The People v. Michael Anthony Barrera

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P. v. Barrera CA3

NOT TO BE PUBLISHED

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Defendant Michael Anthony Barrera appeals following his conviction of second degree burglary. (Pen. Code, § 459; undesignated statutory references are to the Penal Code.) Defendant contends the trial court erred in (1) denying his request for a jury instruction on theft as a lesser related offense, and (2) admitting into evidence the section 969b packet of certified records of defendant's prior convictions and prison term in violation of his constitutional right to confrontation and cross-examination. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

An information filed on September 22, 2009, alleged that on July 4, 2009, defendant committed second degree burglary by entering a store with intent to commit theft. The information also alleged one prior strike conviction (§§ 667, subds. (c), (e), 1192.7) and a prior prison term (§ 667.5, subd. (b)) for a 2007 felony assault.

At trial, store clerk Bill Wu testified that, on July 4, 2009, he was working at the Valero Gas Mart when defendant and another man entered the store. Defendant's companion went to the counter and paid the clerk about a dollar for a small item. Defendant walked directly to the refrigerator holding beer, grabbed two 18-packs of beer, turned, and walked out of the store without paying. On his way out, he said something like "Thanks very much" to the clerk. Defendant's companion took a 12-pack of beer and walked out without paying for it. The clerk saw defendant leave in a vehicle but did not see the companion get into the vehicle.

The store's surveillance videotape showed defendant was in the store a total of 20 seconds. Before defendant and his companion entered the store, they spoke to each other outside for about 20 seconds. As they approached the store, the companion made a hand gesture to defendant.

Defendant testified at trial. He admitted he was convicted of a felony in 2007, went to prison, and was

released in February 2009. Defendant testified he is an alcoholic and was drinking a lot at the time in question, often to the point of blacking out and not knowing what he was doing. On July 4, 2009, he attended a family barbecue near the Valero Gas Mart. He drank a lot, blacked out, and woke up two days later. He did not remember the events depicted on the videotape.

The trial court denied a defense request for a jury instruction on petty theft (§ 488) as a lesser related offense of the charged burglary.

The jury found defendant guilty of second degree burglary. Defendant then waived his right to a jury trial of the bifurcated priors. Based on defendant's trial testimony and a certified section 969b record of defendant's priors, the trial court found true the prior felony conviction and prior prison term.

The trial court denied defendant's motion for new trial and sentenced defendant to an aggregate term of three years and eight months in prison -- the low term of 16 months, doubled, plus a consecutive one year for the prior prison term.

DISCUSSION

I

Defendant contends the trial court erred in denying his request to instruct the jury on petty theft (§ 488). Defendant argues the facts were consistent with a theory that defendant and his companion did not enter the store with the intent to steal beer but rather spontaneously decided to steal the beer after entering the store, such that the crime was theft rather than burglary. We see no error.

The trial court and the attorneys discussed jury instructions in chambers, putting on the record only disagreements about instructions.

On the record, the trial court explained it was denying defendant's request for instruction on petty theft, because it is not a lesser included offense of burglary and, while it could be a lesser related offense to burglary, in this case, "based on the conduct shown in the video, and the testimony of [the store clerk], the B-line that [defendant] made into the store, directly to the refrigerator holding the beer, the immediate taking of the beer, and the B-line out of the store, which took about 20 seconds, the Court concluded that . . . there was just no evidence, certainly no evidence from defense or the People, that would support a finding that [defendant] crossed the threshold of the store, and then, and only then, formed an intent to take the beer."

As defendant acknowledges, he was not entitled to instruction on theft as a lesser included offense of burglary, because a burglary can be committed without stealing, and therefore theft is not a lesser included offense of burglary. (People v. Tatem (1976) 62 Cal.App.3d 655, 658.)

Defendant acknowledges People v. Birks (1998) 19 Cal.4th 108, held a criminal defendant does not have a unilateral entitlement to instructions on lesser related offenses that are not necessarily included in the charge. Instruction on lesser related offenses is proper only upon mutual assent of the parties. (Id. at pp. 112-113; accord, People v. Taylor (2010) 48 Cal.4th 574, 622.) "[T]he prosecution undertakes no duty to prove uncharged, nonincluded offenses, and such proof may well be overlooked in the presentation of the prosecution's case. The defense has no duty to prove any crime by any standard. Thus, and particularly when the prosecution does not consent, the giving of instructions on lesser merely related offenses invites the jury to convict the defendant of a crime that no party may have attempted to establish beyond a reasonable doubt." (Birks, supra, 19 Cal.4th at p. 132.) The Supreme Court observed its conclusion, by respecting the prosecutor's discretion to determine what charges to prosecute, had the salutary consequence of avoiding a separation-of-powers problem. (Id. at pp. 134-135.) Refusing a defendant's unilateral request for instruction on a lesser related offense does not violate any constitutional due process right to present a theory of the defense case. (Taylor, supra, 48 Cal.4th at p. 622.)

