Filed 4/23/14 P. v. Fite CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DEON STACEY FITE, JR., Defendant and Appellant.	B249434 (Los Angeles County Super. Ct. No. MA056886)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed.

Michele A. Douglass, 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, and Susan Sullivan Pithey, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Deon Stacey Fite, Jr. guilty of, among other things, second degree robbery. During defendant's trial, two spectators, including his mother, were removed because they were disrupting the proceedings. Defendant contends on appeal that their removal violated his state and federal constitutional rights to a public trial. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

On July 20, 2012, Chantra Boonsook was working as a cashier at a gas station in Lancaster. Boonsook was at the register when defendant entered the store, pointed a gun at her head, and demanded money. Defendant took about $100 to $200 from the register, as well as a red envelope and a laminated $2 bill. The station's surveillance cameras captured the incident.

Around the same time, Steven Montenegro was getting gas. Montenegro went inside the station, and defendant followed, heading straight to the cashier. Defendant swept the gun around the store, including at Montenegro, and then pointed it at the cashier's head. Before defendant left the store, he told everyone to lie down and put their hands on the back of their heads. Montenegro identified defendant at a field showup.

Tonya Heywood was also getting gas. She had just entered the station when defendant came in wearing a bandanna over his mouth. Defendant pulled out a gun and demanded money from the cashier, at which point Heywood ran out of the store. She drove away, but she saw defendant enter the Sienna Heights apartment complex.

Brandon Lott was visiting someone at Sienna Heights. He was leaving when he realized he didn't have his cell phone, which he thought he'd left in his car. He did not give his phone to defendant, who when arrested had a gun, a red envelope, a laminated $2 bill, and Lott's cell phone.

The People's gang expert, Detective Richard O'Neal, testified that defendant is a member of Bloods on Point (BOP), an Antelope Valley gang. Based on a hypothetical modeled on the facts of the case, it was his opinion that such a crime would be committed for the benefit of the gang.

Defendant testified. Although he admitted being a gang member, he denied committing the crime for the gang's benefit. He did rob the gas station, but he only pointed the gun at the cashier. Defendant's gang expert, Robert Freeman, said that, in his opinion, it could not be determined whether a crime like defendant's benefitted the gang.

II. Procedural background.

On May 3, 2013, a jury found defendant guilty of count 1, the second degree robbery of Boonsook (Pen. Code, § 211);[1] count 2, assault with a firearm of Montenegro (§ 245, subd. (a)(2)); and count 4, possession of a firearm by a felon (§ 29800, subd. (a)(1)). The jury found a firearm enhancement under section 12022.53, subdivision (b), true as to count 1, and a firearm enhancement under section 12022.5, subdivision (a), true as to count 2.[2] The jury found him not guilty of count 3, receiving stolen property, and hung as to a gang allegation under section 186.22, subdivision (b)(1).

On June 13, 2013, the trial court sentenced defendant to the high term of 5 years on count 1, doubled to 10 years based on a strike defendant admitted, plus 10 years for the gun enhancement under section 12022.53, subdivision (b), plus 5 years under section 667, subdivision (a). On count 4, the court sentenced him to a consecutive 1 year 4 months plus 1 year under section 667.5, subdivision (b). His total sentence therefore was 27 years 4 months.

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

[2] The trial court imposed but stayed under section 654 a sentence on count 2.

DISCUSSION

I. Defendant's right to a public trial was not violated by the exclusion of two spectators.

Defendant contends that the exclusion of his mother on the second day of trial violated his federal and state rights to a public trial. We disagree.

A. *Additional facts.*

On the second day of trial, during the testimony of Detective O'Neal, the trial court interrupted the proceedings to ask two women in the front to step out of the courtroom. When one asked if they would be allowed back, the court answered, "Not today." The person responded, "I drove from San Diego. That's my son."

