People v. Wanless

2003 | Cited 0 times | California Court of Appeal | May 23, 2003

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

OPINION

A jury convicted defendant of (1) carrying a dirk or dagger and (2) possession of a firearm by a felon. The court found defendant had suffered prior "strike" convictions for residential burglary in 1985 and carjacking in 1995. Pursuant to the three strikes law, the court sentenced defendant to life with a minimum of 25 years on each count, to run concurrently. Defendant argues instructional error and challenges his sentence as excessive. We affirm.

I. FACTS

A. Prosecution Testimony

On October 11, 2001, Riverside County Sheriff's Department deputies assigned to the West County Narcotic Task Force were conducting an undercover narcotics investigation at a hotel in San Bernardino. About 7:30 p.m., Detective Reynolds saw defendant and another person get out of a car in the hotel parking lot. Defendant had with him a fanny pack. Reynolds was about 20 feet from defendant.

Deputy Dorrough was positioned in a room on the fourth floor of the hotel. Defendant knocked on the door and entered the room when Dorrough opened the door. Defendant had a fanny pack over his shoulder.

Dorrough and other officers who were in the room identified themselves to defendant. Dorrough searched defendant and found a sheath containing a knife in his waistband. The blade of the knife was about five inches long. The top of the knife could be screwed off to reveal a smaller knife inside.

Dorrough searched the fanny pack and found a .38 caliber revolver wrapped in a shirt. The gun appeared to be operable, and Dorrough determined that the trigger mechanism worked. The gun was unloaded.

B. Defendant's Testimony

Defendant testified he was staying at the hotel on October 11, 2001. He got a ride to go shopping from a man by the name of Ogilsbie, whom he did not know. When they returned to the hotel, they went upstairs to defendant's room. Defendant asked Ogilsbie if he knew where to get any crack cocaine. Ogilsbie said they were selling some in another room in the hotel and that if defendant took a fanny pack down to that room, they would give him some cocaine in return.

Defendant took the fanny pack and went to the room Ogilsbie had specified. He knocked on the door and someone let him in. He went inside and saw a lot of people in the room. They told him there was a sting operation or task force at work, and he was arrested.

Defendant denied he had the pack with him when he got out of Ogilsbie's car in the parking lot. Instead, he said, he had a brown paper bag from Radio Shack, where he had purchased a phone.

Defendant also denied he knew there was a gun in the fanny pack. He testified he had not looked inside the pack before going into the room and suspected it contained methamphetamine. He believed when he took the pack to the room that he was going to get some crack cocaine from a person named Shawn Colter.

Defendant admitted he lied to the officers when he was arrested. Originally he told the officers the pack had been hanging outside the room in which the officers arrested him. After one of the officers said he had not seen the pack hanging outside the room, defendant changed his story and said Ogilsbie had given him the pack. According to defendant, he lied because he was scared.

Defendant also admitted he had the knife when he entered the room and that his shirt was concealing the knife from view.

Finally, defendant admitted prior convictions for carjacking in 1995 and residential burglary in 1985. Defendant also testified that at the time he was arrested, he was on parole for stealing two tapes from a car in 1999.

C. Further Prosecution Testimony

After defendant testified, Deputy Dorrough testified he had searched the room in which defendant was arrested and found about an ounce of methamphetamine, along with scales and packaging. He did not find any evidence that crack cocaine was being sold from the room. Dorrough testified that his past experience indicated the person who was selling drugs from the room, Shawn Colter, only sold methamphetamine. According to Dorrough, people who use crack cocaine do not usually associate with people who use methamphetamine. Dorrough also testified defendant never mentioned anything about crack cocaine when he was arrested.

Detective Reynolds testified in rebuttal that he believed defendant was accompanied by a female when he arrived at the hotel and reiterated that he believed defendant was carrying a fanny pack.

II. DISCUSSION

A. CALJIC Nos. 2.03 and 2.21.2

The court gave CALJIC No. 2.03, stating: "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he's now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide."

