People v. Waggoner

2003 | Cited 0 times | California Court of Appeal | January 7, 2003

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Brent Waggoner appeals his conviction for second-degree commercial burglary. He argues that the trial court erred (1) in denying his Pitchess motion (Pitchess v. Superior Court (1974) 11 Cal.3d 531) (2) in admitting evidence of a sanitized prior conviction and (3) in admitting evidence that he was unemployed. We find that these contentions lack merit. We find support for Waggoner's argument that he should not have been asked on cross-examination if other witnesses were lying. However, no prejudice resulted from this error. Finally, we reject Waggoner's claims that his conviction must be reversed because the trial court instructed the jury with CALJIC No. 17.41.1 and that his sentence of seven years constitutes cruel and unusual punishment. We shall affirm the judgment.

PROCEDURAL BACKGROUND

While on parole, Waggoner was charged with one count of second-degree commercial burglary. (Pen. Code [1] § 459.) It also was alleged that Waggoner suffered one prior serious or violent felony for robbery and three prior offenses (robbery, transportation or sale of a controlled substance, and possession of a controlled substance) for which he did not remain free of prison custody for a period of five years.

Waggoner moved for pretrial discovery requesting "[t]he names, addresses, and telephone numbers of all persons who have filed complaints with or who were interviewed by investigators or other personnel from the Claremont Police Department (hereafter `Investigating Department') against Officer K. Franklin #2534, Officer L. Brown and Officer E. Barnes, relating to false arrest, illegal search and seizure, fabrication of probable cause, the fabrication of charges and/or evidence, fabrication of police reports, coerced confession/cooperation, dishonesty, and improper tactics, as well as the dates of the filing of such complaints." [2] Waggoner also sought "[d]isclosure of the discipline imposed upon the named officers as a result of the [I]nvestigating Department's investigation of any citizen complaint described . . . above."

Waggoner argued the requests were relevant to his criminal case because "[t]he police report says that Mr. Waggoner said that he was trying to return the purse, that he'd used the restroom and found

the purse in the restroom and that a lady yelled at him and he dropped the purse." "According to information and belief, Mr. Waggoner did not make the statements to the officers that he found the purse in the restroom or any other statement other than acknowledging his presence." "If, as expected, defendant offers a defense at trial that the officers fabricated probable cause, and lied in their official report, then the officers' prior conduct would be admissible . . . ." The trial court denied Waggoner's request for discovery of the police officers' personnel files.

Waggoner moved in limine to exclude any reference to the enhancement that he used a firearm in the commission of a robbery. The trial court granted this motion, ordering the prosecutor refrain from mentioning the use of a firearm in connection with Waggoner's prior robbery conviction. Waggoner also moved to exclude evidence of his prior felony conviction for transportation or sale of a controlled substance. The court found that the prejudicial effect of informing the jury that Waggoner suffered a prior conviction for the transportation or sale of a controlled substance outweighed its probative value. Thus, the court permitted the prosecutor to ask Waggoner if he was convicted of two prior felonies and if one prior felony was robbery.

The jury was instructed with CALJIC No. 17.41.1. The jury found Waggoner guilty of second degree commercial burglary. Waggoner waived his right to a jury trial on the priors. The court found the alleged priors to be true. The court denied Waggoner's motion to reduce the burglary from a felony to a misdemeanor and his motion under People v. Superior Court (Romero) (1996) 13 Cal.4th 497 to strike a prior conviction.

In sentencing Waggoner, the trial court concluded that the aggravating factors outweighed the mitigating factors based on Waggoner's criminal history and his parole violation. The court sentenced Waggoner to the upper term of three years and doubled the three-year term pursuant to section 1170.12, subdivisions (a)-(d). The court added one year for one prior pursuant to section 667.5, subdivision (b). The court struck the remaining priors. Waggoner timely appealed.

