People v. Tolliver

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Appellant Nathan Tolliver III was convicted of two counts of resisting an executive officer (Pen. Code, § 69) and one count of evading an officer with willful disregard for safety (Veh. Code, § 2800.2, subd. (a)). He was sentenced to the upper term on each count. He appeals his conviction on the ground that the court improperly excluded evidence that would have supported his necessity defense. He also argues that his sentence violates the Sixth Amendment to the United States Constitution under Cunningham v. California (2007) ___ U.S. ___ [127 S.Ct. 856] (Cunningham). We affirm the judgment.

Appellant also asks that we determine whether the trial court's conduct of a Pitchess[1] examination complies with People v. Mooc (2001) 26 Cal.4th 1216, and whether the court improperly withheld any information from the personnel records it reviewed. We have reviewed the transcript of the examination and find no error in the court's conduct.

FACTUAL AND PROCEDURAL HISTORY

At about 2:30 a.m. on September 2, 2005, appellant had an argument with Brianne Barth, his former girlfriend, and he apparently tried to break into her Long Beach apartment. She called Darin Blizzard, an off- duty Long Beach police officer who was a family friend, and he arrived shortly thereafter. Blizzard confronted appellant, and when appellant walked away, Blizzard told Barth to call the police, which she did. Blizzard then circled the block in his car, looking for appellant. As he did so, he noticed appellant following him in a sport utility vehicle. Blizzard accelerated and appellant followed him onto the 605 freeway.

Blizzard used his cellular phone to call for backup. Appellant hit Blizzard's car once and nearly struck it two more times. After he narrowly missed Blizzard's car for the second time, a black-and-white police car arrived. Appellant stopped on the freeway and got out of his vehicle. A uniformed police officer got out of the black-and-white car and ordered appellant to lay on the ground. Appellant approached the officer and tried to grab his shoulder. The officer struck appellant several times with his baton, at which point appellant ran back to his vehicle and got inside. The

officer broke the driver side window of appellant's vehicle and another uniformed officer fired a taser inside. Appellant drove away with three police cars (but not Blizzard) in pursuit, emergency lights and sirens active.

The chase continued on the 605 freeway, the 405 freeway, the 22 freeway and surface streets in Huntington Beach, and ended when appellant crashed. At some point during this portion of the chase, appellant called his girlfriend, Lanae Mitchell, and said he was being pursued by people who were trying to kill him.

Appellant was arrested and charged with one count of assault with a deadly weapon, two counts of resisting an executive officer, and one count of evading an officer with willful disregard for safety. At trial, he attempted to introduce evidence of the cellular phone call he made to his girlfriend during the chase, but the court excluded this as hearsay. Appellant was acquitted of assault with a deadly weapon, but convicted on the other three counts. He was sentenced to the upper prison term of three years for each count, to be served concurrently. This is a timely appeal from the judgment.

DISCUSSION

I.

Appellant argues that the trial court abused its discretion by excluding the cell phone statement he made to Mitchell during the chase. He claims the statement satisfies the spontaneous statement and contemporaneous statement exceptions to the hearsay rule. (Evid. Code, §§ 1240, 1241.) The statement was relevant because it would have supported his necessity defense to the charge of evading an officer with willful disregard for safety.

At the outset we note that regardless of whether it was error to exclude the statement, the evidence does not support a necessity defense. In order to establish that defense, a defendant must prove by a preponderance of the evidence that, among other things, he did not substantially contribute to the emergency to which he was reacting when he committed the crime.[2] (People v. Buena Vista Mines, Inc. (1998) 60 Cal.App.4th 1198, 1202.)

Here, appellant initiated a high speed chase in which he pursued an off-duty police officer, collided with him once and barely missed him twice. When a marked police car arrived and the officer inside ordered appellant to lay on the ground, appellant approached the officer and tried to grab him. After the officer struck appellant with his baton, appellant ran back to his vehicle and got inside. The officer broke the driver side window of appellant's vehicle and another uniformed officer fired a taser inside. Appellant drove off and the officers ran back to their cars to pursue him. It is in the context of these events that appellant claims his flight from the police was necessary.