The court also gave CALJIC No. 2.21.2, stating: "A witness who's willfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless from all the evidence you believe the probability of truth favors his testimony in other particulars."

Defendant claims giving these instructions was improper in several ways.

1. Evidentiary basis for CALJIC No. 2.21.2

First, defendant asserts there was no evidentiary basis for CALJIC No. 2.21.2. Citing People v. Hempstead (1983) 148 Cal.App.3d 949, 956 and People v. Turner (1990) 50 Cal.3d 668, 698-699, he contends the instruction should not be given in the absence of some internal conflict in the testimony of the witnesses or some inherent implausibility within a witness's testimony. Defendant argues that in this case his testimony was neither inherently improbable nor inherently inconsistent.

Neither case cited by defendant holds that CALJIC No. 2.21.2 should only be given in cases of internal conflict or inherent implausibility. Hempstead held the instruction was proper because of inconsistencies between witnesses' testimony, not because of internal inconsistency or implausibility. (People v. Hempstead, supra, 148 Cal.App.3d at p. 956.) Turner merely held the instruction is proper not only when there are discrepancies between opposing witnesses, but also where there are inconsistencies within the testimony of a single witness or his efforts to explain away undisputed circumstances are inherently implausible. (People v. Turner, supra, 50 Cal.3d at p. 699.)

The Supreme Court has stated that there is a sufficient evidentiary basis for CALJIC No. 2.21.2 where "[t]he jury could reasonably conclude that one or more witnesses had been willfully false in their testimony." (People v. Lang (1989) 49 Cal.3d 991, 1024.) The court in Lang held the instruction was proper where a prosecution witness testified the defendant had once pointed a gun at him, but the defendant denied the incident took place. (Ibid.) In People v. Allison (1989) 48 Cal.3d 879, the court

held the instruction was proper where a number of prosecution witnesses testified there was a great amount of blood in an apartment after a killing, but the defendant testified he saw none. (Id. at p. 895.)

There was a comparable conflict between defendant's testimony and that of Detective Reynolds. Defendant claimed he drove into the hotel parking lot with Ogilsbie, a male, and had a brown paper bag with him. Reynolds testified defendant was accompanied by a female and had the fanny pack with him.

Defendant's story also conflicted with assertions Deputy Dorrough made in his testimony. Defendant claimed he went to the room to get crack cocaine from Shawn Colter. Dorrough testified Colter did not sell crack cocaine, only methamphetamine; there was no evidence of crack cocaine being sold in the room, only methamphetamine; and people who used crack cocaine did not associate with people who used methamphetamine.

Given these conflicts in the testimony, the jury "could reasonably conclude that one or more witnesses had been willfully false in their testimony." (People v. Lang, supra, 49 Cal.3d 991, 1024.) The jury was not compelled to reach that conclusion. It may have believed Detective Reynolds mistook defendant's companion for a female, and mistook a paper bag for the fanny pack. It also may have believed defendant was simply mistaken about whether Colter was selling crack cocaine. But that is not the standard for whether CALJIC No. 2.21.2 is proper. Since there was a sufficient evidentiary basis for a finding of willful falsehood, the court was justified in giving the instruction.

2. Necessity for additional instructions

Defendant contends the challenged instructions were unnecessary because the court gave the general instruction on witness credibility, CALJIC No. 2.20. That instruction advised that when evaluating a witness's believability, the jury could consider anything with a tendency in reason to prove or disprove the truthfulness of the witness, including his or her ability to perceive, remember, or communicate any testimonial event; the character and quality of the witness's testimony; the witness's demeanor; whether the witness had any bias, interest, or motive to lie; the existence or nonexistence of any fact to which the witness testified; the attitude of the witness; any previous consistent or inconsistent statement of the witness; an admission by the defendant [sic] of untruthfulness; and the witness's prior conviction of a felony.

We do not view CALJIC Nos. 2.03 and 2.21.2 as unnecessary simply because the court gave CALJIC No. 2.20. Both of the challenged instructions expand on what is covered in CALJIC No. 2.20. CALJIC No. 2.03 addresses an element -- the defendant's willfully false pretrial statements -- that is not addressed in CALJIC No. 2.20. CALJIC No. 2.03 also cautions the jury that even if it finds the defendant made a false pretrial statement, that conduct is not sufficient by itself to prove guilt.

