Filed 3/19/15 P. v. Amezquita CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE G. AMEZQUITA, Defendant and Appellant.	B253650 (Los Angeles County Super. Ct. No. TA126714)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Modified and Affirmed.

Gloria C. Cohen, under appointment by the Court of Appeal for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, John J. Kline and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jose G. Amezquita was convicted, following a jury trial, of three counts of home invasion robbery in violation of Penal Code[1] section 211 and four counts of receiving stolen property in violation of section 496, subdivision (a). The trial court found true the allegations that appellant had suffered two prior serious felony convictions within the meaning of section 667, subdivision (a), and the "three strikes" law (§§ 677, subdivisions (b) through (i) and 1170.12). The trial court sentenced appellant to a total term of 60 years to life in prison, consisting of a term of 25 years to life in state prison pursuant to the three strikes law for the robbery of Wilmer Flores plus a consecutive 25 years to life for the robbery of Lesbia Baca, plus two five-year terms for the section 667, subdivision (a) enhancements. The sentences for the robbery of Vilma Fajardo and for receiving stolen property were imposed concurrently to the 60 years to life term.

Appellant appeals from the judgment of conviction, contending the trial court erred in instructing the jury with CALCRIM No. 315 on eyewitness testimony and in calculating appellant's presentence custody credit. We order appellant's presentence custody credits corrected, as set forth in more detail in our disposition. The judgment is affirmed in all other respects.

Facts

Sometime before November 7, 2011, Wilmer Flores bought Honduran lottery tickets from Zoila Herrera Ayala, known as "La Negra." On November 7, Flores won about $10,000 in that lottery. La Negra brought the money to his apartment on South Broadway. It was customary for a winner to tip La Negra 10 percent of the winnings. Flores gave her $500, less than the customary amount. La Negra was not happy and asked for more. Flores refused.

That night, Flores and his wife Lesbia Baca went out to celebrate, leaving their children at home with a babysitter, Vilma Fajardo. Although Flores and Baca returned home at about 1:00 or 2:00 a.m., Fajardo stayed the night.

---

[1] All further statutory references are to the Penal Code unless otherwise specified.

Around 6:30 or 7:00 the next morning, Fajardo heard a knocking at the door. She went to Flores and Baca's bedroom and told them someone was at the door. Baca went to the door, and spoke with appellant and another man who both claimed to be police officers. They told her to open the door, and she did.

The men came in with their guns drawn. They had badges, bulletproof vests and radios. A third man entered the apartment five minutes later wearing civilian clothing.

Appellant grabbed Baca and pushed her. The second man went into the bedroom and hit Flores in the head with a gun. The men said they wanted the money Flores had won.

Baca said they would give the men everything they had. Appellant took Baca into the children's bedroom. Fajardo was there with the two children. Appellant punched Baca and demanded money. Baca gave him money she had on her person. Appellant demanded the rest. Baca said she had sent it to Honduras. Appellant demanded her ring, and got it. He then said he would kill one of the children if he did not get the money. He said La Negra told them the money was there.

Appellant demanded the children's documents and Baca's as well. Baca gave him the children's documents. Appellant said things would be very bad for her if she did not give him the money. Baca got another $100 from a closet, which angered appellant. Appellant tied up and gagged Baca and Fajardo with duct tape.

The second intruder tied up and gagged Flores with duct tape.

Appellant and the second man searched the residence. Appellant said he had found the money. Appellant told Baca he would kill her if she called the police. The men left, having been there about 30 to 40 minutes. The men had taken a camera, some jewelry, cell phones, and over $8000 in cash.

Baca used her teeth to break the tape, went outside and asked a neighbor to call the police.

Flores had to have surgery on his left eyebrow area and the back left side of his head. His cheek was fractured.

Detective Steven Velasquez of the Los Angeles County Sheriff's Department came to the apartment shortly after the robbery to investigate. Sheriff's deputies had already interviewed Flores and Baca, but Detective Velasquez re-interviewed them. Both told the detective that one of the suspects had a very distinctive tattoo on his neck which said, "Kenia."[2] Flores had not mentioned the tattoo in his initial interview.