On these facts, no reasonable juror could find by a preponderance of the evidence that appellant did

not substantially contribute to the police pursuit, the situation to which he claims his necessity defense applies. The defense of necessity may not be invoked where it is the culpable conduct of the defendant that creates or contributes to the claimed necessity. (People v. Verlinde (2002) 100 Cal.App.4th 1146, 1165.) As a matter of law, appellant was not entitled to present a necessity defense.

Although the trial court allowed him to do so, and instructed on the defense, any error the court made by excluding evidence in support of that defense was harmless. (People v. Watson (1956) 46 Cal.2d 818, 836.) With this in mind, we turn to the specific evidentiary errors appellant raises.

Evidence Code section 1240 states: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) [p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception." A spontaneous statement is one made without deliberation or reflection. (People v. Ramirez (2006) 143 Cal.App.4th 1512, 1523.) Whether a particular statement meets these requirements is a question of fact to be resolved by the court. (Ibid.) This preliminary factual determination will be upheld if substantial evidence supports it, but the ultimate decision to admit or exclude the evidence is reviewed for abuse of discretion. (Ibid.)

In this case, appellant had the presence of mind to call his girlfriend to tell her that he was being pursued. Moreover, appellant made the call sometime during the second leg of the chase, during which he had time to drive on three freeways. These facts provide substantial evidence for the court's finding that appellant had time to reflect (and, impliedly, that the call was not spontaneous). Given this finding, the court properly ruled that Evidence Code section 1240 did not apply to the call.

Appellant claims the trial court misinterpreted Evidence Code section 1240 by ruling that the mere passage of time to reflect precluded application of the hearsay exception. But that was not how the court ruled. It said: "The [Evidence Code section 402 motion] to prohibit introduction of the statement is granted. I do find that the defendant had time to reflect on this, it is a self-serving statement presented to, in my opinion, justify his actions, and it has no indicia of trustworthiness under either exception to warrant its presentation to the jury. So we will not hear about that." The court found that appellant had time to reflect, but it did not say that fact alone precluded the application of Evidence Code section 1240, or that the court's decision was based solely on that fact.

Evidence Code section 1241 provides that: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) [i]s offered to explain, qualify, or make understandable conduct of the declarant; and [¶] (b) [w]as made while the declarant was engaged in such conduct."[3]

Here, appellant called his girlfriend and told her that he was fleeing from people who were trying to kill him. It is undisputed that appellant made the statement while he was fleeing from the police. That statement was offered at trial to explain appellant's reason for fleeing. The statement met Evidence Code section 1241's requirements and thus was excepted from the rule against hearsay.[4]

Although the trial court erred in excluding the statement, the error was harmless because the call was offered to support a defense to which appellant was not entitled as a matter of law.

Appellant also argues that the exclusion of his cellular statement violated his right to due process of law under the Sixth and Fourteenth Amendments to the United States Constitution. These arguments were not raised at trial, and hence are forfeited on appeal. (People v. Santos (2007) 147 Cal.App.4th 965, 972.)

II.

Appellant asks that we determine whether the trial court abused its discretion by denying his Pitchess motion. (People v. Mooc, supra, 26 Cal.4th 1216, 1228 ["`A trial court's decision on the discoverability of material in police personnel files is reviewable under an abuse of discretion standard'"].)

Upon proper request by a defendant, the custodian of a police officer's personnel records must bring to court all documents "potentially relevant" to the request so that the trial court may review them in camera. (People v. Mooc, supra, 26 Cal.4th at pp. 1228-1229.) If the custodian does not bring the complete personnel record, he or she must state for the record what documents were omitted and why they were omitted. (Id. at p. 1229.) A court reporter must be present, and the court must make a record of the documents it reviewed. (Ibid.) Subject to certain statutory limitations and exclusions, the trial court must disclose to the defendant any information it finds in the records that is relevant to defendant's case. (Id. at p. 1226.)

In this case, the court reviewed complete computer printouts of each officer's internal affairs file, and all of the actual files that supported the printouts were present as well. As the court reviewed each printout, it announced each complaint against the officer, what the complaint alleged and whether the complaint would be disclosed, thus creating a record of its review. The court ordered disclosure of every allegation that was relevant to appellant's Pitchess motion. The court followed the procedural requirements of a Pitchess motion, and our review of its decision not to disclose certain information in the officers' confidential files shows no abuse of discretion.