FACTUAL BACKGROUND

On August 19, 2001, Waggoner entered an office building that was closed to the public and took Sharon Berry's purse from the lunch room. Waggoner opened the purse, but did not remove anything from the purse. Berry asked Waggoner to give back her purse, and he "pointed to the exit and he said, oh, I thought it was that lady's there." No one was at the exit where Waggoner pointed. Berry approached Waggoner and took her purse. Waggoner did not resist. Berry called 911 and described Waggoner.

Officer Kenneth Franklin, an employee of the Claremont Police Department, responded to a radio call about the theft of a purse. After receiving a description of the subject, he approached Waggoner. Officer Franklin asked Waggoner "How are you doing?" Waggoner responded, "I'm the person that was trying to return that lady's purse in the office." Waggoner said that a lady yelled at him and he

dropped the purse.

In addition to Berry, Dianne Hutchings and Janice Vaitkus, Berry's co-workers, saw Waggoner in the office building and identified him. Waggoner's Testimony

Waggoner testified in his defense. He testified that on August 19, 2001, he went to Venice beach. To return to his home in Riverside, he took a bus. When he reached Claremont, he did not have enough money to pay for the bus to Riverside. Waggoner had to use the restroom, so he entered an office building near the bus station. After using the restroom, Waggoner left the building. Later he returned to the building to use the phone. He entered the lunch room and noticed bags. He "looked at the purse and [he] said man, that lady just left out of here with some bags and then I said - I said man, if I take her purse to her, then she might help me - in my mind I was thinking that she might help me because I did it and I could ask for - that's what I was thinking." Waggoner never opened the purse. When Ms. Berry said it was her purse, he did not resist when she took the purse back. Waggoner was going to ask if he could use the phone because he was "running low on change," but Berry walked away. Waggoner did not intend to steal anything when he entered the office building.

When defense counsel asked Waggoner if he was convicted of robbery, he answered affirmatively. When defense counsel asked Waggoner if he was convicted of another felony, Waggoner answered affirmatively. When defense counsel asked if the conviction involved violence, the trial court sustained the prosecutor's objection. When defense counsel asked if it was a theft-related conviction, the trial court again sustained the prosecutor's objection. After the jury recessed, the court stated "I'll be more than happy to let you inform the jury exactly what the felony was, but I won't let you tell them everything that it wasn't. I did that specifically for the benefit of the defendant that they wouldn't be prejudiced by knowledge of possession, transportation or sale of drugs." The court also indicated it would instruct the jury not to speculate regarding the nature of the prior.

At another side bar, defense counsel objected to any mention of Waggoner's parole status. Defense counsel was concerned that Waggoner gave his parole address to the police officer. The prosecutor responded that she did not intend to question Waggoner on his parole status but wanted to ask if he was unemployed. The court indicated she could ask if he was employed, but not if he was on parole. Defense counsel did not object at sidebar to questions regarding Waggoner's unemployment and did not object when the prosecutor asked Waggoner whether he was employed.

When Waggoner's testimony differed from that of other witnesses, the prosecutor asked Waggoner if the other witness was lying. Defense counsel repeatedly objected to these questions on grounds that the questions were argumentative and called for speculation. With one exception, the trial court overruled defense counsel's objections.

CONTENTIONS

Waggoner contends that the trial court erred in denying his motion for discovery of the police officers' personnel files, the trial court erred in the manner it sanitized his prior conviction, evidence of his unemployment should not have been admitted, the prosecutor committed misconduct, CALJIC No. 17.41.1 is an improper instruction requiring reversal, and his sentence constitutes cruel and unusual punishment.

DISCUSSION

I. The Trial Court Correctly Denied Waggoner's Pitchess Motion

Pitchess v. Superior Court, supra, 11 Cal.3d 531 and its progeny establish a scheme for balancing a criminal defendant's due process right to a fair trial and a police officer's privacy right to maintaining the confidentiality of his or her employment file. (People v. Mooc (2001) 26 Cal.4th 1216, 1226.) Waggoner argues the trial court erred in denying his motion for discovery of complaints against three police officers, one of whom spoke to him and completed a report.

