accurate. Also, the jury was properly instructed on the law regarding voluntary intoxication, and there is no basis in the record to conclude that the jury could have been misled by the officer's comments.

Remand Required for Resentencing

The trial court imposed an upper term sentence on Gonzalez. He contends that the sentence was based on sentencing factors not tried by a jury in violation of his Sixth Amendment right to jury trial and due process. Subsequent to the briefing of the case, the United States Supreme Court invalidated the portion of California's Determinate Sentencing Law that permits a judge to impose an upper term sentence based on aggravating sentencing factors that are not determined by a jury. (*Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856], overruling *People v. Black* (2005) 35 Cal.4th 1238 in part.) Accordingly, we will vacate the sentence and remand for resentencing consistent with the *Cunningham* case.

DISPOSITION

Gonzalez's upper term sentence is vacated and the matter remanded for resentencing consistent with *Cunningham v. California, supra,* 127 S.Ct. 856. The trial court is directed to prepare an amended abstract of judgment in accordance with this disposition and deliver it to the Department of Corrections. In all other respects the

judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James R. Brandlin, Judge

Superior Court County of Los Angeles

Joanna Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Larry M. Daniels, Supervising Deputy Attorney General, Michael C. Keller, Beverly K. Falk, Deputy Attorneys General, for Plaintiff and Respondent.