Filed 2/22/12 P. v. Velasquez CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CHRIS P. VELASQUEZ, Defendant and Appellant.	B229017 (Los Angeles County Super. Ct. No. PA066713)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles L. Peven, Judge. Affirmed as modified.

Carol S. Boyk, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Theresa A. Patterson and Elaine F. Tumonis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Chris P. Velasquez guilty of assaulting a peace officer with a deadly weapon, corporal injury to a cohabitant, and resisting an executive officer. On appeal, defendant contends: (1) the trial court erred in failing to give a unanimity instruction in connection with the assault charge; (2) insufficient evidence supported a finding that he committed the assault with a knife; (3) the trial court erred in refusing to hear a statement from the victim, defendant's girlfriend, at the sentencing hearing; and (4) the trial court made several errors in calculating the length of defendant's sentence. Defendant also requests that we review the proceedings that took place pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We modify the judgment to correct two sentencing errors, and affirm in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the facts in accordance with the usual rules on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263 (*Virgil*).) On February 5, 2010, Cynthia Young called 911 from her home in San Fernando. She told the 911 operator her boyfriend—defendant—had "gone crazy," and hit her with a bat, then ran down the street. She said defendant "started acting weird," and hit her with the bat across her right breast and her hand as she tried to block the blow.

Abilio Lopez, a reserve police officer for the City of San Fernando, was on duty on February 5. He was en route to Young's house in response to the 911 call when he saw defendant. Defendant was running while carrying a baseball bat. Lopez turned on his patrol car's lights and spotlight. He got out of the patrol car, identified himself as a police officer, and ordered defendant to drop the bat. Defendant raised the bat in a threatening manner. Lopez drew his weapon, identified himself again, and repeatedly ordered defendant to drop the bat and get down on the ground. Defendant waved the bat at Lopez and several times swung the bat as if he intended to throw it at Lopez. At times, defendant lunged forward several feet toward Lopez. Lopez stood behind the open door of the patrol car with his weapon aimed at defendant. He ordered defendant to drop the bat and get down over 10 times. Defendant made motions to put the bat down, but then raised it again, waved it in an aggressive and threatening manner while stepping forward, then lowered it, as if to taunt Lopez. Lopez estimated defendant was 20 to 30 feet away;

close enough that if defendant threw the bat it would reach Lopez. Eventually, defendant put the bat down and started walking toward Lopez. As he walked, defendant swung his arms in the air.[1] Defendant approached to within 15 or 20 feet of Lopez. Throughout the incident, defendant repeatedly said, "Shoot me." His demeanor was irrational, aggressive, and threatening. Although Lopez was yelling loudly, defendant did not respond. He instead displayed threatening, violent gestures. Lopez feared defendant wanted to fight him.

Lopez moved around 10 or 15 feet away from his patrol car into the street. Defendant was walking in his direction. Lopez thought defendant might run toward him, and he wanted to avoid being trapped behind the patrol car. As defendant walked toward Lopez and Lopez walked away from the patrol car, a second police officer arrived at the scene, Officer Brandon Ordelheide. Ordelheide saw an object in defendant's left hand. When Ordelheide shined his patrol car spotlight on defendant, he saw that the object was a knife. Defendant was carrying the knife in his left hand with the blade protruding between his thumb and index finger. Ordelheide turned his patrol car toward defendant and accelerated to force defendant to back up and to allow Lopez to get behind Ordelheide's car. Defendant dove to the ground on a grassy patch between the sidewalk and the street, then sprang back onto his feet empty handed. Defendant looked down at the grassy patch. Ordelheide ran toward defendant, yelling orders for defendant to get down on the ground. Ordelheide tackled defendant to the ground. The two officers and defendant then engaged in a struggle as defendant resisted being restrained. Defendant pushed the two officers off his body, threw his elbows back, and kicked his feet; he also bit Ordelheide's forearm. During the scuffle, Ordelheide hit defendant in the face five times, injuring a tendon in his hand and causing a contusion and fracture around defendant's right eye. Eventually, Ordelheide and Lopez were able to partially handcuff defendant. Officers later found the knife on the ground.

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[1] Lopez did not recall if defendant was swinging punches in the air. Instead, he demonstrated the motion, which was described in the record as: "You have both hands up with your elbows pointed down, your arms pointed to the ceiling, and you're moving your hands kind of back and forth in a forward direction and then back over by the ears."

Following the altercation, Young told Ordelheide that before she called 911, defendant grew angry and yelled at her. Young said defendant raised the baseball bat as if to strike her. Young also told Ordelheide she and defendant had been drinking alcohol and defendant was using methamphetamine that night.