To obtain discovery of police officers' employment files "the information sought must be requested with sufficient specificity to preclude the possibility of a defendant's simply casting about for any helpful information . . . ." (People v. Mooc (2001) 26 Cal.4th 1216, 1226.) Only evidence which is similar to the alleged misconduct is discoverable. (California Highway Patrol v. Superior Court of Santa Cruz (2000) 84 Cal.App.4th 1010, 1020.) Waggoner's requests were overbroad. He sought information on persons who have filed complaints against three police officers "relating to false arrest, illegal search and seizure, fabrication of probable cause, the fabrication of charges and/or evidence, fabrication of police reports, coerced confessions/cooperation, dishonesty, and improper tactics . . . ." Waggoner also sought "[d]isclosure of the discipline imposed upon the named officers as a result of the [I]nvestigating Department's investigation of any citizen complaint . . . ." On its face, Waggoner's request for information suggests that he was "simply casting about for any helpful information" as it is not tailored to any specific issue in his case.

Further, to show good cause for discovery, a Pitchess motion must include "`[a]ffidavits showing good cause for the discovery or disclosure sought, setting for the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information form the records.'" (People v. Mooc, supra, 26 Cal.4th 1216, 1226.) Good cause requires a "`specific factual scenario' which establishes a `plausible factual foundation' for the allegations of officer misconduct committed in connection with the defendant." (California Highway Patrol v. Superior Court ,supra, 84 Cal.App.4th 1010, 1020.)

In an effort to show good cause for discovery, Waggoner argued the "evidence would be relevant to establish the defense to this case, which is that the defendant is being charged based upon fabricated probable cause and dishonesty on the part of the officers." In an affidavit, attached to the motion and signed in good faith by Waggoner's counsel, counsel indicated that Waggoner did not make

statements recorded in the police report, suggesting that the police report was fabricated. He further argued the "materials sought in this motion would be used by the defense to locate witnesses to testify that the officers have character traits, habits and custom for engaging in false arrest, illegal search and seizure, fabrication of probable cause, the fabrication of charges and/or evidence, dishonesty, fabrication of false police reports, dishonest, and improper tactics."

Waggoner's allegations are conclusory and fail to establish a plausible factual foundation for the asserted misconduct -- an arrest without probable cause. Waggoner "was alleging that all three of the officers had `fabricated probable cause' by falsely attributing statements to appellant that he did not make." Waggoner assumes that if he had not spoken to the officers, there would have been no probable cause to arrest him. Waggoner fails to acknowledge that the officers were called following a 911 phone call and had received a description of the suspect prior to speaking with him. Waggoner refutes the statements in the police officer's report attributable to him, but does not dispute the other basis for probable cause to arrest him. In short, Waggoner's conclusory allegation that the officers lacked probable cause to arrest him was insufficient to compel discovery of the officers' employment files.

Waggoner's argument is problematic for another reason. He asks this court to rely on an affidavit that he knows is false. The affidavit attached to his Pitchess motion stated:

"Based on my review of the arrest reports and investigation in this matter, I believe that the evidence will show the only thing Mr. Waggoner said to the officer was that he was in the building. According to information and belief, Mr. Waggoner did not make the statements to the officers that he found the purse inthe restroom or any other statements other than acknowledging his presence. If, asexpected, defendant offers a defense at trial that the officers fabricated probablecause, and lied in their official report, then the officers' prior conduct would beadmissible at defendant's trial."

In contrast to the allegation in the affidavit, during trial Waggoner testified that he told the police officer "I am the guy upstairs who was trying to change - return a purse, It was a mistake."

Waggoner's testimony makes plain that the information and belief on which counsel based the Pitchess motion was inaccurate. In other words, there was no basis for the assertion that the police officers fabricated the police report and no good cause to seek discovery of the police officers' employment files. Thus, even if the trial court had abused its discretion, Waggoner cannot establish that due process requires a remand of this case for an in camera review of the police employment records where the only basis for the requested discovery was false.