Appellant's fingerprint was found on a small box at the apartment.

On November 16, 2011, Flores and Baca met with a sketch artist, who developed a drawing based on the information provided by Flores and Baca. Baca described a person who looked like appellant. Flores could only describe the other intruder.

Detective Velasquez used departmental resources to search for an individual with a "Kenia" tattoo. He identified appellant as having such a tattoo. On December 8, 2011, Detective Velasquez showed a six-pack photographic lineup containing appellant's photo to Flores and Baca. All suspects had their neck areas blacked out in the photos, since appellant's photo would have shown a distinctive tattoo there. Flores looked at the lineup for about 10 minutes, then stated that he believed appellant and another man were the robbers. Detective Velasquez testified that Flores was unsure of his identification. Baca identified appellant as the first robber who entered the apartment.

Fajardo was shown the photographic lineup on March 26, 2012. She selected appellant.

At trial, Flores identified appellant. Baca stated that appellant "look[ed] something like" the robber. Fajardo did not identify appellant in court.

In December 2011, the sheriff's department executed a search warrant at appellant's residence. They found a black BB gun, a walkie-talkie, two rolls of duct tape and a bulletproof vest. Flores testified that the vest and walkie-talkie looked like the ones worn by the robbers, and the BB gun looked like the gun carried by appellant.

The sheriff's department also opened a safe and found property belonging to Christine Cazares, Jesus Zazueta and Gladys and Willie Adams. These items were the

---

[2] Baca may have initially spelled the word "Kenea."

basis of the receiving stolen property charges. No items related to the Flores-Baca robbery were found.

Appellant did not present any evidence at trial.

Discussion

1. CALCRIM No. 315

Appellant contends the trial court erred in failing to remove the "certainty" factor from the list of factors to be considered by the jury in evaluating eyewitness identification testimony. He contends this factor is not supported by scientific evidence.

a. Forfeiture

Appellant did not object to CALCRIM No. 315 in the trial court. Respondent contends appellant has forfeited this claim. However, as respondent acknowledges, section 1259 permits review of a jury instruction to which no objection was made if the instruction affected the substantial rights of the defendant. "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) Hence, we review the claim.

b. Instruction

The court gave the jury the standard version of CALCRIM No. 315. That instruction tells the jury: "You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. [¶] In evaluating identification testimony, consider the following questions: . . ." The instruction then lists fourteen questions, including the question, "How certain was the witness when he or she made an identification?"

c. Analysis

Appellant acknowledges that both the California and United States Supreme Courts have approved the use of certainty as a factor in evaluating eyewitness identification. (*People v. Johnson* (1992) 3 Cal.4th 1183 [approving CALJIC No. 2.92, the predecessor to CALCRIM No. 315]; *Neil v. Biggers* (1972) 409 U.S. 188.) However, he contends that since 1992, scientific research has shown that a witness's certainty has little correlation with the accuracy of the identification. To support this contention, appellant relies on a number of law review articles and the holdings of state courts of last resort in Georgia, Massachusetts and Utah. (*Brodes v. State* (2005) 279 Ga. 435 [614 S.E.2d 766]; *Commonwealth v. Santoli* (1997) 424 Mass. 837 [680 N.E.2d 1116]; *State v. Long* (Utah 1986) 721 P.2d 483.)

As long ago as 1984, the California Supreme Court recognized that studies indicated a lack of correlation between the degree of certainty an eyewitness expresses in an identification and the accuracy of that identification. (See *People v. McDonald* (1984) 37 Cal.3d 351, 369.) Four years later, the court approved CALJIC No. 2.92, which contained a certainty factor. (*People v. Wright* (1988) 45 Cal.3d 1126, 1141.) Four years after that, the court specifically held that it was not error to instruct on the certainty factor. (*People v. Johnson*, *supra*, 3 Cal.4th at pp. 1231-1232.) The court reached this holding even though an expert witness had testified that a witness's certainty is not positively correlated with accuracy of identification. (*Ibid*.)

