Filed 12/10/03 P. v. Starling CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 977.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

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD DENNIS STARLING, Defendant and Appellant.	G031131 (Super. Ct. No. 01HF0505) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John J. Ryan, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lynne G. McGinnis and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found Richard Dennis Starling guilty of one count each of resisting arrest (Pen. Code, § 148) and grand theft (*id.*, § 487, subd. (a)), and of two counts of assault with a deadly weapon on a peace officer (*id.*, § 245, subd. (c)). Starling challenges the convictions on the assault counts, contending: (1) the jury was incorrectly instructed on the elements of assault with a deadly weapon; (2) the court erred in denying Starling's request for personal juror identifying information; and (3) the evidence was insufficient to support the conviction.

We affirm because:

1. The trial court correctly instructed the jury with CALJIC No. 9.00 (Assault—Defined), as revised in 2002, based upon *People v. Williams* (2001) 26 Cal.4th 779. Further, the trial court did not err by refusing to give Starling's proposed special instruction that recklessness or criminal negligence is insufficient to establish assault.

2. The trial court did not abuse its discretion in denying Starling's petition for release of personal juror identifying information without a hearing because Starling failed to make a showing sufficient to support a reasonable belief juror misconduct occurred.

3. The evidence supported the convictions for assault, as defined in *People v. Williams, supra,* 26 Cal.4th at pp. 788, 790.

FACTS

In the early morning hours of May 11, 2001, Police Officer Trent Harris responded to a call from a woman saying she saw someone stealing the wheels of a car in a parking structure on the grounds of an apartment complex. Harris drove into the apartment complex and parked outside of the parking structure. As he walked toward the structure, he heard the sound of tools. When he reached the parking structure, he looked into the second floor and saw the legs of a man, later identified as Starling, moving

between a bronze Lexus automobile and a blue pickup truck. Harris heard someone running from the area of the Lexus and heard the truck engine rev.

Officer Michael Johnson arrived at the parking structure with his police dog. Johnson walked up a flight of stairs inside the parking structure and positioned himself near the spot where Starling had been seen. Johnson saw the blue pickup truck and heard its engine rev. Johnson then heard tires screeching and, turning right, saw the truck heading straight toward him and his dog. As the truck accelerated, Johnson drew his revolver and ordered the driver to stop. The truck did not stop, and Johnson pulled his dog back to get out of its way. The truck swerved to avoid hitting Johnson and, accelerating, headed toward Harris. Harris drew his revolver and flashlight and ordered the truck to stop. The truck accelerated, swerved a bit to the left of Harris, and exited the parking structure.

Meanwhile, two more police cars arrived at the scene. Officer Rachel Hall drove one car, and Officer Fisher drove the other. Officer Charles Freeman was in the car with Officer Hall. Hall and Fisher drove their patrol cars into the apartment complex grounds and up a steep road leading to the parking structure. They approached the parking structure with the patrol car lights turned off. Hall's patrol car was directly behind Fisher's until the cars drove around a corner, at which point, Hall pulled her car to the left and straddled a line in the middle of the road.

Over the police radio, Hall heard Harris say, "he is splitting." Hall and Fisher stopped their cars. Hall's car was about one car length in back of Fisher's. The left side of Hall's car was about nine feet from the curb. Hall and Freeman noticed Fisher's car backing up, heard the sound of another vehicle accelerating, and saw headlights ahead. Hall then saw a blue pickup truck round a corner and travel toward her patrol car at a speed of 30 to 34 miles per hour. Hall and Freeman heard the truck accelerate and heard no braking sounds. Starling's truck hit Hall's patrol car head-on, pushing it 15 to 20 feet. Hall suffered injuries to her neck, shoulder, and one knee.

Freeman got out of the patrol car and, seeing Starling flee his pickup truck, drew his revolver and ordered Starling to stop. When Starling disobeyed the order, Freeman grabbed him, pushed him to the ground, and handcuffed him. In the back of Starling's pickup truck were four wheels and tires, a jack, bricks, bolt cutters, wire cutters, and other tools. The wheels had been taken off a 2002 Lexus automobile.

Craig Hosman, a traffic investigator for the California Highway Patrol, conducted an on-scene investigation while the vehicles were present. He testified the street where the collision occurred had a 14 percent grade. He testified the front right tire of Starling's truck left a 39-foot rotating skid mark, followed by a four-foot locked tire skid mark. The rear left tire left a locked wheel skid mark of about nine feet, and the front left tire of Hall's patrol car left a locked wheel skid mark of seven feet.