At the trial, Young provided testimony favorable to defendant, both in the prosecution's case-in-chief and in the defense case. During the prosecution case, Young testified that she called 911 because she was concerned for defendant's safety. She said they were at home and thought someone was in their truck, so defendant asked for a baseball bat. According to Young, he was "fiddling with the bat," then took off running, and she "got hit." Young admitted she told Ordelheide defendant had asked her what she was hiding under her coat, but she denied reporting that defendant yelled at her. She testified defendant did not raise the bat at her. She maintained the bat hit her as defendant turned to run away, and that the blow was an accident. She denied telling Ordelheide that she saw defendant raise the bat as if to strike her. She also denied that either she or defendant drank alcohol or used illegal drugs on the night of the incident, and she further denied making a contrary statement to Ordelheide. Young testified that she was still defendant's girlfriend, she loved defendant, and wanted him back. She claimed she would not lie to protect defendant because she had been abused in a previous relationship and got a divorce when her husband began to be abusive. She maintained she would not protect defendant if he deliberately hit her.

In the defense case, Young testified that within a month after the incident, she ran into Officer Ordelheide. According to Young, Ordelheide "boasted" about how defendant broke an officer's arm, and the police beat up defendant.

A jury found defendant guilty of assault upon a peace officer (Lopez) with a deadly weapon (Pen. Code, § 245, subd. (c)),[2] and found true an allegation that defendant personally used a knife in the commission of the assault (§ 12022, subd. (b)(1)). The jury further found defendant guilty of corporal injury to cohabitant (§ 273.5, subd. (a)), and found true an allegation that defendant personally used a baseball bat in the commission

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[2] All further statutory references are to the Penal Code.

of the crime (§ 12022, subd. (b)(1)). The jury additionally convicted defendant of resisting an executive officer (§ 69).

Defendant admitted suffering two prior convictions (§ 667.5, subd. (b)), and one strike within the meaning of the "Three Strikes" law (§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court sentenced defendant to an aggregate prison term of 19 years consisting of: the middle term of four years for assault, plus a one-year term for the personal use enhancement, doubled under the Three Strikes law (10 years); one-third the middle base term on the corporal injury count, plus a one-year term for the personal use enhancement, doubled (4 years); and five years for his prior prison term. The court also imposed a concurrent two-year term for the resisting an executive officer count. The court stayed an additional one-year sentence on each of the section 667.5, subdivision (b) allegations. Defendant timely appealed.

DISCUSSION

I. The Trial Court Did Not Err in Failing to Give a Unanimity Instruction on the Assault Count

Defendant was charged with one count of assault upon a peace officer—Lopez—with a deadly weapon, in violation of section 245, subdivision (c). On appeal, defendant contends the jury could have found he committed the crime based on either his use of the baseball bat, or his use of the knife, and the prosecutor did not select one act as the basis of the charge. Defendant argues the trial court was therefore required to sua sponte give a unanimity instruction. We find no prejudicial error.

"As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty." (*People v. Jennings* (2010) 50 Cal.4th 616, 679; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) However, a unanimity instruction is not required " 'when the acts alleged are so closely connected as to form part of one transaction.' [Citations.]" (*Jennings*, at p. 679.) "Even when the prosecution proves more unlawful acts than were charged, no unanimity instruction is required where the acts proved

constitute a continuous course of conduct." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115.)

Here, although there was evidence defendant had two different weapons, the evidence described one continuous assault against Lopez. The altercation with Lopez lasted only a few minutes. Defendant's gestures and actions taunting and threatening Lopez were essentially the same, only at one point he held a bat, and at one point Ordelheide saw that defendant had a knife. Defendant's actions with the bat and with the knife were so closely connected that they formed a single incident of assault, thus no unanimity instruction was required. (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1011 [continuous course of conduct for attempted murder where evidence showed defendant fired multiple shots at victim; jury had to accept or reject victim's testimony in toto]; *People v. Curry* (2007) 158 Cal.App.4th 766, 782 (*Curry*) [where defendant took victim's shoes and phone almost simultaneously during an assault, the takings formed a single incident of robbery]; *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1296 (*Haynes*) [robbery in which defendant stole half of victim's cash, then pursued victim in car and stole second half; no unanimity instruction required].)

Further, even if defendant's actions with the bat and his actions with the knife constituted two discrete crimes, we would find the trial court's failure to give a unanimity instruction harmless. "The failure to provide a unanimity instruction is subject to the *Chapman* harmless error analysis on appeal.[3] [Citation.] Under that standard the question is ' "whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on *evidence* establishing the requisite [elements of the crime] independently of the force of the . . . misinstruction." ' [Citation.] [¶] . . . 'Where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless. [Citation.] Where the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have

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3 *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. [Citation.]' [Citation.]" (*Curry*, *supra*, 158 Cal.App.4th at p. 783.)

