Filed 3/27/08 P. v. Pinks 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

THE PEOPLE, Plaintiff and Respondent, v. LENNOX WINSTON PINKS, Defendant and Appellant.	B198046 (Los Angeles County Super. Ct. No. KA 076726)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles E. Horan, Judge. Reversed in part with directions and affirmed in part.

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Cindy Brines, 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, Assistant Attorney General, Lance E. Winters and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

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Lennox Winston Pinks was convicted of two counts of robbery and one count of possession of marijuana for sale. He appeals, arguing that the trial court committed two instructional errors and that one of his robbery convictions is not supported by substantial evidence. We agree with his substantial evidence argument and therefore reverse one robbery conviction, but we otherwise affirm.

BACKGROUND

The second amended information charged Pinks with two counts of second degree robbery in violation of Penal Code section 211[1] (counts 1 and 2) and one count of possession of marijuana for sale in violation of Health and Safety Code section 11359. The information further alleged that, in committing the robberies alleged in counts 1 and 2, Pinks personally used a firearm within the meaning of section 12022.53, subdivision (b).

Pinks pleaded not guilty and denied the special allegations. A jury convicted him on all counts and found the firearm allegations true. The trial court sentenced him to 13 years and 8 months in state prison, calculated as follows: the midterm of 3 years, plus 10 years for the firearm enhancement, on each of counts 1 and 2, the sentences to run concurrently; plus the midterm of 8 months on count 3, to run consecutively.

The evidence showed that in the evening of October 5, 2006, Pinks entered a convenience store carrying a gun. Pinks pointed the gun first at the box boy and then at the cashier, and he demanded money from the cashier. The cashier initially refused Pinks' demand but ultimately complied and opened the cash register drawer, from which Pinks took $120 to $130. The box boy phoned the owner of the store and informed him of the robbery, and the owner called the police.

Pinks was apprehended less than one week later. In custody, he initially denied involvement in the robbery but later admitted it after being shown footage from a surveillance camera, and he said he had used a pellet gun or BB gun in the robbery. At

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1 All subsequent statutory references are to the Penal Code unless otherwise indicated.

trial, the cashier testified that he had observed the gun closely, and it appeared to be a "real gun."

DISCUSSION

I. No Duty to Instruct on Lesser Included Enhancements

The trial court instructed the jury on the sentencing enhancement for personal use of a firearm. Pinks argues that the trial court had a duty to instruct the jury sua sponte concerning the lesser included enhancement for personal use of a deadly or dangerous weapon because the record contained substantial evidence that Pinks used a pellet gun or BB gun, which is a deadly or dangerous weapon but not a firearm. We disagree because, as a matter of law, the trial court has no duty to instruct the jury sua sponte on lesser included enhancements.

In *People v. Majors* (1998) 18 Cal.4th 385, the California Supreme Court held that "a trial court's sua sponte obligation to instruct on lesser included offenses does not encompass an obligation to instruct on 'lesser included enhancements.'" (*Id.* at p. 411.) Pinks argues that we are not bound by that case, however, because it was implicitly overruled by the United States Supreme Court's statement in *Apprendi v. New Jersey* (2000) 530 U.S. 466, that a "'sentence enhancement' . . . is the functional equivalent of an element of a greater offense." (*Id.* at p. 494, fn. 19.) The argument fails because the statement in *Apprendi* means only that, *for purposes of the due process requirement that every fact which increases the maximum penalty to which the defendant is exposed must by found by a jury beyond a reasonable doubt*, a sentence enhancement is the functional equivalent of an element of a greater offense. *Apprendi* had nothing to do with a court's sua sponte obligation to instruct on lesser included offenses or lesser included enhancements. *Apprendi* therefore did not overrule the California Supreme Court's holding that trial courts have no sua sponte obligation to instruct on lesser included enhancements.

The two other cases on which Pinks relies are likewise inapposite. *People v. Breverman*, *supra*, 19 Cal.4th at pages 148-149, dealt only with the sua sponte obligation

to instruct on lesser included offenses, not lesser included enhancements. We consequently cannot agree with Pinks' suggestion that *Breverman* implicitly overruled *People v. Majors*, *supra*, 18 Cal.4th 385, which was decided only a few months earlier. Pinks' reliance on *People v. Sengpadychith* (2001) 26 Cal.4th 316, too is misplaced, because that case did not deal with the sua sponte obligation to instruct on lesser included offenses *or* lesser included enhancements.