Officer Howard Eisenberg, another traffic investigator, went to the collision scene three days later. From inspecting the collision scene and the pickup truck, and reviewing the officers' reports, Eisenberg concluded the space between Hall's patrol car and the curb was wide enough for Starling's truck to pass through and only sideswipe the patrol car. Eisenberg could not determine whether Starling was accelerating as he approached the police cars. Eisenberg testified none of the skid marks was caused by braking before the collision.

Detective Douglas Jones interviewed Starling in the hospital two days after the collision. Starling admitted he had been in the parking structure to steal rims and tires. Starling said that, as he was leaving, he saw a police officer pointing a gun at him and yelling at him to stop, he "freaked out," and he decided to flee to avoid going to jail. Starling said he did not try to hit Officer Johnson. While driving down the roadway, Starling saw a police car backing up. He passed that police car but, he claimed, a second one crashed into his truck. Starling said he was traveling at 10 to 15 miles per hour. Starling at first claimed he tried to brake and steer around the second police car. After Jones told Starling about the damage to the vehicles and the absence of skid marks

indicating braking, Starling claimed he saw a gap between the two police cars and tried to drive through the gap. Starling did not assert that he was going too fast to stop, that it was too dark to see the police cars, or that he was unaware the two vehicles were police cars.

Thomas Murtaugh, an accident reconstruction expert, testified on Starling's behalf. Based upon his review of police reports and photographs, and a visit to the accident scene, Murtaugh concluded (1) no physical evidence existed showing the location of the second patrol car at the time of the collision; (2) the locked wheel skid from the truck's front wheel was caused by last second preimpact braking; (3) the safest route for Starling to have taken was between the two patrol cars; and (4) after seeing the patrol cars, Starling had enough time only to begin applying the brakes.

ANALYSIS

I. *Instructional Error*

The trial court instructed the jury with CALJIC No. 9.00 (Assault—Defined), as revised in 2002,[1] based upon *People v. Williams, supra,* 26 Cal.4th 779. Starling contends CALJIC No. 9.00 compelled the jury to convict him under a negligence

---

[1] CALJIC No. 9.00 (2002 rev.) (6th ed. 1996) states, in relevant part: "In order to prove an assault, each of the following elements must be proved: [¶] 1. A person willfully [and unlawfully] committed an act which by its nature would probably and directly result in the application of physical force on another person; [¶] 2. The person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person; and [¶] 3. At the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another. [¶] The word 'willfully' means that the person committing the act did so intentionally. However, an assault does not require an intent to cause injury to another person, or an actual awareness of the risk that injury might occur to another person. [¶] To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted it may be considered in connection with other evidence in determining whether an assault was committed [and, if so, the nature of the assault]."

standard and was therefore erroneous. He argues *People v. Williams* was wrongly decided.

In *People v. Williams, supra,* 26 Cal.4th 779, 790, the California Supreme Court confirmed assault is a general intent crime and held: "[A]ssault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." To be guilty of assault, a defendant "must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*Id.* at p. 788.) Criminal negligence is not enough, the court explained, because a defendant may not be convicted based upon facts he did not know but should have known. (*Ibid.*) The 2002 revision of CALJIC No. 9.00, given here, conforms to *People v. Williams*. (See Use Note to CALJIC No. 9.00, *supra*, at p. 159.)

We are bound by *People v. Williams.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We therefore conclude the trial court did not err by instructing the jury with the 2002 revision of CALJIC No. 9.00.

Starling relies upon *People v. Wright* (2002) 100 Cal.App.4th 703, in which a panel of the Third District Court of Appeal severely criticized *People v. Williams* as defining the mental state for assault under a negligence standard. But in *People v. Wright* the court conceded it was bound by *People v. Williams* and affirmed the assault conviction. (*People v. Wright, supra,* 100 Cal.App.4th at p. 706.)

Starling argues even if *People v. Williams* is correct, the trial court erred by refusing his special instruction stating, "neither reckless conduct nor criminal negligence can constitute a sufficient basis for an assault." We find no error.

We determine whether the jury instructions are correct from the court's entire charge, not from a consideration of parts of an instruction or from a particular

instruction read in isolation. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) The trial court instructed the jury with CALJIC Nos. 3.30, 4.45, and 9.00, and remarked these instructions "actually cover this topic very well." As explained above, CALJIC No. 9.00, as revised in 2002, correctly defined assault in accordance with *People v. Williams, supra,* 26 Cal.4th 779.

