Filed 12/10/03 P. v. Cole CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ROCKLYN V. COLE, Defendant and Appellant.	B159398 (Super. Ct. No. KA053346-01)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark Grant Nelson, Judge. Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Noah P. Hill, Deputy Attorney General, for Plaintiff and Respondent.

Rocklyn V. Cole appeals his conviction and sentence for robbery. On appeal, he claims his conviction must be reversed because the court committed prejudicial error: (1) in allowing the introduction of Cole's pre-trial statements to the police concerning his drug addition and his prior criminal conduct; and (2) in failing to give the jury his pinpoint instruction on the issue of fear. In our view, evidence of Cole's drug use was relevant and admissible on the issue of intent and any error in admitting evidence concerning his prior crimes was harmless. Moreover, the court did not err in refusing to give the pinpoint instruction as the content of the proposed instruction was sufficiently conveyed in other instructions.

With respect to his sentence, he asserts the court erred when it imposed four separate serious felony conviction enhancements under Penal Code section 667, subdivision (a). Cole claims that two of the four prior convictions were brought and tried together and thus the court could impose only three section 667, subdivision (a) enhancements. As set forth more fully below, we disagree. Sufficient evidence in the record before the trial court showed all four prior convictions were separate, and consequently, the sentencing enhancements were proper. We affirm the judgment and sentence.

FACTUAL AND PROCEDURAL HISTORY

At three o'clock in the morning in July 24, 2001, Cole entered a Sav-On Drug Store in Covina. He approached a store clerk and asked to buy a pack of cigarettes. The clerk retrieved the pack from behind the counter and proceeded to ring-up the purchase on the cash register. While Cole paid, the clerk dropped a coin and bent down to pick it up. As the clerk stood up, Cole reached over into the open cash drawer, saying to the clerk, "I need the money. I don't want to hurt you. Just give me the money."

The clerk complied and allowed Cole to take the money ($164) from the register. The clerk said he felt nervous, testifying: "I didn't know it was going to happen . . . this guy reaching over the counter. I mean anything could have happened. . . . I didn't know

what was going to happen. I didn't know if he had anything, a weapon, or if even if he would have jumped over the counter, I mean, its yeah, I was nervous." The clerk further testified he did not try to stop Cole because he did not know what would happen and he just wanted Cole to leave the store. Cole told the clerk to go to the back of the store and the clerk complied. The clerk further testified Cole appeared more muscular than he was and he stood only a couple of inches away from the clerk when Cole took the money.

Cole was arrested and charged with the robbery. At trial, Cole stipulated he entered the Sav-On at 3:00 a.m. The prosecution produced a store videotape depicting the robbery. Cole stipulated he was the person shown on the videotape.

The prosecution also produced evidence that when Cole was arrested, police interviewed him concerning the robbery. During the police interview Cole told detectives he had been a cocaine addict for over twenty years and no matter what he did or tried he was unable to overcome his addiction. He also told the officers he had "essentially done the same type of thing before"; he had committed robberies in the past at 1:00, 2:00, and 3:00 o'clock in the morning; he had never used a gun; he normally got $100-200; and he targeted 7-Eleven stores and small markets. Cole objected to the introduction of his statements during the police interview as irrelevant, inadmissible under Evidence Code section 352 and as hearsay. The court admitted the evidence.

The jury found Cole guilty. The court sentenced Cole to 25 years to life on the robbery count[1] and 20 additional years for four separate serious felony conviction enhancements under Penal Code section 667, subdivision (a).

Cole appeals.

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[1] The court found Cole had suffered multiple prior strike convictions.

DISCUSSION

I. The Admission of Cole's Pre-Trial Statements Did Not Result in Reversible Error.

To prove robbery, the prosecution shoulders the burden to demonstrate all of the following elements: (1) the possession of personal property by the victim; (2) the defendant took the property from the victim or from his immediate presence; (3) the property was taken against the will of the victim; (4) the taking was accomplished through the use of force or fear; and (5) the defendant took the property with the specific intent to permanently deprive the victim of the property. (See Pen. Code, § 211; CALJIC No. 9.40.)

All evidence relevant to the elements of robbery is admissible. (See Evid. Code, § 351.) Pursuant to Evidence Code section 352, the court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will, among other things, create substantial danger of undue prejudice.

Under Evidence Code section 1101, subdivision (a) evidence of a person's character, including specific instances of his or her conduct is inadmissible when offered to prove his or her conduct on a specified occasion. This notwithstanding, admission of evidence a person committed a crime, civil wrong, or other act is admissible when it is relevant to prove some fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (Evid. Code, § 1101, subd. (b).)