CALJIC No. 2.20 does not include any cautionary provision comparable to that contained in CALJIC No. 2.03. The cautionary provision is important given the danger that a jury may be tempted to convict merely because it thinks the defendant lied about the crime. As the Supreme Court has pointed out, "`[t]he cautionary nature of [CALJIC No. 2.03] benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.]'" (People v. Boyette (2002) 29 Cal.4th 381, 438; People v. Jackson (1996) 13 Cal.4th 1164, 1224.)

CALJIC No. 2.21.2 also addresses a matter -- the effect of a witness's willfully false testimony -- not explicitly covered by CALJIC No. 2.20. CALJIC No. 2.20 advises the jury it may consider the existence or nonexistence of any fact to which a witness testified --i.e., whether the witness's testimony was accurate. However, it does not expressly deal with the effect of willful falsehood while testifying.

Moreover, CALJIC No. 2.21.2 tells the jury that while it may reject the entire testimony of a witness who willfully testifies falsely on a material point, it should not do so if it believes the probability of truth favors his or her testimony on other points. As with CALJIC No. 2.03, CALJIC No. 2.20 does not include any comparable cautionary provision. The cautionary provision is important to prevent the jury from automatically discounting testimony which may be convincing simply because it finds the witness falsely testified about an entirely different matter.

Finally, Supreme Court cases hold that an instruction which is merely superfluous is not prejudicial. (People v. Jackson, supra, 13 Cal.4th 1164, 1225 [instruction permitting jury to infer consciousness of guilt from defendant's attempt to fabricate evidence]; People v. Pride (1992) 3 Cal.4th 195, 248-249 [same].) Accordingly, even if defendant were correct in arguing the challenged instructions were unnecessary, he would not demonstrate reversible error.

3. Pinpoint instructions

Defendant contends the challenged instructions were improper "pinpoint" instructions because they implied certain conclusions from specified evidence. Both CALJIC No. 2.03 and CALJIC No. 2.21.2 have been held not to be improper pinpoint instructions. (People v. Boyette, supra, 29 Cal.4th 381, 439 [CALJIC No. 2.03]; People v. Kipp (1998) 18 Cal.4th 349, 375 [same]; People v. Savedra (1993) 15 Cal.App.4th 738, 746 [CALJIC No. 2.21.2].) In Savedra, in fact, the court described the contention that CALJIC No. 2.21.2 is an impermissible pinpoint instruction as "frivolous." (Savedra at p. 746.)

Defendant asserts that while the instructions might not be erroneous pinpoint instructions standing alone, in combination they inexorably imply certain conclusions from certain evidence. Neither instruction, however, inexorably requires the jury to draw any particular inference. Both tell the jury they "may" reach a given conclusion from a given finding. Moreover, the instructions deal with disparate matters. CALJIC No. 2.03 deals with false pretrial statements, while CALJIC No. 2.21.2

deals with false testimony at trial. Accordingly, since the instructions do not overlap, it is difficult to see how they could combine to constitute an improper "pinpoint" instruction when, as the cases cited ante hold, neither would do so standing alone.

4. Lessened burden of proof

Defendant contends the challenged instructions, in combination, lessen the prosecution's burden of proof because they permit the jury to discredit the entirety of the defense simply because it finds the defendant made false pretrial statements and gave testimony that conflicted with that of prosecution witnesses. The Supreme Court has upheld both CALJIC No. 2.03 and CALJIC No. 2.21.2 against claims that they impermissibly lessen the prosecution's burden of proof. (People v. Boyette, supra, 29 Cal.4th 381, 438-439 [CALJIC No. 2.03]; People v. Turner, supra, 50 Cal.3d 668, 698 [CALJIC No. 2.21.2].) As the court explained in Turner with respect to CALJIC No. 2.21.2, "the instruction is neutrally phrased and does not focus attention on a particular witness. . . . Applying neutral standards of credibility to defense witnesses does not improperly `lessen the prosecution's burden.'" (Turner at p. 699.)