III.

Appellant argues that under the recent United States Supreme Court decision in Cunningham, his sentence to the upper term prescribed by California's determinate sentencing law (DSL) violates the Sixth and Fourteenth Amendments to the United States Constitution. In light of People v. Black (2007) 41 Cal.4th 799 (Black II), we reject his argument.

The DSL specifies three prison terms for most criminal offenses: a lower term, a middle term and an upper term. Penal Code section 1170, subdivision (b) requires the trial court to impose the middle

term unless there are circumstances that aggravate or mitigate the crime.[5]

In Apprendi v. New Jersey (2000) 530 U.S. 466 (Apprendi), the United States Supreme Court held that the Sixth Amendment right to a jury trial requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (Id. at p. 490.) In Cunningham, supra, 127 S.Ct. at page 868, the high court held that the middle term prescribed by the DSL, not the upper term, is the relevant "statutory maximum" for the purposes of Apprendi, because the DSL directs trial courts to impose the middle term in the absence of facts beyond those found by the jury. The Supreme Court concluded that the DSL violates the Sixth Amendment as far as it permits trial courts, not juries, to find facts permitting upper term sentences. (Cunningham, at p. 871.)

Black II applied Cunningham to the DSL. The state high court ruled that an upper term sentence does not violate the Sixth Amendment so long as a single fact is established in accordance with Cunningham and the precedent of that decision. (Black II, supra, 41 Cal.4th at p. 812.) Once a defendant is rendered eligible for the upper term by any such fact, the trial court may consider other facts in deciding whether to sentence a defendant to the upper term, and those additional facts do not have to satisfy Apprendi. (Id. at p. 813.)

In this case, appellant admitted that he served a prior prison term for violations of Penal Code sections 67, 460, subdivision (b), and 475, subdivision (a). The trial court explicitly used his recidivism as the basis for sentencing him to the upper term. Since appellant's prior conviction made him eligible for the upper term, the trial court did not violate the Sixth Amendment by finding and considering other aggravating facts in sentencing him. (Black II, supra, Cal.4th at p. 816.)

Appellant contends that Black II was wrongly decided and maintains that Cunningham requires his sentence to be reversed. Appellant may preserve this objection for federal review; it is our obligation to follow Black II. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

We concur: MANELLA, J., SUZUKAWA, J.

1. Pitchess v. Superior Court (1974) 11 Cal.3d 531.

2. The full requirements of the defense are as follows: "the defendant must show, by a preponderance of the evidence, that he or she `violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which [he or]

she did not substantially contribute to the emergency.'" (People v. Buena Vista Mines, Inc., supra, 60 Cal.App.4th at p. 1202; see also CALCRIM No. 3403.)

3. While there is little authority elucidating the meaning of Evidence Code section 1241, its history indicates that it is a true hearsay exception that expands on the common law doctrine of "verbal acts." (See Recommendation on Evidence Code (Jan. 1965) 7 Cal. Law Revision Com. Rep. (1965) pp. 237- 238, in which this portion of the 1965 Evidence Code is explained.)

4. Respondent contends that appellant made the statement under circumstances that indicate the statement was not trustworthy, and therefore Evidence Code section 1252 bars application of Evidence Code section 1241. But respondent misstates the law. Evidence Code section 1252 states: "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness." "This article" refers to chapter 2, article 5 of the Evidence Code, which encompasses Evidence Code sections 1250 through 1253. Evidence Code section 1252 does not bear on Evidence Code section 1241, which is in chapter 2, article 4 of the Evidence Code.

5. The California legislature amended the DSL, effective March 30, 2007, in response to Cunningham, supra, 127 S.Ct. 856. (Stats. 2007, ch. 3.) The Judicial Council then amended the sentencing rules to implement the legislature's amendment of the DSL, effective May 23, 2007. Because appellant was sentenced under the DSL in May 2006, we refer to the law as it was before these amendments.