The trial court has discretion in admitting evidence. We will not disturb the exercise of the court's discretion absent a showing the trial court abused its discretion, i.e., acted in an arbitrary, capricious or patently absurd manner resulting in a miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316; *People v. Kipp* (1998) 18 Cal.4th 349, 371 [trial court's decision to admit evidence under Evidence Code section 1101 reviewed for abuse of discretion]; *People v. Cardenas* (1982) 31 Cal.3d 897, 904

[abuse of discretion standard of review applies to rulings under Evidence Code section 352].)

On appeal Cole argues the trial court abused its discretion in admitting his pre-trial statements to police concerning his drug addiction and prior crimes because this evidence was irrelevant to the material issues of the case and violated Evidence Code section 1101. In any event, he maintains the evidence should have been excluded under Evidence Code section 352 as unduly prejudicial.[2] We examine each of Cole's pre-trial statements seriatim.

A. Evidence Concerning Cole's Drug Addiction.

Evidence of a defendant's drug addiction is inadmissible where it "tends only remotely or to an insignificant degree to prove a material fact in the case . . . ." (*People v. Cardenas*, *supra*, 31 Cal.3d at p. 906.) Where, however, evidence of drug abuse is shown to have a direct connection to the crime, such evidence may be admissible. (E.g., *People v. Felix* (1994) 23 Cal.App.4th 1385, 1392-1394 [prosecution demonstrated defendant's drug addiction was relevant to issue of intent; he committed the burglary to obtain funds to pay for his habit].)

In our view, the prosecution demonstrated Cole's statements about his drug addiction were sufficiently connected to the crime of robbery. Cole made his statements concerning his drug addiction in the context of the police questioning him about the robbery. This context establishes the direct connection between the crime and his

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[2] Cole also appears to suggest the court's admission of this evidence implicated his federal constitutional rights to due process and a fair trial. Cole failed to preserve any federal constitutional error for our review as he did not present any such objections below and nothing in Cole's objections based on Evidence Code sections 1101 and 352 preserve federal constitutional objections. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Raley* (1992) 2 Cal.4th 870, 892.) In any event, these matters are not properly raised because they are merely perfunctorily asserted without argument in support.

statement; the connection between the robbery and his drug habit was neither remote or insignificant. Contrary to Cole's claim this evidence was not relevant to any issue in the case, his statements were offered to prove his motive and intent to commit the crime. Nonetheless, Cole argues that because he stipulated he entered the Sav-On and was the person shown on the video-surveillance taking the money from the register, the only issue at trial was whether the taking was accomplished through the use of fear. While the issue of fear was hotly contested at trial, it was not the only matter at issue. (See *People v. Daniels* (1991) 52 Cal.3d 815, 857-858 [defendant's guilty plea put in issue all elements of the offense, including intent].) Cole never conceded he harbored the specific intent to permanently deprive Sav-On of the funds. The prosecutor was required to prove this element at trial and offered the evidence of Cole's drug use to demonstrate intent. Specifically the prosecutor argued Cole committed the robbery to obtain funds to buy drugs: "it goes to his motive and intent, intent to criminally deprive the Sav-On Market of the money is an element that the People need to prove. He said that he spends the money on cocaine, that indicates that the money he gets from robberies he whittled away and does not return [the money] to the market." In view of the foregoing, we conclude this evidence was relevant to prove a material issue of the case and passes muster under *Cardenas, Felix* and Evidence Code section 1101, subdivision (b).

This conclusion, however, does not end the inquiry. Even though we find the trial court did not err in concluding this evidence was relevant to the issue of intent, this evidence must nonetheless be examined for its prejudicial effect under Evidence Code section 352. "When a section 352 objection is raised, the trial court 'must weigh the admission of the challenged evidence carefully in terms of whether the probative value of the evidence is greater than the potentially prejudicial effect [of] its admission . . . .' 'The fundamental rule is that relevant evidence whose probative value is outweighed by its prejudicial effect should not be admitted.'" (*People v. Cardenas*, *supra*, 31 Cal.3d at p. 904; citations omitted.)

The court did not abuse its discretion in concluding the probative value of this evidence was not outweighed by undue prejudice. On one hand this evidence had strong probative value. As discussed above, this evidence was compelling and directly relevant to the issue of intent. On the other hand the evidence of drug use is, in general, prejudicial. However, the prejudice was not undue nor did it outweigh the relevance of the evidence. Unlike in *Cardenas*, where a police officer testified Cardenas was under the influence of narcotics when he was arrested, here the evidence came in the form of Cole's voluntary confession that for many years he struggled with a drug addiction and he had tried unsuccessfully to overcome it. Under the circumstances, Cole's statements would likely generate more sympathy for his plight, than undue prejudice. Consequently, we cannot say admission of this evidence constituted a miscarriage of justice.

