Filed 4/25/06 P. v. Jones CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RALPH WALDO JONES, Defendant and Appellant.	F048334 (Super. Ct. No. 04CM3705) **OPINION**

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Louis F. Bissig, Judge.

Laura G. Schaefer, 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, and Charles A. French, Deputy Attorney General, for Plaintiff and Respondent.

-ooOoo-

* Before Vartabedian, Acting P.J., Levy, J., and Gomes, J.

A jury convicted appellant Ralph Jones of escape by force or violence (Pen. Code, § 4532, subd. (b)(2);[1]count 1) and conspiracy to commit the crime of escape (§§ 182, subd. (a)(1); 4532, subd. (b)(2); count 2), and found true allegations that appellant had suffered a prior felony conviction that qualified as a "strike"[2] and for which he served a prison term (§ 667.5, subd. (b)). The court imposed a prison term of nine years, consisting of the four-year midterm on count 1, doubled pursuant to the three strikes law (§§ 667, subd. (e)(1); 1170.12, subd. (c)(1)), plus one year for the prior prison term enhancement. On count 2 the court imposed an eight-year term, and stayed execution of that term pursuant to section 654.

Appellant's appointed appellate counsel has filed an opening brief which summarizes the pertinent facts, with citations to the record, raises no issues, and asks that this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant himself has filed a brief in which he contends (1) the evidence was insufficient to support his conviction on count 1, and (2) the court incorrectly instructed the jury on the elements of the offense of escape.

FACTS

Kings County Deputy Sheriff Luis Hernandez testified to the following. Appellant was incarcerated at the Kings County jail when, on the morning of September 28, 2004,[3] Deputy Hernandez went to appellant's cell to "pull him for court." The deputy called to appellant and, when appellant did not respond, went to appellant's bed, pulled back the sheets and discovered that towels and sheets roughly in the shape of a

---

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

[2] We use the term "strike" as a synonym for "prior felony conviction" within the meaning of the "three strikes" law (§§ 667, subds. (b)-(i); 1170.12), i.e., a prior felony conviction or juvenile adjudication that subjects a defendant to the increased punishment specified in the three strikes law.

[3] All references to dates of events are to dates in 2004.

body had been placed in the bed and appellant was not there. Deputy Hernandez, in looking around the "dorm" where appellant was housed, went into the bathroom and found that the metal grate covering the window was damaged and there was broken glass all over the floor.

Kings County Deputy Sheriff Chris Fernandes testified that in investigating appellant's disappearance, he found blood on the roof of the jail and damage to a chain link fence on jail property, "apparently where someone climbed it."

Deputy Fernandes further testified to the following. Telephone calls made by jail inmates are tape recorded. The deputy listened to a tape recording of a call appellant made to Keisa Jackson on the evening of September 27 in which appellant told Jackson he was going to escape from jail; she should meet him at the baseball field outside the jail; and if he was not there by 2:30 p.m. she should leave.

Keisa Jackson testified to the following. Appellant telephoned her and asked her to meet him at the baseball field at 2:00 p.m. to help him escape from jail. He also told her that if he was not there at a "certain time" she was to leave. Jackson agreed to do what appellant asked, but she did not go to meet him. Appellant came to her home on September 28; she did not know how he got there; and he left shortly after he arrived.

Appellant was taken into custody on September 30. Deputy Fernandes testified that when he interrogated appellant, appellant told him he used a stool to "create the damage on [the metal grate in the bathroom]."

DISCUSSION

Sufficiency of the Evidence

Section 4532, subdivision (b)(1) provides, inter alia, that any person incarcerated in a county jail on a felony charge or conviction, who escapes, is guilty of a felony. And if that escape is "committed by force *or* violence," that offense is punishable by two, four

or six years in prison. (§ 4532, subd. (b)(2), emphasis added.)[4] However, as appellant notes, the offense charged in count 1 of the information was escape by "force *and* violence." (Emphasis added.) As best we can determine, appellant argues as follows: because in count 1 he was charged with committing an escape by both force *and* violence, in order to establish a violation of section 4532, subdivision (b)(2) the prosecution was required to prove both force and violence; in order to establish the "violence" element, the prosecution was required to prove that appellant committed a battery in effecting his escape; there was no evidence appellant committed a battery; and therefore his conviction on count 1 cannot stand. There is no merit to this contention.

As the court stated in *People v. Bravot* (1986) 183 Cal.App.3d 93, " '[T]he words "force" and "violence" [in section 4532] are synonymous and mean any wrongful application of physical force *against property* or the person of another.' [Citation.] Section 4532, subdivision (b) speaks in general terms of 'force or violence' and does not in any way indicate that it must be directed to a person." (*Id*. at p. 97; accord, *People v. White* (1988) 202 Cal.App.3d 862, 866.) Thus, the prosecution was not necessarily required to prove that appellant committed a battery.

Appellant relies on *People v. Lozano* (1987) 192 Cal.App.3d 618 and in particular the court's statement that "the line between simple and forcible escape is crossed upon the commission of a battery." (*Id*. at p. 627.) However, *Lozano* makes clear that this is an accurate statement of the law only when the prosecution relies on evidence of force or violence directed at a person. (*Ibid*. ["where an escapee's force or violence is directed *against a person*, it is synonymous with the crime of battery" (emphasis added)].) Here, the prosecution did not attempt to prove that appellant directed physical force at a person. Rather, the prosecution theory was that the "force or violence" element of section 4532,

---

[4] Escape not committed by force or violence is a lesser offense, the sentencing triad for which is 16 months, 2 years or 3 years.

subdivision (b)(2) was established by evidence that appellant applied physical force to jail property.

"It is the prosecution's burden in a criminal case to prove every element of a crime beyond a reasonable doubt. [Citation.] To determine whether the prosecution has introduced sufficient evidence to meet this burden, courts apply the 'substantial evidence' test. Under this standard, the court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses *substantial evidence*—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.)

As demonstrated above, there was ample evidence appellant applied physical force to jail property. Therefore, substantial evidence supports appellant's conviction of committing the offense described in section 4532, subdivision (b)(2).

Claim of Instructional Error

In a related argument, appellant contends the court erred in failing to instruct the jury on the elements of battery (§ 242). This argument is based, in turn, on the claim that the prosecution was required to prove appellant committed a battery in effecting his escape. But as demonstrated above, this claim is without merit. Therefore, the court did not err in not instructing the jury as to the elements of battery.

Independent Review

Following independent review of the record, we have concluded that no reasonably arguable legal or factual issues exist.

DISPOSITION

The judgment is affirmed.