Further, as noted ante, CALJIC No. 2.03 specifically states that a false pretrial statement is not sufficient by itself to prove guilt. CALJIC No. 2.21.2 similarly states that a jury should not reject the entire testimony of a witness who testifies falsely if it believes the probability of truth favors his or her testimony in other particulars. Thus, while both instructions permit inferences adverse to the defendant from specified conduct, each instruction also specifically cautions that the specified conduct does not, by itself, warrant conviction of the defendant or rejection of his or her entire testimony. That being the case, it is difficult to see how the instructions, even in combination, would lead the jury to discredit a defense entirely based on false pretrial statements or conflicting testimony, as defendant contends.

The Supreme Court noted the precautions built into CALJIC No. 2.21.2 in People v. Millwee (1998) 18 Cal.4th 96, 159, stating: "By its own terms, CALJIC No. 2.21.2 permits -- but does not require -- a general inference of distrust where testimony is `willfully false' in `material part.' The instruction also authorizes rejection of the witness's testimony as a `whole' only where appropriate based on `all the evidence.' We decline to reconsider prior decisions permitting use of CALJIC No. 2.21.2 where supported by the evidence at the guilt or penalty phase."

Defendant notes the court in People v. Lescallett (1981) 123 Cal.App.3d 487, 493 suggested in dictum that an instruction equivalent to CALJIC No. 2.21.2 might not be advisable where it could appear to be directed principally toward a defendant's exculpatory testimony. However, the Supreme Court has not found Lescallet's dictum persuasive. In People v. Allison, supra, 48 Cal.3d 879, 895, the court said, "we are unpersuaded by defendant's reliance on dictum in [Lescallett], for his assertion that the instruction should not have been given since he testified in his own behalf and the jury may have viewed it as directed principally toward his exculpatory testimony. . . . `Nothing in the language of

the instruction itself improperly singled out [defendant.] By its terms, the instruction referred only to a "witness" and not to anyone by name or legal status. The jury was also instructed that "every person" who testified under oath is a witness (CALJIC No. 2.20), and that no statement by the court was intended to suggest that the jury should believe or disbelieve "any" witness (CALJIC No. 17.30).'" The court similarly rejected Lescallet's dictum in People v. Turner, supra, 50 Cal.3d 668, 699, citing Allison.

Here, as in People v. Allison, supra, 48 Cal.3d 879, the court gave CALJIC Nos. 2.20 and 17.30, dispelling any suggestion that CALJIC No. 2.21.2 might be directed solely or principally at defendant's testimony. In addition, the court advised the jury that "[d]iscrepancies in a witness's testimony or between a witness's testimony and that of other witnesses . . . do not necessarily mean that a witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently." That instruction, again, adequately cautioned the jury not to reject defendant's defense just because his testimony conflicted in some respects with that of the prosecution witnesses. Consequently, the challenged instructions did not improperly lessen the prosecution's burden of proof.

B. Failure to Strike Prior Convictions

Defendant moved the court to exercise its discretion to strike one of his prior strike convictions, to avoid a mandatory life sentence under the three strikes law. The court denied the motion. Defendant contends this was an abuse of discretion.

In People v. Williams (1998) 17 Cal.4th 148, the Supreme Court stated that in deciding whether to dismiss a defendant's prior strike conviction a court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes law] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (Id. at p. 161.)

The record shows the court in this case properly considered the factors identified in People v. Williams. In denying defendant's motion, the court noted defendant had no job prospects, no personal family, no children that he was caring for, and no wife. He was on parole at the time he committed the present offenses. He was under the influence of cocaine at the time and was trying to buy more. He lied to the police. Consequently, defendant was "a liar, drug user, and a thief . . . ." The court further noted defendant lacked job skills and had been kicked out of the Army. His criminal record went from car burglary to home burglary to carjacking to possession of guns, increasing in seriousness.