B. Evidence of Cole's Prior Crimes.

Below the prosecutor offered Cole's statement to detectives he had committed similar crimes in the past, arguing the statements were relevant to the issue of intent and admissible under Evidence Code section 1101 to show Cole committed the current robbery pursuant to the same design or plan he used to commit the prior crimes. Specifically the prosecutor argued:

> "While Mr. Cole is stipulating that he is the one that went into the market and took the money, the circumstances surrounding the taking of the money are going to be primarily in issue, whether or not he took the money and it is a simple theft or he used other circumstances to create a sense of fear in the victim, the clerk, in order to get that money, raising petty theft or grand theft . . . to a robbery. [¶] He lays out exactly what he has done in the past and those factors are almost identical to what we have going on in this case. So he's by the statement saying this is what I do and the jury is entitled to hear that."

Evidence of prior criminal acts is inherently prejudicial; such evidence is only admissible if it has substantial probative value. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.)

With respect to the assertion this evidence is relevant to the issue of Cole's intent to permanently deprive Sav-On of money, we observe evidence of intent is admissible to prove that, if the defendant committed the prior criminal act, he did so with the intent that comprises an element of the current charged offense. (*People v. Balcom* (1994) 7 Cal.4th 414, 423.) Thus, evidence Cole committed similar offenses would have some relevance on his intent in the present case. This notwithstanding, because Cole's statements to police concerning his drug addiction and the depiction of Cole taking the money on the videotape, if believed, constitute compelling evidence of his intent, evidence of Cole's prior similar offenses are merely cumulative on the issue of intent. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405; *People v. Balcom*, *supra*, 7 Cal.4th at p. 423 [prosecution has no right to present cumulative prejudicial evidence].) Consequently, the limited probative value of this evidence as it relates to the issue of intent is outweighed by the substantial prejudicial effect of its admission.

The admissibility of this evidence to prove the existence of a common design or plan is also problematic. Evidence of a common design or plan is admissible to establish the defendant committed the act alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, in proving design or plan the "act" is still undetermined. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 393-394.) Here nearly every aspect of the "act" of robbery was shown by other evidence on the videotape, and in the victim's testimony. The prosecutor's statements, however, suggest this evidence was somehow relevant to the issue of fear. The connection between the issue of fear and his prior criminal acts is tenuous at best. Cole's statements to police concerning the circumstances of his prior crimes are not particularly probative of whether the taking here was accomplished through the use of fear. Indeed, he told police that on prior occasions he struck small markets, early in the morning, took relatively small amounts of money and

never used a gun. These admissions do not show one way or another whether Cole used "fear" to commit his prior crimes or the current one. Consequently, we conclude the trial court abused its discretion in admitting evidence of Cole's prior criminal acts.

Notwithstanding this conclusion, in our view, the court's error does not require a reversal of the judgment. A verdict shall not be set aside, nor a judgment based thereon be reversed, by reason of erroneous admission of evidence unless, after an examination of the entire record, this court concludes the errors resulted in a miscarriage of justice. (See Evid. Code, § 353; Cal. Const., art. VI, § 13.) In other words, reversal is warranted only where this court is of the opinion it is reasonably probable that a result more favorable to Cole would have been reached absent the erroneous admission of the evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The evidence of Cole's guilt was overwhelming. The videotape caught Cole in the act of committing the crime. The clerk provided the evidence from which a reasonable jury could infer the taking was accomplished by fear and the money was taken against the clerk's will. Cole's admissions to police about his drug habit provided compelling evidence of specific intent. We also note any possibility of prejudice resulting from the admission of this evidence was diminished by the court's instructions to the jury in CALJIC No. 2.50 about the proper limited use of this evidence and in CALJIC No. 2.71 to view evidence of oral admissions with caution. There is no indication in the record the jury had any difficulty in following the court's directives. On the record before this court, we see no such reasonable probability of a more favorable result to Cole, and therefore no miscarriage of justice warranting reversal.

II. The Court Did Not Err in Denying Cole's Request For a "Pinpoint" Jury Instruction Concerning the Issue of Fear Because the Subject Matter Was Sufficiently Covered by Other Instructions.

During the discussion of proposed jury instructions, Cole requested a pinpoint instruction concerning the issue of fear. Specifically he requested the court instruct the

jury that "[t]aking is not accomplished by fear unless as a result of the perpetrator's actions the victim was, in fact, afraid, and such fear allowed the taking to be accomplished." The trial court denied the request finding CALJIC Nos. 9.40 and 9.41 have the "same sum and substance" as Cole's requested instruction.

On appeal, Cole claims the court erred in denying its request for a pinpoint instruction. We disagree.

A criminal defendant has a right to an instruction that pinpoints the theory of the defense. However, the court is not required to give requested instructions that are duplicative of other instructions or that are argumentative. (*People v. Noguera* (1992) 4 Cal.4th 599, 648.)

