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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DON HOWARD AVEY, Defendant and Appellant.	G033490 (Super. Ct. No. 03NF0562) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kazuharu Makino, Judge. Affirmed.

Jeffrey J. Stuetz, 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, Anthony Da Silva and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant claims error because the trial court permitted impeachment of a witness who was convicted of a felony in 1983. The Attorney General concedes there was error. We conclude that, even though we are unable to determine whether the court erred because there is no evidence before us that the witness's felony conviction was expunged, it is not reasonably probable there would have been a more favorable result absent the impeachment of the witness.

Defendant was not denied his right to confront witnesses against him because the jailer who inventoried his property after his arrest was not the witness who testified about defendant's property inventory. We can find no error in the court's permitting the jail supervisor to testify about the contents of the property report.

Defendant waived his objections there was prosecutorial misconduct. Nonetheless, the prosecutor's argument was both logically connected to the evidence and was fair comment on the evidence, and did not constitute misconduct.

CALJIC No. 2.15 does not misstate the law and does not direct the jury that corroboration automatically means guilt. We find no error with this instruction.

We affirm.

I

FACTS

Defendant was charged with second degree robbery and evading a pursuing peace officer while driving. A jury found him guilty of both counts and found it to be true that he personally used a revolver while committing the robbery. He was sentenced to 25 years to life on each count and was given an additional 10 years for the gun enhancement, all to be served consecutively. In addition, while the court found to be true and struck punishment for four prior convictions under Penal Code section 667.5, subdivision (b), it found to be true that defendant suffered five prior convictions under Penal Code section 667, subdivision (a)(1) and sentenced him to an additional five years

for each. (All statutory references are to the Penal Code, unless otherwise specified.) Defendant's total sentence is 85 years to life in prison.

Defendant raises several issues on appeal. He claims his convictions should be reversed because of improper impeachment, because the introduction of hearsay statements deprived him of his Sixth Amendment rights of confrontation and cross-examination, because the prosecutor commented that defendant did not call certain persons as witnesses and because of instructional error.

Eric Cunningham was working at the Starbucks located at 1331 West Imperial Highway in the City of La Habra on February 16, 2003. A man with a sweatshirt hood pulled over his head and a thin, black nylon mask over his entire face walked into the store. His hands were inside his sweatshirt. At first, Cunningham thought the man was a teenager "playing around." But he became fearful when the individual came behind the counter and pointed a gun at him.

The man held a black revolver with his latex glove-covered right hand. With his left hand, he produced a white bag with blue writing on it and indicated that Cunningham should put the money into it. Cunningham said he could see the hand very clearly. "It was white. It was thin. Long fingers. He had a wedding band on his wedding finger. And the knuckles were kind of reddish. Looked like a person who had worked with their hands." The man instructed Cunningham to "give me the bills in the drawer and the large bills underneath." Cunningham complied. After all the cash registers were emptied, the man instructed Cunningham to wait five minutes before he called anybody, and then the man left the store.

Cunningham kept his eyes on the man after he left. He watched him drive away in a silver Dodge. "It was a newer model. Could have been an Intrepid or a Stratus." A total of $903 was stolen by the man.

Customer Ray Grant was seated outside Starbucks and saw the robbery in progress. He said the man weighed around 200 pounds and was about 6 feet 2 inches. As the man left the store, he pulled his mask up to his nose, and Grant observed a gray mustache. Grant said the man got into a "light colored Dodge Intrepid maybe, but it was a good distance away."

Another customer, Edwin Boehme, who was standing in front of the counter during the robbery, estimated the robber's height to be 6 feet tall and his weight to be about 200 pounds. He also saw a wedding band on the man's left hand. He observed the man walk across the parking lot after the robbery and get into "a metallic silver or gold four door, like a Dodge style vehicle. Possibly an Intrepid."

Boehme was already in his vehicle going in the same direction and followed the vehicle. He saw that the first four digits on the license plate of the car driven by the robber were 4PAR.

