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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G036194
v.	(Super. Ct. No. 04NF2793)
DANIEL BOY SALINAS III,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Carla M. Singer, Judge. Affirmed.

Martha L. McGill, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, David Delgado-Rucci and Pat Zaharopoulos, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Daniel Boy Salinas III was convicted of five counts of second-degree robbery; the jury also found true he personally used a knife as to one count and personally used a firearm as to four counts. He was sentenced to 27 years and 4 months based on the court's decision to impose consecutive sentences pursuant to Penal Code section 669. Specifically, on count 2, the principal count, he received a middle term of 3 years plus a 10-year consecutive term on the firearm enhancement. On count 1 the sentence was one year, equal to one-third the midterm, and an additional consecutive four months for the firearm enhancement. For each of counts 3, 4, and 5, he received consecutive one-year sentences, equal to one-third the midterm, plus 40 months, to be served consecutively, for the firearm use.

Defendant appeals, claiming the court improperly usurped the jury's function when it incorrectly told the jury that two witnesses had identified him as the robber and under *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*) the consecutive sentences were invalid. Because both claims lack merit we affirm the judgment.

FACTS

During a six-week period two gas stations and one doughnut shop in La Habra were robbed for a total of five times. There were five different victims; the two whose identification testimony is at issue are Maria Sanchez and Cecilio Lopez.

The modus operandi of the robber was the same or very similar in each robbery. In four he used a gun; three times he pulled up his shirt to show it to the victims and one time he pointed it. Two of the victims testified that the gun police found wrapped in a bandanna in defendant's closet looked like the one used in the robbery. In one instance a knife was used. The victim in that crime testified that the knife police found on top of defendant's bed looked like the one used.

In the four gas station robberies, defendant entered the store and asked for Kool cigarettes. After the victims reached for the cigarettes, defendant showed the gun. Defendant smokes Kools and they were found in his bedroom by police.

Four of the five victims testified the robber wore a blue baseball cap; three stated it had an "LA" logo on it. Police found a Los Angeles Dodgers baseball cap in the laundry room of the house defendant lived in with his father. At trial, his father identified it as defendant's, and the cap had defendant's name in it.

Three of the robberies were captured on video surveillance; the tapes were shown to the jury. Each victim testified the man in the video was the robber. At least one video showed a Ford Crown Victoria in the parking lot. Police later discovered defendant's father owned such a car that he allowed defendant to drive.

The victims were shown six-pack photo lineups. The witness from the doughnut shop knew defendant as a regular customer and positively identified him. Lopez and one other witness picked defendant, although they were not absolutely positive. The officer who presented the lineup to a fourth witness testified he said defendant's photo stood out although he was not sure. Sanchez could not pick anyone from the six-pack.

At trial two witnesses positively identified defendant as the robber. A third was not sure. The identification testimony of the other two witnesses, Sanchez and Lopez, is the issue of this appeal.

When Sanchez was asked if anyone in the courtroom looked like the robber, she first pointed to a juror and said, "Looks like him." She did so because "he was more or less like him, a little bit heavy." But she selected him "[o]nly because of his body, but not his face." And she had not yet seen defendant.

After the court asked her to "look around the entire courtroom before you answer," Sanchez testified, "Looks like him over there, the one who is seated," wearing

"[t]he shirt that has stripes." The court stated: "Record will reflect the witness has identified the defendant."

Sanchez was apparently visibly upset, causing the court to ask if she needed a break, water, or a tissue. When questioned why she was upset, she replied she was afraid and stated, "I get very much nervous as I look at him."

When Lopez was asked if he saw the robber in the courtroom, he testified, "Looks like that person. (Indicating.)" When asked to be more specific he said, "It's that person who is on that side, white shirt" who "does not wear a tie." The court stated, "The witness has identified the defendant."

In imposing consecutive sentences, the court noted that the crimes "occurred on different dates, at different times with different victims . . . . [¶] The rules of court tell us that when there are crimes and objectives . . . predominantly independent of each other, and when the crimes involve separate acts of violence or threats of violence, and when the crimes are committed at different times or separate places, . . . consecutive sentencing is appropriate . . . ."

DISCUSSION

1. Court's Use of "Identified"

The defense was that defendant did not commit the robberies and this turned on the identity of the robber. Defendant contends the court erred in its statement during the testimony of two victims that they had "identified" defendant. We disagree.