Finally, Waggoner makes a related claim that he was denied a fair trial because the prosecutor is required to disclose exculpatory information under Brady v. Maryland (1963) 373, U.S. 83, 87 (Brady). Brady holds that to comport with due process the prosecution must disclose evidence that is both "favorable to the accused" and "material to the issue of guilt or punishment." (Id. at p. 87.) Evidence

is favorable to the accused if it is directly exculpatory or can be used for purposes of impeachment. (United States v. Bagley (1985) 473 U.S. 667, 676.) Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (Id. at p. 682.) The standard for materiality under Brady (materiality to the fairness of trial) is narrower than the standard for materiality under Pitchess (materiality to the subject matter in the pending litigation). (City of Los Angeles v. Superior Court (2002) 29 Cal.4th 1, 10.) Thus, because Waggoner failed to demonstrate materiality as necessary for his Pitchess motion, he necessarily failed to satisfy the narrower standard under Brady.

II. The Trial Court Acted Within Its Discretion In Sanitizing Waggoner's Prior Felony

With respect to his prior felony conviction for transporting or selling a controlled substance, the trial court allowed Waggoner to choose either (1) to admit evidence of the felony conviction for transporting or selling a controlled substance or (2) to sanitize the felony and refer to it only as a felony. Waggoner selected the latter, but now argues that the sanitization of the felony "poses a significant possibility that the jury will assume that the undisclosed prior offense is identical to the crime charged." Waggoner argues that the trial court should have permitted a third option: to sanitize the felony and permit defense counsel to ask whether the felony was theft related. [3]

Waggoner's request to inform the jury that his prior was not theft related may have been meritorious if his crimes had been committed prior to the passage of Proposition 8. (People v. Barrick (1982) 33 Cal.3d 115, 124-125; People v. Rollo (1977) 20 Cal.3d 109, 119.) The passage of Proposition 8 altered the law to add the following provision to the California Constitution: "Any prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment . . . ." (Cal. Const., art I, § 28, subd. (f).) Under current law, introduction of a sanitized conviction is not an abuse of discretion even if it results in the possibility of jury speculation, the precise error Waggoner asserts. (People v. Massey (1987) 192 Cal.App.3d 819, 825.) The trial court did not abuse its discretion in granting Waggoner the choice of a wholesale admission of the prior or the admission of a sanitized version. (People v. Ballard (1993) 13 Cal.App.4th 687, 698.)

To bear on a witnesses' credibility, a conviction must involve moral turpitude. (People v. Wheeler (1992) 4 Cal.4th 284, 296 fn. 6, citing People v. Castro (1985) 38 Cal.3d 301, 315.) Waggoner's conviction for the transportation or sale of a controlled substance involved moral turpitude. (People v. Castro, supra, 38 Cal .3d at p. 317.) The trial court's grant of Waggoner's request to sanitize the felony when it was introduced to the jury does not alter its status from a felony involving moral turpitude to a felony lacking moral turpitude.

III. Admission Of Evidence Of Waggoner's Unemployment Was Not Error

In People v. Wilson (1992) 3 Cal.4th 926, the prosecution sought to introduce evidence that the defendant was required to make restitution for a prior conviction in the amount of $13,007. (Id. at p.

934.) The defense counsel objected to the introduction of the restitution fine asserting that the probative value of the evidence was outweighed by its prejudicial effect. (Ibid.) The trial court permitted the prosecution to introduce evidence that the defendant was indebted to a governmental agency in Kansas in the amount of $13,007. (Ibid.) The high court found that the trial court had erred because "[e]vidence of a defendant's poverty or indebtedness generally is inadmissible to establish motive to commit robbery or theft, because reliance on poverty alone as evidence of motive is deemed unfair to the defendant, and the probative value of such evidence is considered outweighed by the risk of prejudice." (Id. at p. 939.)

Waggoner argues that by a parity of reasoning, evidence of his unemployment was inadmissible to show his motive for the burglary. Waggoner waived this issue by failing to raise it in the trial court. (People v. Eckstrom (1986) 187 Cal.App.3d 323, 332.)