Here, defendant did not offer a separate defense to the allegation that he assaulted Lopez with a bat. Instead, his only defense to the assault charge was that he never had a knife and the knife police recovered was not his. The jury clearly rejected this defense because it found true the special allegation that he personally used a knife in the commission of the assault.[4] Thus, the jury unanimously concluded defendant used a knife by, at a minimum, displaying it in a menacing manner. After rejecting defendant's argument that he had no knife, there was no reasonable basis to distinguish between his actions with the bat and his actions with the knife, in that they occurred in close succession, in virtually the same location, and for the same objective. (*Haynes*, *supra*, 61 Cal.App.4th at pp. 1295-1296.) The only reasonable inference from the jury's true finding on the personal use enhancement, and the evidence adduced at trial, is that the jury also unanimously concluded defendant committed an assault on Lopez with the knife.

II. Sufficient Evidence Supported the Jury's Conclusion that Defendant Committed an Assault with a Knife

Defendant further argues there was insufficient evidence for the jury to find he committed an assault upon Lopez with a knife. Specifically, defendant contends there was insufficient evidence to establish he attempted to injure Lopez with the knife, or that he had the present ability to do so during the incident. We disagree. When reviewing a claim of insufficient evidence, we determine " ' "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." . . . "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the

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[4] The jury was instructed with CALCRIM No. 3145: Personally Used Deadly Weapon, which included the following statement: "Someone personally uses a deadly or dangerous weapon if he intentionally [¶] [d]isplays the weapon in a menacing manner."

jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. . . . ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' " . . .' . . ." (*Virgil*, *supra*, 51 Cal.4th at p. 1263, citations omitted.)

To find defendant guilty of assault with a deadly weapon, the jury was required to determine the prosecutor proved defendant did an act with a weapon that by its nature would directly and probably result in the application of force to a person; defendant did the act willfully; when defendant acted he was aware of facts that would lead a reasonable person to realize the act, by its nature, would directly and probably result in the application of force to someone; and when defendant acted, he had the present ability to apply force with a weapon. (CALCRIM No. 860; *People v. Williams* (2001) 26 Cal.4th 779, 787-788, 790.)

The evidence at trial regarding the knife was as follows. Lopez never saw the knife. However, when Ordelheide arrived on the scene, he saw a knife in defendant's hand. At that point, defendant had dropped the bat, was saying "shoot me," and was approaching Lopez while aggressively and violently swinging his arms. Lopez thought defendant wanted to fight him. Defendant was around 15 or 20 feet away from Lopez, which led Lopez to leave the cover of his patrol car to avoid getting trapped. Ordelheide saw defendant dive to the ground and when he arose, he no longer had the knife in his hand. However, he was looking around on the ground, suggesting he was looking for the knife to pick it back up.

This evidence was sufficient to allow the jury to conclude defendant willfully acted with the knife, that his actions were of a nature that they would directly and probably result in the application of force, and that defendant had the present ability to apply force with the knife. Defendant was making aggressive gestures while holding a knife and deliberately approaching Lopez. That defendant was still several steps away from Lopez before he dropped the knife is not dispositive. (*People v. Hartsch* (2010) 49 Cal.4th 472, 507-508 [pointing gun at someone under threatening circumstances sufficient to establish assault]; *People v. Chance* (2008) 44 Cal.4th 1164, 1173-1174

[present ability to injure is having the means and location to strike immediately; that the victim takes step to avoid injury does not negate present ability]; *People v. Raviart* (2001) 93 Cal.App.4th 258, 266-267.) Lopez testified that defendant had moved close enough to him that he feared defendant would be able to run at him and reach him before he could fire his weapon.

We disagree with defendant's assertions that the prosecutor improperly conflated the testimony of Lopez and Ordelheide, and that there was no evidence defendant ever approached Lopez while holding a knife because Lopez did not see a knife. The testimony of the two officers overlapped such that they both described defendant's actions at the same moment in time, from two different points of view. Given the testimony, the jury could reasonably conclude that at the same time Lopez saw defendant advancing toward him (leading him to move away from his patrol car), Ordelheide arrived at the scene and saw defendant holding a knife while approaching Lopez. Further, the jury could reasonably conclude defendant had the knife in his hand as he was approaching Lopez and gesturing; Lopez simply did not see the knife, and Ordelheide did. Making aggressive and violent motions with a knife while approaching someone may reasonably be construed as an act that by its nature would directly and probably result in the application of force to the person. Substantial evidence supported the jury's conclusions.