After the People rested, the trial court made this statement, out of the jury's presence: "During the course of the trial I asked two ladies to step out. That's because they were in the front row—I don't know what their names are. I am assuming they are affiliated with this case. They were talking and laughing loud enough where it kept catching my attention. I tried to signal to them to get them to get quiet but then they got even louder. And at that point that is when I asked them to step out. [¶] Obviously, at that point she started to argue with me on the record, and that was just indicative of the type of conduct that was going on. [¶] So they are welcome back whenever they want to come back but they just need to understand that they can't carry on that way during the course of the trial."

That afternoon, the defense presented its case, including defendant's testimony. The record does not reflect whether the women returned to the courtroom that day or any day thereafter.

B. *Excluding defendant's disruptive mother did not violate his constitutional rights.*

A criminal defendant has a constitutional right to a public trial, including the presence of friends or relatives. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 13; *In re Oliver* (1948) 333 U.S. 257, 271-272; *Waller v. Georgia* (1984) 467 U.S. 39,

44; *People v. Esquibel* (2008) 166 Cal.App.4th 539, 551, 553.) The right to a public trial, however, may be "subjected to reasonable restrictions that are necessary or convenient to the orderly procedure of [the] trial." (*Esquibel*, at p. 552.) The circumstances under which right to an open trial will give way to other rights or interest " 'will be rare' " and " 'the balance of interests must be struck with special care.' " (*Ibid.*, quoting *Waller v. Georgia*, *supra*, at p. 45; see also *People v. Woodward* (1992) 4 Cal.4th 376, 383.)

A violation of the right to a public trial creates reversible per se error. (*People v. Woodward*, *supra*, 4 Cal.4th at p. 381.) But the temporary exclusion of select supporters of the accused does not necessarily create an automatic violation of the constitutional right to a public trial. (*People v. Esquibel*, *supra*, 166 Cal.App.4th at p. 552; *People v. Bui* (2010) 183 Cal.App.4th 675, 688.) Where, as here, some, but not all, spectators are asked to leave the courtroom, there must be a showing that the "exclusion of the public was necessary to protect some ' "higher value" ' such as the defendant's right to a fair trial, or the government's interest in preserving the confidentiality of the proceedings." (*Esquibel*, at p. 552.) The trial court must balance the competing interests and allow a form of exclusion no broader than needed to protect those interests. (*Ibid.* [exclusion of defendant's two friends during a child witness's testimony did not violate the defendant's constitutional rights].)

The record here shows that the trial court excluded defendant's mother and companion to protect a "higher value," namely, an orderly trial process and the right to a fair trial. While Detective O'Neal was testifying, the spectators were so disruptive and disrespectful that they ignored the trial court's silent entreaties to quiet down. Instead, they got louder. When the court then told them to leave the courtroom, defendant's mother did not immediately comply. Instead, she protested that she had come from San Diego and "[t]hat's my son." Such disruption of the proceedings, especially during the testimony of a witness, cannot be countenanced. By removing the spectators, the trial court acted properly to *protect* defendant's right to a fair trial. (See, e.g., *People v. Pena* (2012) 207 Cal.App.4th 944 [defendant's constitutional right to a fair trial was not

violated by the temporary exclusion of his family members where some of them had inappropriate contact with jurors].)

Defendant, however, also complains that his mother was excluded from a particularly important part of the proceedings, his testimony. That is unfortunate, but it is not, under these circumstances, a constitutional violation. Moreover, the exclusion of defendant's mother was temporary. The trial court initially told her that she could return the next day. But the court later said that she was "welcome back whenever they want to come back but they just need to understand that they can't carry on that way during the course of the trial." The record does not reflect whether she returned.

We also reject defendant's alternative contention that his counsel rendered ineffective assistance of counsel because he failed to object to the exclusion of the spectators.[3] A defendant claiming ineffective assistance of counsel must establish both error and prejudice. (See generally, *Strickland v. Washington* (1984) 466 U.S. 668.) Because we have concluded that no error occurred as a result of any alleged failure of trial counsel to object to the exclusion of the spectators, we reject the claim that defendant's trial counsel rendered ineffective assistance.

[3] The People argue that the issue has been forfeited. To preserve the issue for appeal, a defendant must object to and request a curative admonition for alleged spectator misconduct. (*People v. Chatman* (2006) 38 Cal.4th 344, 368.)

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.