Thus, defendant was not entitled to a theft instruction.

Defendant argues this is not a Birks issue. He invokes the general principle that a trial court must instruct the jury on all general principles of law relevant to the issues raised by the evidence. (People v. Breverman (1998) 19 Cal.4th 142, 154 [substantial evidence supported instruction on voluntary manslaughter based on heat of passion as a lesser included offense of murder].) However, under Birks, supra, 19 Cal.4th 108, the general principle of law relevant to this case is that instruction on lesser related offenses is proper only upon mutual assent of the parties (id. at pp. 112-113; accord, Taylor, supra, 48 Cal.4th at p. 622) -- which did not occur in this case.

Defendant argues Birks was wrongly decided, but he acknowledges we need not consider this argument, because the Supreme Court's Birks opinion is binding on us as an intermediate appellate court (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455).

We see no instructional error.

II

Defendant contends admission of certified records of the California Department of Corrections and Rehabilitation (§ 969b[1]) to prove his prior conviction and prior prison term constituted improper admission of testimonial hearsay in violation of his Sixth Amendment right to confrontation and cross-examination. Even assuming for the sake of argument that the contention is preserved for appeal despite defendant's failure to object on this ground[2] in the trial court, and further assuming for the sake of argument that erroneous admission of the records could be considered prejudicial in light of defendant's trial testimony admitting the prior conviction and prison term, we see no constitutional violation.

In Crawford v. Washington (2004) 541 U.S. 36 [158 L.Ed.2d 177], the United States Supreme Court held that the confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (Id. at pp. 53-54 [at p. 194].)

People v. Taulton (2005) 129 Cal.App.4th 1218, 1221, held "records of prior convictions are not 'testimonial'" and thus not subject to Crawford's confrontation requirements. "Crawford supports a conclusion that the test for determining whether a statement is 'testimonial' is not whether its use in a potential trial is foreseeable, but whether it was obtained for the purpose of potentially using it in a criminal trial or determining if a criminal charge should issue." (Taulton, supra, 129 Cal.App.4th at p. 1224.) Taulton found "enlightening" Crawford's mention that business records are not testimonial. (Ibid.) Taulton concluded prior conviction records under section 969b "are prepared to document acts and events relating to convictions and imprisonments. Although they may ultimately be used in criminal proceedings, as the documents were here, they are not prepared for the purpose of providing evidence in criminal trials or for determining whether criminal charges should issue. Therefore, these records are beyond the scope of Crawford . . . ." (Taulton, supra, 129 Cal.App.4th at p. 1225.)

Defendant contends Taulton does not survive Melendez-Diaz v. Massachusetts (2009) 557 U.S. __ [174 L.Ed.2d 314]. The Supreme Court in Melendez-Diaz found three "certificates of analysis" showing the results of forensic analysis performed on seized cocaine fell within the "core class of testimonial statements," and their admission violated Crawford. (Melendez-Diaz, supra, 557 U.S. at p. __ [174 L.Ed.2d at p. 321].) The Supreme Court discussed clerk's certificates authenticating official records as the one class of evidence that has traditionally been admissible even though it was prepared for use at trial. The Supreme Court emphasized that the clerk's authority in this area is extremely narrow: the clerk may certify only the correctness of the copy of a record kept by the office, not to provide an interpretation of a record's content, substance, or effect. (Melendez-Diaz, supra, 557 U.S. at p. __ [174 L.Ed.2d at p. 328].) "A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant." (Id. at p. __ [174 L.Ed.2d at p. 329], fn. omitted.)

We find the section 969b packet is analogous to the clerk's certificate, not the forensic analysis concluding a substance was cocaine. The analyst from the Department of Corrections and Rehabilitation who created the priors packet did not create any records for the sole purpose of providing evidence against defendant; she compiled a group of pre-existing documents, and then authenticated it. This is exactly what the Supreme Court described as the limited certifying role of a clerk. The individual documents were not created for this prosecution. Admission of the section 969b packet did not violate defendant's constitutional rights to confront and cross-examine witnesses against him.

DISPOSITION

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The judgment is affirmed.

We concur: NICHOLSON , J. MAURO , J.

1. Section 969b provides: "For the purpose of establishing prima facie evidence of the fact that a person being tried for a crime or public offense under the laws of this State has been convicted of an act punishable by imprisonment in a state prison, county jail or city jail of this state, and has served a term therefor in any penal institution . . . , the records or copies of records of any state penitentiary, reformatory, county jail or city jail . . . in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence."

2. Defendant objected, without success, in the trial court that the prosecutor needed to lay a foundation for the 969b packet. He does not reiterate the issue on appeal and acknowledges his foundational objection differs from his current constitutional claims.