Even if Waggoner had not waived the issue, we would not find the trial court erred in admitting evidence of his unemployment. In this case, Waggoner's defense was that he did not have enough money for the bus and he was attempting to befriend the owner of the purse so that the owner would give him money for the bus. As Waggoner argues in another section of his brief, "[t]he evidence demonstrated that he had only 35 cents in his possession when he was taken into custody, did not have enough money for the bus fare home, was unable to reach anyone by telephone to give him a ride, and that he was recently unemployed."

Waggoner also argues that admission of the evidence of his unemployment violates the equal protection clause. He contends "the use of evidence of poverty to achieve a criminal conviction constitutes an improper, invidious discrimination which violates the constitutional right to equal protection." Waggoner's contention fails to show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner, a threshold requirement to demonstrate a violation of the equal protection clause. (People v. Basuta (2001) 94 Cal.App.4th 370, 397.) Therefore, even if Waggoner had objected in the trial court on this ground, his objection would have been overruled. Furthermore, if the introduction of evidence of his unemployment was introduced in error, it was not prejudicial. There was already evidence of appellant's impecunious condition and the evidence against appellant was strong.

IV. The Trial Court Erred In Permitting The Prosecutor To Ask Waggoner If Other Witnesses Were Lying

According to Waggoner, "[b]y asking appellant to give an opinion whether other witnesses had lied, the prosecutor committed misconduct." [4] Waggoner did not object to the prosecutor's questions on this basis, and the issue is waived. (People v. Samayoa (1997) 15 Cal.4th 795, 841.) Nor did Waggoner request an admonishment to the jury, which also results in waiver of the issue on appeal. (People v. Cooper (1991) 53 Cal.3d 771, 822.) [5]

Waggoner, however, objected to the prosecutor's questions on the grounds that they were speculative and argumentative. Those objections should have been sustained. The questions call for speculation because Waggoner does not have personal knowledge of whether a witness was lying or perceived an event differently from him. (Jefferson, Cal. Evid. Benchbook (3ed. 2002) § 27.55 p. 466 ["an examiner's question asking a lay witness to testify to facts that the witness has not personally observed, or to state an opinion not based on his or her own observations, calls for speculation"].) The questions are argumentative because they do not call for a fact from the witness, but instead call for an inference. (3 Witkin, Cal. Evid. 4th (2000) Presentation at Trial, § 168, p. 232.)

The remaining issue is prejudice. Waggoner argues that the questioning "likely caused the jury to reject appellant's explanations for his presence in the Visiting Nurse's Association building and his possession of the purse." Waggoner has not demonstrated it is reasonably probable he would have received a more favorable verdict absent the evidence. (People v. Watson (1956) 46 Cal.2d 818, 836.) The extent of Waggoner's defense was that if he took the purse the owner would help him. As the trial court explained "there was something contrived about his testimony," and, in addition to the jury, the trial court found it not believable. Moreover, the evidence against Waggoner was overwhelming. Three persons identified him as the person who took the purse, he acknowledged to police officers that he took the purse, and testified that he took the purse. Upon review of the entire record, it is not reasonably probable that the verdict would have been more favorable to defendant without the challenged questions by the prosecutor.

V. Instructing the Jury with CALJIC No. 17.41.1 Does Not Constitute Reversible Error

Waggoner argues that instructing the jury with CALJIC No. 17.41.1 threatened the sanctity of the jury deliberations and inhibited jurors from exercising their independent judgment. He contends that his right to a trial by jury was violated and that the error violates the federal constitution.

Our Supreme Court recently rejected similar arguments in People v. Engelman (2002) 28 Cal.4th 436 (Engelman). Even though the Engelman court concluded that the instruction posed too great a risk of intruding on the jury's deliberative processes and ordered that it no longer be used (id. at pp. 446-449), it found no merit in the defendant's state and federal constitutional claims. (Id. at pp. 441, 444.) Following Engelman, we find no merit to Waggoner's claims that instructing the jury with CALJIC No. 17.41.1 constitutes a constitutional violation requiring reversal.