Customer Ryan Taylor said the robber wore a blue sweatshirt with a zipper. He said the man was about six feet tall, but he estimated his weight to be 180 to 185 pounds. The man was holding a Big 5 sporting bag.

Fullerton Police Officer Matt Wilkerson heard a radio broadcast about an armed robbery. The suspect was described and said to be driving a gold or silver Dodge Intrepid with a partial license plate of 4PAR. During the night, he patrolled some high crime areas looking for the suspect or the car. Around 3:45 a.m., he located an Intrepid with the license plate number of 4PAR486. He requested backup and additional officers responded. Thereafter, defendant got into the car and Wilkerson pulled up behind him at an intersection. Defendant got out of his car. Wilkerson stepped out of his vehicle and ordered defendant to step away from his car.

Defendant got back in his car, slammed the door and drove towards the freeway. At that point, Wilkerson turned on the lights and siren of his patrol vehicle and

other units did the same. A pursuit ensued. Several vehicles had to brake to avoid colliding with defendant on the freeway. Defendant exited the freeway, proceeded through three cities at speeds from 80 to 95 miles per hour and ran through red traffic lights. The right front tire of the Intrepid blew out. When defendant's vehicle slammed into a parked car on a La Habra residential street, he was taken into custody. He was wearing what appeared to be a gold wedding band on his left hand ring finger. A small puppy was inside the car. Money was scattered around the driver's seat and rear floorboard.

The next day, La Habra Police Detective Pamela Burstein was assigned to investigate the robbery. As part of her investigation, she inventoried the contents of the Dodge Intrepid owned by defendant. On the front of the driver's seat, there was one $5 bill. On the driver's floorboard, there were ten $5 bills. In the back seat area, there were five $10 bills, thirty-five $1 bills and twenty-seven $5 bills. She also found a glove and a hooded sweatshirt in the trunk.

Charles Thompson was the day shift supervisor at La Habra's jail on February 16, 2003. Jailers are trained to make a record of a prisoner's property, including cash and jewelry. Thompson brought to court a document filled out by jailer Marquez when defendant was arrested. According to Thompson, Marquez had been properly trained to fill out arrest and detention reports. When the prosecutor asked Thompson about the contents of the record, defendant's attorney objected the questions called for hearsay and lacked foundation. The court overruled the objections. But when Thompson said two yellow metal rings were listed, the court sustained the objection: "Well lacks foundation that there's any training as to how you write down rings." The witness then explained jailers are trained to itemize a gold ring by stating, not that it's gold, but that it is yellow metal. At that point, the defense attorney said the document testimony deprived her of an "ability to confront the witness who actually filled it out to

go into his training." The objection was overruled. Thompson said the document listed $307.56 in cash.

At trial, defendant expressed an intention to call Ed Story as a witness. Outside the presence of the jury, the prosecutor said she wanted to impeach Story with a prior felony conviction. Defendant's attorney said, "It appears that that [conviction] was expunged and dismissed under 1203.4." The court indicated the prosecutor could impeach Story with the prior conviction.

Story had known defendant for about a year and a half. Defendant ran errands and did other jobs for him. Story said he paid defendant $490 or $500 in cash the Friday before he was arrested. Defendant's attorney asked Story about his 1983 conviction for perjury. During cross-examination, Story clarified he suffered a felony conviction for perjury.

Defendant testified that during the morning of February 16, 2003, he and his wife argued over pain pills defendant was taking for his back. As a result of the argument, and while his wife was still angry, defendant testified he and his wife went to the very same Starbucks where the robbery occurred. Defendant explained he became angry with his wife and left her at Starbucks while he drove off in his Dodge Intrepid. From there, he drove home, picked up his dog and then drove to Santa Ana to buy heroin.

According to defendant, he had not been on heroin for about a year, but "I reverted back to it this particular day." After he purchased heroin at First and Raitt in Santa Ana, defendant and a "guy in Santa Ana" drove around and used drugs in the car.