For all of these reasons, we reject Pinks' argument that the trial court had a duty to instruct the jury sua sponte concerning the lesser included enhancement for personal use of a deadly or dangerous weapon.

II. Waiver of Other Claim of Instructional Error

Pinks argues that the trial court erred by failing to instruct the jury on the definition of a BB gun. We conclude that Pinks has forfeited this claim by failing to raise it in the trial court.

"[T]he trial court normally must, even in the absence of a request, instruct on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case." (*People v. Carter* (2003) 30 Cal.4th 1166, 1219.) At the same time, however, "[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Lang* (1989) 49 Cal.3d 991, 1024.)

Pinks did not request a clarifying instruction concerning the definition of a BB gun, so he has waived the issue unless he can demonstrate that the instructions given were not "correct in law." (*People v. Lang*, *supra*, 49 Cal.3d at p. 1024.) He cannot. The trial court instructed the jury on the definition of a firearm. The instruction was correct and adequate as given, because it correctly informed the jury of the facts the jury needed to find in order to find that the weapon Pinks used was a firearm within the meaning of the enhancement. Pinks' failure to request additional clarifying instructions

"bars appellate review of the issue" on direct appeal. (*People v. Johnson* (1993) 6 Cal.4th 1, 52.)

III. No Evidence of Constructive Possession with Respect to the Box Boy

Pinks argues that his conviction for robbery of the box boy must be reversed because (1) the box boy's status as an employee of the store is not, in itself, sufficient to prove that the box boy had constructive possession of the cash that Pinks took, and (2) the record contains no other evidence that is sufficient to support a finding of constructive possession. We agree.

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Possession, however, may be constructive. In *People v. Nguyen* (2000) 24 Cal.4th 756, the court noted that "the theory of constructive possession has been used to expand the concept of possession to include employees and others." (*Id.* at p. 762.) For example, employees and security guards have been held to be victims of store robberies even though they had no actual (as opposed to constructive) possessory interest in the property stolen. (*Id.* at p. 761.) They have sufficient representative capacity on behalf of the owner to be considered robbery victims. (*Ibid.*)

In determining whether employees have constructive possession of property taken from a business, some cases have held that "business employees—whatever their function—have sufficient representative capacity to their employer so as to be in possession of property stolen from the business owner." (*People v. Jones* (2000) 82 Cal.App.4th 485, 491; accord, *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 521.) Others have held that the court must engage in "a fact-based inquiry regarding constructive possession by an employee victim . . . . That is, . . . the proper standard to determine whether a robbery conviction can be sustained as to an employee who does not have actual possession of the stolen property is whether the circumstances indicate the employee has sufficient representative capacity with respect to the owner of the property, so as to have express or implied authority over the property. Under this standard,

employee status does not alone as a matter of law establish constructive possession." (*People v. Frazer* (2003) 106 Cal.App.4th 1105, 1115.)[2]

We agree that constructive possession must be based on more than just employee status. The employee must have express or implied authority over the property before it can be said to be in his constructive possession. (*People v. Frazer*, *supra*, 106 Cal.App.4th at p. 1115; cf. *In re Daniel G.* (2004) 120 Cal.App.4th 824, 831 [a person has constructive possession of an item if he "knowingly exercises control or the right to control the object"]; accord, *People v. Morante* (1999) 20 Cal.4th 403, 417.)

We also agree that, apart from the box boy's status as an employee, no other evidence supports a finding that the box boy had constructive possession of the cash in the store. The evidence introduced at trial showed that the box boy's duties were "stocking the merchandise on the cooler and on the shelves." The record contains no evidence that he had the duty or the authority to handle cash. The box boy did not even testify that he knew how to operate the register.

Respondent's only argument concerning the sufficiency of the evidence under the standard we adopt is that a finding of constructive possession is supported because the box boy "was the one who called [the store owner] to inform him of the robbery." The argument fails, because the box boy's calling the store owner does not show that the box boy had express or implied authority over any of the cash in the store.

Because the record does not contain sufficient evidence to support a finding that the box boy had constructive possession of the property that Pinks took, we reverse Pinks' conviction for robbery of the box boy.

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2 The issue is before the Supreme Court in *People v. Scott*, review granted Nov. 16, 2005, S136498.

DISPOSITION

The judgment is reversed as to count 2. The trial court is directed to dismiss count 2, prepare an amended abstract of judgment so stating, and forward a corrected copy to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, Acting P. J.

JACKSON, J.*

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* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)