In addition, to the extent error might have occurred, it was harmless. (People v. Molina (2000) 82 Cal.App.4th 1329, 1332-1335.) The record does not show any reports to the court about jurors who refused to follow the court's instructions, that the jury had any difficulty in reaching a verdict, or that the court in any way improperly intruded into the jury's deliberations.

VI. Waggoner's Seven Year Sentence Does Not Constitute Cruel And Unusual Punishment

According to the probation report, which the trial court read and considered, Waggoner was on parole at the time he committed the current offense. Waggoner's criminal history began in 1986 when he was convicted of burglary in Arizona. In 1987, while on probation, he was again convicted of burglary. In 1994, he was convicted for transporting or selling a controlled substance and for robbery. In 1997, he was convicted of possession of a controlled substance and in 2001 he was convicted of being under the influence of a controlled substance. Based on these offenses, Waggoner has been ordered to serve prison sentences of two years, 16 months, and three years. According to the probation report, Waggoner's record "shows a possible six year history of substance abuse."

Waggoner argues that, even acknowledging his lengthy criminal history, his sentence is cruel and unusual punishment under both the state and federal constitutions. Relying primarily on Solem v. Helm (1983) 463 U.S. 277; In re Lynch (1988) 8 Cal.3d 410; People v. Dillon (1983) 34 Cal.3d 441; and Andrade v. Attorney General of the State of California (9th Cir. 2001) 270 F.3d 743 [6] , he argues that his seven year sentence is grossly disproportionate to his crime of nonviolent burglary. Waggoner emphasizes that he returned the purse without threatening the victim and that he committed the crime "as a matter of necessity." Waggoner also argues that his recidivism is a result of his narcotics addiction pointing out that he had three prior narcotics related convictions.

Under the California Constitution, a sentence is cruel or unusual if it is so disproportionate that it shocks the conscience and offends fundamental notions of human dignity. (In re Lynch (1972) 8 Cal.3d 410, 424.) In applying the foregoing test, the nature of the offense and of the offender are relevant factors. (People v. Dillon (1983) 34 Cal.3d 441, 479.) The nature of the offense includes both abstract and specific criteria such as the motive, the nature of the crime, the defendant's involvement, and the consequences of the crime. (Ibid.) The nature of the offender includes criteria such as the defendant's age, prior criminality, personal characteristic, and state of mind. (Ibid.) A defendant must overcome a "`considerable burden'" to show that a sentence is disproportionate because it is the Legislature that determines the appropriate penalty for criminal offenses. (People v. Weddle (1991) 1 Cal.App.4th 1190, 1197, quoting People v. Bestelmeyer (1985) 166 Cal.App.3d 520, 529.)

Waggoner's seven year sentence was based not only on his current conviction for second degree commercial burglary, but also on his recidivism. He was sentenced as a second strike offender because of his prior robbery conviction. (Pen. Code §§ 667, 1170.12.) Waggoner also has a lengthy criminal history commencing in 1986. Even assuming his criminal history is a result of his substance abuse, "drug addiction is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment." (People v. Martinez (1999) 71 Cal.App.4th 1502, 1511.) Viewed in light of his current conviction and his criminal history, Waggoner's seven-year sentence does not shock the conscience.

Nor is Waggoner's sentence cruel and unusual under the federal constitution. In 1980, the United States Supreme Court, upheld a life sentence for a third-time offender who had been convicted of fraudulent use of a credit card to obtain $80 worth of goods or services, with passing a forged check

in the amount of $28.36, and with obtaining $120.75 by false pretenses. (Rummel v. Estelle (1980) 445 U.S. 263, 265-266.) In arguing that the life sentence constituted cruel and unusual punishment, the defendant underscored the lack of violence in his crimes and the small amount of money involved. (Id. at p. 275.) The court rejected the defendant's arguments finding that the state had an interest in punishing recidivist criminals in a harsher manner than non- recidivist. (Id. at p. 276.) "[G]iven [the defendant's] record, Texas was not required to treat him in the same manner as it might treat him were this his first `petty property offense.'" (Id. at p. 284.)