Later, he drove toward home and ran into a man named Paul, whose last name defendant does not know. The two discussed how defendant could buy drugs closer to home. They then purchased more heroin and "drove around and got high." At that point, the two picked up Paul's "lady friend" and Paul said he wanted to go to Wal-Mart "to make some money." Defendant explained: "That meant that he was going to

steal stuff out of Wal-Mart, and then take it back and get the money." Defendant told Paul he did not want to take part in the venture, and said, "I couldn't do that." He then permitted Paul to borrow the car to go to Wal-Mart.

After Paul and the woman drove off in the Intrepid, defendant tied up his dog outside a Denny's restaurant while he went inside and ate. When the two returned, Paul apologized for taking so long. He explained the Intrepid's right front tire had a flat. Paul gave defendant $100. He and the dog then went to a motel "because I told my wife that I would never bring drugs around the kids."

At 3:30 a.m., he got back into the car. "I wanted to get the dog something to eat." While he was stopped at a light, he saw someone with a gun who said, "Stop right there or I'll blow your blank head off." Defendant said he didn't know who it was, so he "took off."

Defendant did not see money in the car. He explained: "Obviously if I knew it was there and I was in a high speed chase I would have gotten rid of it."

When instructions were discussed outside the presence of the jury, the court asked defendant's counsel about CALJIC No. 2.15. Counsel told the court, "that's fine." The judge clarified, "So no objection to that?" Counsel answered, "No."

In instructing the jury, the court read CALJIC No. 2.15: "If you find that a defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crime of robbery. Before guilt may be inferred there must be some corroborating evidence tending to prove defendant's guilt. [¶] . . . [¶] As corroboration you may consider the attributes of possession, time, place and manner, whether the defendant had an opportunity to commit the crime charged, the defendant's conduct, and his false or contradictory statements, if any, and other statements he may have made with reference

to the property, and any other evidence which tends to connect the defendant with the crime charged."

During argument, defendant's attorney told the jury defendant was "a married man with two stepchildren living in a townhome in La Habra. Is this someone who's so desperate that he's going to commit this awful robbery? That's a big leap, folks." In rebuttal, the prosecutor asked where his wife and children were, and added: "His wife could have come in here and testified for him just like the people's witnesses came in and testified for him. Why is she not here? She could have corroborated his story about the fight at Starbucks over painkillers. Please. . . . Heroin maybe, not painkillers. She's not here because that didn't happen, and that's not what preceded the events of that day. [¶] . . . The stepson is not here for the same reason the wife's not here, because they can't help him because it's a made up lie." No objection was made.

Later, the prosecutor argued: "He's had the right to address the witnesses and the evidence against him. He's had the right to bring in his own evidence. He's had a lawyer." This time, defendant's attorney objected, without giving any basis for the objection. The court sustained the objection, explaining the argument "doesn't pertain to the evidence."

II

DISCUSSION

Impeachment of witness

Defendant claims the court erred when it permitted impeachment of witness Story with his 1983 felony conviction. The Attorney General agrees there was error but says it was harmless. We note defense attorney's equivocal statement to the trial court that "[i]t appears that that [conviction] was expunged and dismissed under 1203.4." But there is no evidence before this court that Story's conviction was expunged. Regardless of the lack of any evidence on this point, we will address the issue.

"For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony unless: [¶] (c) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense." (Evid. Code § 788, subd. (c).) Thus, if Story's conviction had actually been expunged, and if evidence of it was before the trial court, the trial court erred when it permitted impeachment based upon the expunged conviction.

An error in state law implicates the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. The *Watson* standard requires reversal only if it is reasonably probable that a result more favorable would have been reached in the absence of error. The evidence in this case is overwhelming. Numerous witnesses described some of defendant's physical features as well as his vehicle. The police found cash in small denominations, as was the stolen cash, and clothing similar to that worn by the robber in his car. Defendant acted in a guilty manner when he fled the police. He was wearing a gold wedding ring similar to the one described by witnesses. We conclude that even though we are unable to determine whether the court erred because there is no evidence before us that the witness's felony conviction was expunged, it is not reasonably probable there would have been a more favorable result absent the impeachment of Story.