The record supported the court's assessment of defendant's background and prospects. Defendant

had nine prior convictions, including two burglaries and a carjacking. [1] Defendant told the probation officer he had been addicted to hard drugs since he was 16 (defendant was 40 years old at the time of sentencing). Although defendant contends his drug problem should be viewed as a treatable disease rather than as a ground for an extended prison term, the record shows defendant made little effort to treat the problem. He had been in residential treatment programs in 1986 and 1997 but admitted he had not followed through with the methods for relapse prevention he had been taught in those programs. Thus, when he committed his most recent offenses, he was still firmly entrenched in a life of drug use and in fact was attempting to get more drugs when he was apprehended.

Defendant asserts he is not a classic poster child for the three strikes law. However, that argument misses the point. The relevant question is not whether defendant is a classic repeat offender but whether he is so clearly outside the spirit of the three strikes law as to make his sentence an abuse of discretion.

That point is made in People v. Bishop (1997) 56 Cal.App.4th 1245, a case on which defendant relies. Defendant asserts that, despite the fact the defendant in Bishop had a worse criminal record than defendant's record in this case, the Court of Appeal in Bishop found no abuse of discretion in the trial court's dismissal of two strikes in order to give a two-strike sentence. However, the current offense in Bishop -- petty theft with a prior, for stealing six videocassettes from a drug store -- was significantly less serious than defendant's conduct of carrying a concealed firearm and knife. Moreover, all three of the defendant's strikes in Bishop were at least 17 years old, whereas here defendant's 1995 carjacking conviction was only seven years old when he was sentenced.

Most importantly, however, the court in Bishop emphasized that its failure to find an abuse of discretion did not necessarily mean it would have been an abuse of discretion not to strike the prior convictions. Quoting from People v. Superior Court (Alvarez) (1997) 14 Cal.4th 968, 977-978, the Bishop court said: "` . . . "The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. . . . In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." . . . Concomitantly, "[a] decision will not be reversed merely because reasonable people might disagree. `An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'. . ."' [Citation.]" (People v. Bishop, supra, 56 Cal.App.4th 1245, 1249-1250, fn. omitted.)

Those principles support affirmance here. Unlike Bishop, where the People challenged the sentence, here defendant is attacking the court's exercise of its discretion. Thus, it is his burden "to clearly show that the sentencing decision was irrational or arbitrary." (People v. Bishop, supra, 56 Cal.App.4th 1245, 1249.) Although it might not have been an abuse of discretion for the court to dismiss one of defendant's strikes, its failure to do so was not irrational or arbitrary so as to constitute an abuse of discretion.

C. Cruel and/or Unusual Punishment

Defendant attacks his sentence under the three strikes law as cruel and/or unusual punishment under the California and United States Constitutions. He first argues the three strikes law is unconstitutional because it automatically mandates an increased sentence for recidivists without regard to the nature of the individual offender or his or her current offense. However, as noted in part II.B., ante, even in a three strikes case the trial court has discretion to strike one or more prior convictions to avoid a mandatory sentence under the three strikes law. That discretion ensures that individualized factors relating to the offender and the offense will be given adequate consideration.

Defendant also contends that the three strikes law is too random to survive constitutional scrutiny, because it punishes more severely the offender who commits one or more strike felonies followed by a nonstrike felony than one who commits the same crimes in the reverse order. Thus, the offender whose crimes increase in seriousness is punished more leniently than one whose crimes decrease in seriousness. This argument was rejected in People v. Kilborn (1996) 41 Cal.App.4th 1325, 1328-1330, and People v. Cooper (1996) 43 Cal.App.4th 815, 828. We reject it for the reasons stated in those decisions.

Defendant asserts his sentence is disproportionate, and therefore cruel and unusual, in view of (1) the nature of the offense and the offender; (2) the punishment for more serious crimes in California; and (3) the punishment for comparable crimes in other jurisdictions. To the extent defendant relies on the federal Constitution, the three-part analysis on which his argument rests does not apply. In Ewing v. California (2003) ___ U.S. ___ [123 S.Ct. 1179; ___ L.Ed.2d ___] (Ewing), a majority of the court concluded either that the Eighth Amendment contains only a "narrow" proportionality principle in non-capital cases (Chief Justice Rehnquist and Justices O'Connor and Kennedy) or that it contains no proportionality principle at all (Justices Scalia and Thomas).