We are bound by the decisions of our state Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Further, the U.S. Supreme Court has continued to refer to the factors set out in *Neil v. Biggers*, *supra*, 409 U.S. 188, including the certainty factor, as factors to be considered in evaluating the reliability of eyewitness identifications. (*Perry v. New Hampshire* (2012) ___ U.S. ___ & fn. 5 [132 S.Ct. 716, 724-725 & fn. 5].) Thus, the decisions of that court do not provide a basis to find error in the use of the certainty factor.

d. Prejudice

Even assuming for the sake of argument that the trial court erred in instructing on the certainty factor, there was no prejudice to appellant.

Appellant contends the error was of federal constitutional dimensions, violating his right to due process of law under the Fifth and Fourteenth Amendments to the U.S. Constitution, and so must be assessed under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). The California Supreme Court has applied the reasonable probability standard of *People v. Watson* (1956) 46 Cal.2d 818 to claims of error involving the eyewitness identification instruction in general and the inclusion of the certainty factor in particular. (*People v. Ward* (2005) 36 Cal.4th 186, 214.) Even if the *Chapman* standard applied, that standard would not show prejudice to appellant.

The certainty factor is one of fourteen factors for the jury to consider. It is a neutral factor and applies whether a witness is certain or uncertain of his identification. (See *People v. Johnson*, *supra*, 3 Cal.4th at p. 1234.) In this case, the record shows the eyewitnesses were uncertain of their identifications of appellant. Baca and Fajardo did not identify appellant at trial. Flores did identify appellant at trial, but had been unable to do so previously. Flores was not asked about the degree of certainty of his identification. Thus, generally, the certainty factor would work in appellant's favor, since uncertainty may well indicate a lack of accuracy.

The only certainty expressed by the witnesses related to the "Kenia" tattoo. Baca told the first investigating officer about the tattoo. Flores agreed with Baca when Detective Velasquez went over the interview with the couple soon thereafter. It is undisputed that appellant had a tattoo reading "Kenia" on his neck. This is strong corroborating evidence of the identification of appellant as one of the robbers. The identification of appellant was also corroborated by the discovery of appellant's fingerprint on a box found in the Flores-Baca apartment.

Several additional factors listed in CALCRIM No. 315 were present in this case, and weighed in favor of the accuracy of the identification. The witnesses, particularly Baca, had a significant amount of time to observe appellant, since the robbery lasted 30

to 40 minutes. Baca made her observations under circumstances favorable to her ability to observe, since the entire encounter took place inside the apartment during the daytime. Baca was able to describe one of the robbers in enough detail that a sketch artist was able to create a sketch that looked like appellant. Her description of the robber's tattoo matched appellant's tattoo. She was also able to identify appellant in a photographic lineup. The witnesses were the same race as appellant.

For all of the above reasons, there is no reasonable probability or possibility that appellant would have received a more favorable verdict if the certainty factor had been removed from CALCRIM No. 315. (See *People v. Watson, supra,* 46 Cal.2d 818 [reasonable probability]; *Chapman, supra,* 386 U.S. 18 [reasonable possibility].)

2. Presentence conduct credit

The trial court awarded appellant 741 days of actual credit and 111 days of good time/work time credit, for a total of 852 days of presentence custody credit. He contends he is entitled to a total of 863 days. Respondent agrees. We agree as well.

An error in calculating presentence custody credits results in an unauthorized sentence that can be corrected on appeal. (*People v. Duran* (1998) 67 Cal.App.4th 267; *People v. Acosta* (1996) 48 Cal.App.4th 411, 420-427 [error may be corrected on appeal as long as another issue is raised on appeal].)

Appellant was arrested on December 21, 2011. He was sentenced on January 9, 2014. That totals 751 days in custody. Appellant was entitled to 15 percent work-time credit. (§ 2933.1.) That amount is 112 days. The total amount is thus 863 days.

Disposition

Appellant's presentence custody credits are ordered corrected to 751 days of actual custody and 112 days of custody credit, for a total of 863 days of presentence custody credit. The clerk of the superior court is instructed to prepare an amended abstract of judgment reflecting this correction and to deliver a copy to the Department of

Rehabilitation and Corrections. The judgment of conviction is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GOODMAN, J.*

We concur:

MOSK, Acting P.J.

KRIEGLER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.