Three years later, five justices found a life sentence without the possibility of parole to be cruel and unusual where the defendant was convicted of six nonviolent felonies including third-degree burglary, obtaining money under false pretenses, grand larceny, driving while intoxicated, and writing a "no account" check for $100. (Solem v. Helm (1983) 463 U.S. 277, 280-281.) The court found that the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." (Id. at p. 284.) It characterized all of the defendant's offenses as "relatively minor" noting that "none was a crime against a person." (Id. at pp. 296-297.) Except the death penalty, the defendant's sentence was the most severe punishment that a State could impose. (Id. at p. 297.)

Whether the Eighth Amendment embodies a proportionality review in a non-capital case subsequently was questioned in Harmelin v. Michigan (1991) 501 U.S. 957, which contained no majority opinion. Two justices found that the Eight Amendment contains no proportionality guarantee and that Solem should be overruled. (Id. at p. 965, 987 (opn. of Scalia, J.).) Three justices found that the Eighth Amendment forbids sentences that are "grossly disproportionate" to the crime. (Id. at p. 1001 (opn. of Kennedy, J.).) Four justices found that the Eighth Amendment embodies a proportionality principle. (Id. at p. 1014-1015 (opn. of White, J.), p.1027 (opn. of Marshall, J.).) A majority found that the sentence of life in prison without the possibility of parole for the possession of more than 650 grams of cocaine did not violate the Eighth Amendment. (Id. at p. 996.)

Waggoner's sentence of seven years is far less severe than the life without the possibility of parole imposed on the defendants in Rummel, Solem and in Harmelin. In addition, unlike the defendant in Solem, Waggoner's criminal history includes a violent felony in that he used a firearm in the commission of a robbery. Waggoner's seven-year sentence is based not only on his current conduct but also on his history of recidivism and his sentence is neither disproportionate or "grossly disproportionate" to his criminal conduct.

DISPOSITION

The judgment is affirmed.

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We concur:

RUBIN, J.

BOLAND, J.

1. All further undesignated statutory citations are to this Code.

2. According to the police report, Officers Brown and Barnes detained Waggoner when Officer Franklin contacted the victim and witnesses.

3. The issue is not waived as the Attorney General argues. Waggoner raised the issue in a motion in limine. A motion in limine to exclude evidence is normally sufficient to preserve an issue for review where, as here "(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." (People v. Morris (1991) 53 Cal.3d 152, 190, disapproved on another ground People v. Stansbury (1995) 9 Cal.4th 824, 830 fn. 1.) Once the trial court rejected Waggoner's motion in limine, he was not required to refrain from all mention of the prior in order to preserve the issue.

4. Waggoner correctly points out that federal courts have held that it is error to force a criminal defendant to comment on the veracity of another witness. (See e.g. U.S. v. Sanchez (9th Cir. 1999) 176 F.3d 1214, 1220; U. S. v. Sullivan (1st Cir. 1996) 85 F.3d 743, 749.)

5. Citing People v. Hill (1998) 17 Cal.4th 800, 820 Waggoner argues this claim is not waived because an objection on grounds of prosecutorial misconduct would have been futile. In Hill, the court found that the unusual circumstances of the case where the prosecutor engaged in continual misconduct, "the trial court[] fail[ed] to rein in [the prosecutor's] excesses," and the trial court chastised defense counsel for asserting meritless objections, a further objection on grounds of prosecutorial misconduct would have been futile. (Id. at p. 821.) The record in this case does not reveal similar egregious circumstances.

6. The Supreme Court granted certiorari on April 1, 2002, essentially negating the persuasive value of this opinion. In addition, unlike the defendant in Andrade, Waggoner was sentenced to seven years for a second strike, whereas the defendant in Andrade was sentenced to two consecutive twenty- five years to life sentences for third and fourth strikes. (Andrade v. Attorney General of the State of Californai, supra, 270 F.3d 743, 749.)