Having instructed the jury on what assault is, we question whether the court had any further obligation to instruct the jury on what assault is not. Even if Starling's proposed special instruction supplied an essential element to the definition of assault missing from CALJIC No. 9.00, as revised in 2002, "'[t]he absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole.'" (*People v. Burgener* (1986) 41 Cal.3d 505, 539.) Here, CALJIC No. 3.30 provided the jury with the definition of general intent: "In the crimes charged in Counts 3, 4, and 7, namely, assault with a deadly weapon upon a peace officer and resisting a peace officer, there must exist a union or joint operation of act or conduct and general criminal intent. General intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, [he] is acting with general criminal intent, even though [he] may not know that [his] act or conduct is unlawful." (Original brackets.) CALJIC No. 4.45 instructed the jury: "When a person commits an act or makes an omission through misfortune or by accident under circumstances that show no criminal intent he does not thereby commit a crime." Thus, the instructions as a whole sufficiently apprised the jury that assault was a general intent crime and recklessness or criminal negligence was not enough to establish assault.

Further, any error in failing to give Starling's proposed special instruction was not prejudicial in view of the entire record. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130.) The trial court told the jury during the prosecution's closing argument: "Let me get back to that negligence thing. There are some crimes that have as an element criminal negligence. We don't have such a crime alleged in this case. That is why it is

not in the instruction. Doesn't mean it is not in the law. It is not in the instruction. This crime cannot be committed by criminal negligence. . . . This crime requires general intent as further amplified in the assault instruction, the instruction on assault, and it tells you exactly what is require[d]. [¶] A negligent act would be a reasonable person would have been aware of. Well, general intent requires that the accused be aware of the facts, and that is what the instruction tells you. So you are not going to be instructed on negligence. It is not an element of the crime, okay?"

Starling's counsel argued in closing: "If you are in the back and you say, well, you know what, when Mr. Starling stole those tires and he is leaving the scene, was he criminally negligent? Was he reckless? You might agree he was. He was reckless and criminally negligent. But . . . that is not an assault. And if you have any question about it, send a note out and ask the judge and he will tell you that criminal negligence and recklessness is not intent. It is not an assault. That is the current state of the law." The juror questions and the comment on the verdict form (discussed below) indicate the jury understood the meaning of general intent, knew recklessness or criminal negligence was insufficient, but did not like the verdict it reached.

In light of the instructions as a whole, the trial court's comments, and counsel's closing argument, the jury could not reasonably believe recklessness or criminal negligence was sufficient to convict Starling of assault, and therefore it was not reasonably probable the jury convicted him on that basis.

II. *Request for Personal Juror Identifying Information*

After the jury reached its verdict, Starling filed a petition for release of personal juror identifying information pursuant to Code of Civil Procedure sections 206, subdivision (g) and 237, subdivision (b). The trial court denied the petition. We review for abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317.)

A. *Background*

During deliberations, the jury sent the court five questions regarding the assault counts. The jury also sent the court a note saying, "We agree on two of the charges/counts and we will probably never agree on the other two."

The five questions read:

Question No. 1: "If Starling hit a non-police (civilian) (pedestrians) occupied vehicle while trying to flee, would it be assault with a deadly weapon on that (civilian) pedestrian vehicle?"

Question No. 2: "If the police use a maneuver to stop a fleeing vehicle, is there a charge against the fleeing vehicle? Specifically assault w[ith] a deadly weapon?"

Question No. 3: "[R]equest the police report. (Ofcr. Doug Jones)"

Question No. 4: "The jurors would like to lessen the ADW ([Pen. Code, §]245[, subd.]c) charge. Is that possible?"

Question No. 5: "When does general intent *start* regarding the charge of assault with a deadly weapon ([Pen. Code, §]245[, subd.]c)? With [O]fficer Johnson or only on contact with the Chevrolet?"

The court reviewed the questions and its proposed answers with counsel. Starling's counsel said the court's proposed answers to question numbers 1 and 2 were "fine." As to question number 3, the court and counsel agreed to tell the jury the police report was inadmissible. As to question number 4, Starling's counsel stated, "[w]e don't want any lessers." Starling's counsel stated question number 5 "is just so vague," and the court responded, "I think they have to go back to my answer to number 2 and 1. We'll see."

The court summoned the jury and answered the questions. Starling's counsel did not object to any of the answers.

The jury resumed deliberations, but had more questions the next day. A juror note asked, "Can the jury vote (return a verdict) on 2 (counts) only?" The court

answered the question "yes." A second juror note asked, "What happens if the jury is 'hung'? (What will happen to the process)." The court responded, "That is not an issue for the jury. It is not to be considered."

The jury ultimately reached verdicts on all counts. On the verdict form was written, "[t]his 'sucks' but we are following the law (some agree it ([Pen. Code, §]245) is excessive)." Juror No. 4, the foreperson, apologized for the note.