Such is the case here. Cole's instruction was an accurate statement of the law. (*People v. Smith* (1995) 33 Cal.App.4th 1586, 1595 ["The element [of robbery] of force or fear is satisfied if force or fear caused the victim to give up his or her property"].) Nonetheless, the factors a jury should consider in evaluating the issue of fear were amply addressed in the form jury instructions. CALJIC No. 9.40, informed the jury that:

> "[e]very person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person *accomplished by means of force or fear* . . . is guilty of the crime of robbery . . . [¶¶] In order to prove this crime each of the following elements must be proved: . . . *The taking was accomplished either by force or fear*." (Emphasis added.)

In addition, CALJIC No. 9.41 informed the jury: "The element of fear in the crime of robbery may be either: (1) The fear of an unlawful injury to the person or property of the person robbed, or to any of his [sic] her relatives or family members; or (2) The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery." In view of these instructions, Cole's requested instruction was duplicative and unnecessary because the content of these CALJIC instructions conveyed to the jury it had to decide whether the

clerk was afraid and whether the clerk's fear allowed Cole to take the money from the cash register.

Cole cites *People v. Thompkins* (1987) 195 Cal.App.3d 244, 256-257 for the proposition a defendant is entitled to offer pinpoint instructions intended to supplement or amplify more general instructions. From the record before us, it is ambiguous as to whether Cole was offering the pinpoint to supplement, amplify or replace CALJIC Nos. 9.40 and 9.41. In any event, in our view, no matter how Cole characterized his pinpoint instruction at trial, his special instruction is merely repetitive of the principles explained in the form instructions. The Supreme Court has repeatedly determined that a trial court does not err by refusing to give redundant special instructions. (See *People v. Cash* (2002) 28 Cal.4th 703, 736; *People v. Wharton* (1991) 53 Cal.3d 522, 570-572.)

In view of the foregoing, we conclude the court did not err.

III. The Court Properly Sentenced Cole Pursuant to Penal Code Section 667, Subdivision (a).

The trial court found Cole had suffered four serious-felony prior robbery convictions under Penal Code section 667, subdivision (a) in case Nos. A890767, A890861, SCR49985 and CR94297. Below, as on appeal, Cole argued he suffered only three prior convictions for the purposes of section 667, subdivision (a). Specifically Cole asserted case Nos. A890767 and A890861 were not brought and tried separately because they were disposed of at the same plea hearing, on the same plea form, listed on the same abstract of judgment and resolved at the same sentencing hearing. Consequently, he maintains they constituted only one felony conviction under section 667, subdivision (a). As set forth below, we find no error.

Section 667, subdivision (a) provides, in pertinent part:

> "any person convicted of a serious felony who previously has been convicted of a serious felony in this state shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges *brought and tried separately*. The terms of the present offense and each enhancement shall run consecutively." (Emphasis added.)

The requirement the predicate charges were "brought and tried separately" means "the underlying proceedings must have been *formally distinct* from filing to adjudication of guilt." (*In re Harris* (1989) 49 Cal.3d 131, 136; emphasis added.) So long as formal distinctions between the cases have been properly observed throughout the proceedings, the cases may be resolved in the same plea and sentencing hearings. (*People v. Wagner* (1994) 21 Cal.App.4th 729, 734-738 [facts defendant entered pleas to both offenses in one proceeding and was sentenced on both offenses in the same proceeding, does not alter conclusion offenses were brought and tried separately under section 667, subdivision (a)].) "Formal distinctions" include the use of separate case numbers and separate charging documents as well as the absence of evidence the cases have been otherwise consolidated. (*Ibid*.; see *People v. Wiley* (1995) 9 Cal.4th 580, 592-593.) The trial court's findings on this issue, i.e., whether the cases were brought and tried separately are reviewed for sufficiency of the evidence. (See *People v. Wiley, supra,* 9 Cal.4th at pp. 592-593.)

The record contains sufficient evidence from which the trial court could reasonably infer that case Nos. A890767 and A890861 were formally distinct. As in *Wagner,* these cases were asserted in separate informations and complaints, and have distinct and non-consecutive case numbers. Moreover, there is no evidence these matters were ever formally consolidated. Though the cases were resolved through a single plea form, they were listed on the form separately. Moreover the cases were addressed separately at the hearing. The transcript from the plea hearing discloses Cole was

expressly advised of the consequences of his pleas under section 667, subdivision (a): "If [a] future conviction is for a crime that's designated as a serious felony, each of *these cases* could add an additional five years in state prison to whatever sentence was available in that future conviction." (Emphasis added.) Likewise the sentencing and judgment documents show formal distinctions between these cases were preserved. Consequently, we conclude case Nos. A890767 and A890861 were brought and tried separately and thus, the trial court properly sentenced Cole under section 667, subdivision (a) and *Harris.*

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

JOHNSON, Acting P.J.

ZELON, J.