There is no evidence the court meant anything other than to specify for the record that the witnesses had pointed out defendant as the person they were describing. Nothing in the record suggests counsel for the parties understood the court's use of the word to indicate anything more than that. In fact, when another witness was asked whether she saw the robber in the courtroom and described defendant, pointing to him,

the district attorney stated, "May the record reflect that the witness has identified the defendant[.]" There was no objection and this use of the word "identified" has not been raised in the appeal.

Furthermore, when the witness from the doughnut shop pointed to defendant as the person who robbed her store, the court stated, "Record will reflect she has identified the defendant . . . ." Again, there was no objection to this statement nor was it raised in the appeal. This is further confirmation both that the word was not used in any but the most benign sense and that the jurors would not construe it otherwise.

Defendant apparently is concerned about the court's use of "identified" only as to the testimony of Sanchez and Lopez, because their statements pointing out defendant as the robber were not absolute, that is, they both said something to the effect that defendant "looked like" the robber. This does not change our analysis. In context, nothing in the court's statement that the witnesses had identified defendant indicated to the jury that it was making a factual determination that defendant was the robber. The equivocal testimony went to the weight of the evidence, something exclusively within the jury's province that we do not consider on appeal. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Nor is there any evidence the jury interpreted the court's statement to mean that defendant was the person who had committed the robberies. The jury was still charged with making that determination. In addition to the challenged testimony and court statements, the jury had positive identification by two other witnesses, the six-pack identifications, and the videos showing defendant committing the robberies. It also had the cigarettes, the baseball cap, the knife, the gun, and the car as evidence, tying defendant to each offense.

Moreover, the jury was instructed with CALJIC No. 17.30: "I have not intended by anything I have said or done . . . to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. If anything I have done or said

has seemed to so indicate, you will disregard it and form your own conclusion." The jury is presumed to have followed the instructions. (*People v. Smithey* (1999) 20 Cal.4th 936, 961.)

In giving that instruction the court did not need to refer specifically to its prior statements about identification of defendant. Defendant's citation to *Powell v. Galaza* (9th Cir. 2003) 328 F.3d 558, 564 is not persuasive because there the court did improperly comment on the evidence, not the case here. Defendant has not provided authority for a requirement that the court's clarification of the witnesses' testimony for the record required it to specify those statements when giving CALJIC No. 17.30. And because the court did not make a finding defendant was the robber, it was not required to instruct the jurors at that point in the trial that they were free to make their own determination of identity.

Contrary to defendant's claim, this was not a judicial comment on the evidence nor a usurpation of the jury's fact-finding power. The cases on which defendant relies are distinguishable. In *People v. Sturm* (2006) 37 Cal.4th 1218, in a second penalty phase trial after the defendant had been convicted of first degree murder, the court told the jury that premeditation was a "'gimme'" and the question of premeditation was "'all over and done with.'" (*Id*. at p. 1232.) The Supreme Court held this was error because the statements were inaccurate and "effectively removed the issue of premeditation, or lack thereof, from the jury's consideration . . . ." (*Ibid*.) This is not at all comparable to the statements at issue here.

Likewise, in *People v. Moore* (1974) 40 Cal.App.3d 56, 67, the court reversed because the trial judge inaccurately summed up evidence on a certain issue and then opined the evidence proved the defendant was guilty. That is not the case here.

We also reject defendant's assertion the court's statements were the equivalent of a directed verdict on the two counts at issue. Those counts went to the jury for its decision.

Because we hold there was no error, we need not address defendant's claims the error was not harmless, that an objection was not required to preserve the issue for appeal, or of ineffective assistance of counsel.

2. Consecutive Sentences

Relying on *Cunningham*, defendant argues the court could not impose consecutive sentences because the factors upon which it relied where not found by a jury beyond a reasonable doubt. We disagree.

In *Cunningham*, the 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 "violates a defendant's right to trial by jury . . . ." (*Cunningham, supra*, 549 U.S. __ [127 S.Ct. at p. 860].) It did not address the issue of consecutive sentences.

Penal Code section 669 provides that if a defendant is convicted of two or more offenses the trial court "shall direct whether the terms of imprisonment . . . shall run concurrently or consecutively." Contrary to sentences imposed under the determinate sentencing law where "there is a statutory presumption in favor of the middle term," there is no such presumption in favor of concurrent as opposed to consecutive sentences. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) Thus, a consecutive sentence is within the statutory maximum and is not an increased sentence. That a court must make a finding to impose a consecutive sentence (Cal. Rules of Court, rule 4.425) does not change that conclusion. The consecutive sentences did not violate *Cunningham*.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.