Starling petitioned for the release of personal juror identifying information on the ground "the jurors may have been confused as to the applicable law in Counts 3 and 4." The trial court denied the petition without a hearing, stating: "The motion is denied. There is no cause shown. What is shown is factual, by the way. It is not in dispute. The jurors did not like the law. This court believed the jury was correctly instructed on the law. This court also disagrees with the law, but I have to follow it. And we talked about that before, so it is not a surprise. We talked about it in open court, and we talked about it in chambers. [¶] If I gave them a specific intent instruction, which some justices believe should be given in assault cases, he would have been acquitted of those charges. And that is the way the jury would have found. But they were given the general intent instruction as modified after the Supreme Court's enlightenment to us on what general intent means in these cases, and the jury had to find him guilty. And we know what their opinion was because they wrote it on the verdict form, and that is all part of the record. So the motion is denied for those reasons."

B. *Starling's Petition for Release of Personal Juror Identifying Information*

Code of Civil Procedure sections 206, subdivision (g) and 237, subdivision (b) govern release of personal juror identifying information following a verdict in a criminal proceeding. After the jury's verdict is recorded, defense counsel may seek access to personal juror identifying information within the court's records that is "necessary for the defendant to communicate with jurors for the purpose of developing

a motion for new trial . . . ." (Code Civ. Proc., § 206, subd. (g).) "The court shall consider all requests for personal juror identifying information pursuant to Section 237." (*Ibid*.) Code of Civil Procedure section 237 requires a petition for access to personal juror identifying information to "be supported by a declaration that includes facts sufficient to establish good cause for the release of the . . . information." (Code Civ. Proc., § 237, subd. (b); see *People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322.) If the petition and declaration establish a prima facie showing of good cause, then the trial court must set the matter for a hearing, unless the record shows facts establishing a compelling interest against disclosure. (Code Civ. Proc., §§ 206, subd. (g), 237, subd. (b).) To demonstrate good cause, a defendant must make a sufficient showing "to support a reasonable belief that jury misconduct occurred, that diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial." (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552.)

Starling contends the jurors' questions, the note stating the jurors could not agree on two counts, and the note on the verdict form reading "[t]his 'sucks'" indicate the jurors engaged in misconduct. To the contrary, the questions and notes indicate the jury properly deliberated. Jurors often disagree—disagreement is a natural part, and debate is a desirable part, of the deliberative process. The jury did ask questions regarding the assault counts, but the court answered the questions, and Starling's counsel agreed with the answers. No evidence supported Starling's claim the jurors "were influenced by extrinsic evidence or undue bias." The comment on the verdict form demonstrates the jury obeyed its charge and followed the law even though some jurors did not like the result. Starling failed to make any showing of jury misconduct; therefore, the trial court did not abuse its discretion in denying his petition for release of personal juror identifying information without a hearing.

III. *Sufficiency of the Evidence*

Starling argues the evidence was insufficient to support the convictions on the two assault counts. We conclude the evidence supported the convictions.

"'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] 'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

"The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) The standard of review is the same when the prosecution relies mainly on circumstantial evidence. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

The evidence, viewed favorably to the judgment, established Starling was "aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*People v. Williams, supra,* 26 Cal.4th 779, 788.) Starling was fleeing the crime scene to escape arrest. He knew the police were present. He admitted he saw Officer Johnson, and he refused to obey Officer Harris's command to stop. Once out of the parking structure, Starling sped down a street with a downslope of 14 percent. Starling saw the police cars as he drove downhill. Officers Hall and Freeman heard Starling accelerate as he drove his truck toward them.

Neither Hall nor Freeman heard Starling brake. Officer Eisenberg testified none of the skid marks at the collision scene was caused by braking. There was a nine-foot gap between Officer Hall's patrol car and the curb. Starling told Detective Jones he tried to drive through that gap. A reasonable person would realize, however, that a battery would directly, naturally, and probably result from trying to drive a pickup truck at 30 to 34 miles per hour, downhill, at night, through a nine-foot gap between a car and the curb. The evidence was sufficient to conclude Starling knew of facts that would lead a reasonable person to realize Starling would collide with one of the patrol cars as a result of his conduct.

At oral argument, Starling's counsel argued *People v. Williams, supra,* 26 Cal.4th 779 is distinguishable because in that case the defendant intentionally fired a gun into the passenger-side wheel well of a truck with the intent to scare the victims. In this case, counsel argued, Starling was only trying to get away after stealing rims from an automobile. It is true Starling was trying to escape the scene of the crime, but *People v. Williams* holds assault does not require a specific intent to cause injury. (*Id*. at p. 790.) As explained above, the evidence showed Starling actually knew of facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. The evidence was therefore sufficient to support the convictions on the two assault counts under the definition of assault in *People v. Williams*.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.