Under the narrow proportionality principle recognized by the plurality in Ewing, the Eighth Amendment does not require strict proportionality between crime and sentence and does not mandate comparative analysis within and between jurisdictions. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime. In weighing the gravity of the current offense, the court considers not only that offense, but also the offender's criminal history. (Ewing, supra, ___ U.S. at p. ___ [123 S.Ct. at p. 1180].)

Considering his current offenses and his criminal history, defendant's sentence was not disproportionate. His current offenses both involved possession of a concealed deadly weapon. His past criminal record was lengthy and included two burglaries and a relatively recent carjacking. Defendant had taken no appreciable action to treat his drug problem.

We are equally unpersuaded by defendant's three-part analysis under the California Constitution. With respect to the first factor, the nature of the offense and offender, defendant argues his sentence

is disproportionate because his current offenses were not violent. However, "[t]he seriousness of the threat a particular offense poses to society is not solely dependent on whether it involves physical injury." (People v. Cooper, supra, 43 Cal.App. 4th 815, 826.) Life sentences under the three strikes law have been upheld for much less serious conduct than that involved here. In People v. Goodwin (1997) 59 Cal.App.4th 1084, the defendant received 25 years to life for shoplifting a pair of pants, with prior convictions for two burglaries on a single day 13 years earlier, when he was 19 years old. (Id. at pp. 1093-1094.)

With respect to the second factor, numerous cases have rejected defendant's argument that because a three strikes law sentence exceeds the usual sentence for extremely serious crimes, such as homicide, it is unconstitutional when applied to lesser conduct. As the cases point out, a three strikes sentence is based on recidivism and therefore cannot meaningfully be compared to the punishment for a single offense, even one involving homicide. (See, e.g., People v. Cooper, supra, 43 Cal.App.4th 815, 826; People v. Kinsey (1995) 40 Cal.App.4th 1621, 1630; People v. Ingram (1995) 40 Cal.App.4th 1397, 1416, disapproved on another point in People v. Dotson (1997) 16 Cal.4th 547, 559-560, fn. 8; People v. Cartwright (1995) 39 Cal.App.4th 1123, 1136.)

Finally, with respect to the third factor, defendant's contention that the three strikes law is unduly harsh compared with other states' recidivist statutes overlooks the fact other states impose life sentences for conduct which would not qualify for a life sentence under the three strikes law. (See, e.g., Rummel v. Estelle (1980) 445 U.S. 263, 265-266, 281-282 [100 S.Ct. 1133, 63 L.Ed.2d 382]; Harmelin v. Michigan (1991) 501 U.S. 957, 961, 994 [111 S.Ct. 2680, 115 L.Ed.2d 836].) And in any event, "[t]hat California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual." (People v. Martinez (1999) 71 Cal.App.4th 1502, 1516; accord, People v. Romero (2002) 99 Cal.App.4th 1418, 1433.)

D. CALJIC No. 17.41.1

The court gave CALJIC No. 17.41.1, stating: "The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

Defendant contends the instruction was error. He recognizes the Supreme Court in People v. Engelman (2002) 28 Cal.4th 436 held it is not error to give the instruction, but states he is raising the issue to preserve his right to seek federal review. As we are bound to follow Engelman (Auto Equity Sales, Inc. v. Superior Court of Santa Clara County (1962) 57 Cal.2d 450, 455), we find no error in giving the instruction and do not address defendant's arguments to the contrary.

III. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

We concur:

RAMIREZ, P.J.

KING, J.

1. Defendant describes his 1995 conviction as being for attempted carjacking, but the record indicates it was for carjacking. Defendant apparently was also charged with attempted carjacking in that proceeding, but that charge was dismissed.