Right to confrontation

Defendant next claims the court erred when it permitted testimony regarding an inventory of his property when he was arrested and jailed. He contends he was denied his right to confront witnesses against him.

The question presented in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354] was whether the procedure of playing a tape recorded statement of a witness

to a stabbing "complied with the Sixth Amendment's guarantee that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" (*Crawford v. Washington, supra,* 541 U.S. at p. __ [124 S.Ct. at p. 1357].) The court ruled the Sixth Amendment applied to testimonial statements. (*Crawford v. Washington, supra,* 541 U.S. at p. __ [124 S.Ct. at p. 1374].)

The court noted that its members as well as academics have suggested the Supreme Court revise its doctrine to more accurately reflect the original understanding of the Confrontation Clause and apply it "only to testimonial statements, leaving the remainder to regulation by hearsay law. . . ." Instead of tackling the question of nontestimonial situations, however, the court restricted its ruling to the obvious testimonial circumstance before it. (*Crawford v. Washington, supra,* 541 U.S. at p. __ [124 S.Ct. at p. 1370].)

The court did not specifically define just what a testimonial statement is. "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed. [Fn. omitted.]" (*Crawford v. Washington, supra,* 541 U.S. at p. __ [124 S.Ct. at p. 1374].)

The court also described "an especially acute concern with a specific type of out-of-court statement. [¶] Various formulations of this core class of 'testimonial' statements exist: '*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' [citation]; 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior

testimony, or confessions,' [citation]; 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' [citation]." (*Crawford v. Washington, supra,* 541 U.S. at p. __ [124 S.Ct. at p. 1364].) The court also noted that "statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." (*Ibid.)*

Even though the Supreme Court did not specify exactly what "testimonial" means, no objectively reasonable person would conclude a jail report itemizing property would be included under that term. The report lists property taken at the time of arrest.

Defendant was not denied his right to confront witnesses against him because jailer Marquez did not testify about the property inventory. We can find no error in the court's permitting jail supervisor Thompson to testify about the contents of the property report.

Prosecutor's argument

Defendant asserts prosecutorial misconduct because the prosecutor commented on his failure to call his family as witnesses.

"'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion — and on the same ground — the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820.) A defendant may be excused from a failure to object and request for a curative admonition if, (1) such an objection and request would have been futile, (2) an objection was made without opportunity to request a curative admonition, or (3) a timely admonition would not have cured the harm. None of these circumstances is present here. Therefore, the issue has not been preserved for appeal.

Even absent waiver, there was no misconduct. The prosecutor's argument was a logical and proper response to both defendant's evidence and defense attorney's argument. A prosecutor's argument may be vigorous so long as it amounts to a fair comment on the evidence. (*People v. Hill, supra,* 17 Cal.4th at p. 819.) Defendant's wife would have been a logical witness to support defendant's story about why he was at Starbucks on the day of the robbery. It was fair comment for the prosecutor to point out her absence. "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (Evid. Code § 412.) Further, defendant concedes a prosecutor may comment on the failure to a defendant to call a logical witness, including a spouse.

CALJIC No. 2.15

Defendant claims CALJIC No. 2.15 violates California law. He says the jury was misinstructed that possession of stolen property and slight corroborating evidence amounted to proof beyond a reasonable doubt.

CALJIC No. 2.15 is "a permissive, cautionary instruction which inures to a criminal defendant's benefit by warning the jury not to infer guilt merely from a defendant's conscious possession of recently stolen goods, without at least some corroborating evidence tending to show the defendant's guilt. [Citations.]" (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1174.) In *People v. Yeoman* (2003) 31 Cal.4th 93, the Supreme Court considered CALJIC No. 2.15. It stated the instruction, "informs the jury that conscious possession of recently stolen property is insufficient, without corroboration, to sustain a conviction." (*Id.* at p. 131.)

CALJIC No. 2.15 does not misstate the law and does not direct the jury that corroboration automatically means guilt. We find no error with this instruction.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.