III. The Trial Court's Rejection of Young's Victim Statement at Sentencing Was Harmless Error

Defendant further contends the trial court erred in refusing to allow Young to make a statement at sentencing. Defendant argues the trial court's refusal was an abuse of discretion under rules 4.420 and 4.423 of the California Rules of Court, and a violation of section 1191.1. Although we agree the trial court erred under section 1191.1, we find the error harmless.[5]

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[5] As discussed *infra*, section 1191.1 affords crime victims certain rights to be heard at sentencing. Neither party to this appeal has addressed whether *defendant* may properly challenge an alleged violation of section 1191.1. However, because we conclude the trial

Under section 1191.1, the victim of a crime has "the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his, her, or their views concerning the crime, the person responsible, and the need for restitution." The court is required to consider such victim statements in imposing a sentence. (*Ibid.*; *People v. Zikorus* (1983) 150 Cal.App.3d 324, 331-332.) Section 1191.1 does not limit the victim's statement to aggravating circumstances or statements in favor of a lengthier sentence. In this case, the trial court rejected Young's proffered statement as a victim. The court explained, "I heard her testimony. I heard the 911 call. I heard her testimony, so I see no value in having Ms. Young address the court." Under section 1191.1, the trial court should have allowed Young's statement. However, this was not structural error (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310), and did not involve a federal constitutional right. (*Chapman*, *supra*, 386 U.S. at p. 24.) Under *People v. Watson* (1956) 46 Cal.2d 818, 834-836, we find the error harmless.

To the extent Young would have given a statement offering mitigating circumstances of defendant's crime, it would have been largely cumulative. Young repeatedly explained in her testimony that she thought defendant hit her with the bat by accident. She described at length how this had happened while defendant was "fiddling" with the bat. She testified she called 911 because she was afraid for defendant's safety, and she made certain statements so that the police would arrive without delay. She also testified that she would not tolerate abuse from defendant. Since neither defendant nor Young made an offer of proof regarding the substance of her proposed statement, we do not know exactly what it would have entailed. But defendant argues on appeal: "It can be inferred from the record that Young would have explained why she made the 911 call; why she was certain that appellant had struck her by accident; that he had not physically or verbally abused her and that she would not have tolerated abuse from him." Each of these subjects was covered in Young's trial testimony. Moreover, to the extent Young's testimony may have revealed aggravating circumstances of the crime, defendant cannot argue he was prejudiced because the court did not allow the statement.

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court's error in not complying with the statute was harmless, we do not resolve this question.

We do not condone the trial court's refusal to hear Young's victim statement at sentencing. But we conclude there is no reasonable probability defendant would have received a more favorable sentence had the court allowed Young to provide her statement. Similarly, to the extent defendant's argument is based on the trial court's exercise of discretion under California Rules of Court, rule 4.420(b) to consider aggravating or mitigating circumstances in sentencing, we find no abuse of discretion.

IV. The Personal Use of a Deadly Weapon Enhancement as to the Assault Count Must Be Stricken

The parties agree the trial court erred in imposing a one-year sentence for the personal use of a deadly weapon enhancement in connection with the assault count. The jury found defendant guilty of assault upon a peace officer under section 245, subdivision (c), which identifies the crime of "assault with a deadly weapon or instrument, other than a firearm . . . . upon . . . a peace officer or firefighter . . . ." Use of a deadly weapon was an element of the crime. Thus, imposing an additional sentence for the personal use enhancement, based on defendant's use of a knife, would constitute impermissible double punishment. (§ 654.) We strike the section 12022, subdivision (b) one-year enhancement as to the assault count. (*People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070.)

V. The Personal Use Enhancements Should Not Have Been Doubled

The parties further agree the trial court erred in doubling the two 1-year personal use enhancements. The trial court sentenced defendant to four years in prison on count 1 and one year on count 2; imposed one-year personal use enhancements as to each count; then doubled the resulting seven-year prison term under the Three Strikes law. The two 1-year terms imposed for the personal use enhancements should not have been doubled. (*People v. Sok* (2010) 181 Cal.App.4th 88, 93-94 [enhancements are added after the determination of the base term and are not doubled].) Defendant's sentence must be corrected.

VI. *Pitchess* Review

Defendant requests on appeal that we review the sealed transcript of the *Pitchess* hearing and any corresponding documents to determine whether the hearing was properly

conducted. We have done so, and have found no error. The custodian of records brought the officers' personnel files to court, stated under oath there were no responsive documents in either file, and the trial court indicated it reviewed the personnel files and found no complaints. This was sufficient. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229.)

DISPOSITION

The judgment and sentencing minute order are modified to (1) strike the one-year section 12022, subdivision (b)(1) enhancement as to count 1; (2) reduce to one year the section 12022, subdivision (b)(1) enhancement as to count 2; (3) modify the term imposed as to counts 1 and 2 to five years, doubled pursuant to the Three Strikes law to 10 years, and increased by the one-year enhancement as to count 2, for a total term of 11 years on counts 1 and 2, and a total aggregate prison term of 16 years (including the five additional years for defendant's prior prison term). The trial court is directed to correct the abstract of judgment accordingly, and forward copies of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.