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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELMER DAVENPORT,

Defendant and Appellant.

G045259

(Super. Ct. No. 09NF0022)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Christopher Beesley and Theodore M. Cropley, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant was convicted of aggravated assault inflicting great bodily injury (Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (a))¹ after an altercation outside a Fullerton market. On appeal, defendant argues the court erred by admitting statements he made to a police officer. He also claims the court improperly handled an issue regarding the interpretation of a witness's statement at trial and wrongly refused to provide juror contact information after the trial. We find no reversible error and therefore affirm.

I

FACTS

On the evening of February 6, 2009, Teresa Velasco, along with Jose Saavedra and Tina Hulbert, drove to the Arbor Market in Fullerton to purchase beer.² Defendant, who was already in the market, made a comment about Hulbert's appearance. Hulbert, angry, responded with a vile racial slur against African-Americans.³ Velasco admonished her, but commented that defendant should show respect to women. Hulbert believed defendant was drunk and she smelled alcohol on him. Velasco and defendant engaged in a verbal altercation lasting approximately two minutes. Velasco and Saavedra exited the store, and Hulbert stayed inside to make a purchase.

Velasco and Saavedra walked toward their car. Defendant had also come outside and was acting, according to Velasco, irate and angry. He yelled at Saavedra and challenged him to fight, and Saavedra yelled back. As Saavedra was getting into the car, defendant pushed him in the back, causing Saavedra to stumble. Saavedra and defendant,

¹ Subsequent statutory references are to the Penal Code.

² Video footage of the encounter in the store, without sound, was played at trial. The time stamp showed Velasco and her companions entering the store at approximately 8:30 p.m. Velasco testified it was about 7:30 p.m. There was no testimony verifying the time on the video was correct, however, and the emergency room doctor testified that Velasco was admitted at approximately 8:00 p.m.

³ Although it in no way excuses the racial slur, Hulbert recognized defendant as someone who had made a similar comment about her appearance a few days earlier.

according to Velasco, then began fighting.⁴ Velasco got out of the car and tried to persuade Saavedra to leave. She saw defendant pull out a knife with a four- to five-inch blade with a ridged edge. Velasco went between the two men and tried to physically separate them. Hulbert, who was outside by that point, tried to do the same. Velasco later testified that Saavedra had no weapons.

As Velasco was trying to stop the fight and separate the two men, she received a cut across her arm and chest. Defendant rode away on a bicycle. Velasco realized she was hurt and started screaming. Saavedra and Hulbert drove Velasco to the hospital and Hulbert called 911. She was in pain and was worried she was going to lose her arm. Hulbert thought the injury looked “really bad.”

Officers from the Fullerton Police Department were waiting at the hospital. Velasco had a laceration on her left arm that was approximately 10 centimeters long and three centimeters deep. She also had a shallow wound on her chest approximately 12 centimeters long.

A description of the suspect was communicated to police in the area. Officer Hampton of the Fullerton Police Department heard the description of an African-American male in his late 40’s, wearing a hooded sweatshirt and riding a bicycle. He went to the Armory, which was near the Arbor Market and was used as a homeless shelter. On arrival, he identified defendant as someone who matched the description of the suspect. Defendant was locking up his bicycle at the time.

Hampton approached defendant and had a short conversation. Hampton did not notice any injuries on defendant. While conducting a patdown search, which Hampton had initiated for officer safety based on the dispatch report of an armed suspect, he discovered a four- to five-inch box cutter in defendant’s jacket pocket. After the patdown, Hampton had defendant sit down until other officers arrived. He asked

⁴ According to Hulbert, the altercation was more verbal than physical until Velasco got between the two men.

defendant where he had been and where he was going. Defendant said he had been hanging out with friends at the library and was going to the Armory to take a shower. When asked if he had been to the Arbor Market that night, defendant said he had not been there in several weeks.

Police officers drove Hulbert and Saavedra to the Armory to see if they could identify defendant. While seated in the police car, Hulbert identified defendant as the man who had been at the market. Hampton arrested defendant and transported him to the police station, where he was given warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Hampton again asked defendant if he had been to the Arbor Market that night. Defendant said he had been to the market to purchase a beer, but had not been in any altercation.

Defendant was charged with one count of aggravated assault (§ 245, subd. (a)(1)) and an enhancement alleging defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)). The information also alleged three prison priors (§ 667.5, subd. (b)). Defendant pled not guilty and denied the enhancements and priors.

At trial, in addition to the prosecution witnesses summarized above, several witnesses testified for the defense. Officer Blume of the Fullerton Police Department testified that he was the first officer to arrive on the scene at the Arbor Market. He saw a few pieces of broken glass on the ground, though he had no idea how long the glass had been there. He did not find any large fragments, such as the neck or bottom, of a glass bottle.

Michiko Takayama, who worked at a nearby restaurant, testified with the assistance of a Japanese interpreter. She testified that while taking a break outside the

restaurant between 1:00 and 3:00 p.m.⁵ on the day of the incident, she heard glass breaking (she believed it was a window) and a woman screaming. She did not see any of the people involved, but heard a woman screaming. A few minutes later, she saw an African-American man on a bicycle, but she could not identify defendant in the courtroom. She also saw a woman and a young boy without shoes walk by. Takayama recalled speaking to a police officer in English that evening, and said that she heard a woman screaming and a bottle breaking. She also remembered speaking (also in English) to Eric Castellanos, a defense investigator. She remembered telling Castellanos she had heard the altercation during a smoking break, which she usually took in the afternoon and that was why she remembered the time. She also remembered telling him it was raining that evening.

Castellanos testified that Takayama had spoken to him approximately six months after the incident. She told him she heard the scream and a bottle breaking when she took her smoking break in the evening. Takayama spoke broken English and it was unclear to him how much she understood.

Defendant testified in his own defense. He admitted prior convictions for theft, evading, and resisting an officer. He stated that on the day of the incident, he was doing warehouse work, which required the use of a box cutter. He had one in his pocket on the day of the incident because he was in a hurry to leave work and accidentally left it there.

With regard to the incident, he stated he was in the market on the night in question and rode his bicycle there. He estimated the time at around 8:20 in the evening, and stated that Velasco, Hulbert and Saavedra entered about 10 or 12 minutes later. He

⁵ Takayama was initially asked if she remembered an altercation on the “evening” of the day in question and replied yes. She later testified it was “afternoon after 12:00. I think it’s somewhere around one or two” and later, “around 2:00 or 3:00.” She also said it was light out at the time.

denied making any comment to Hulbert. He testified that as they passed by, Velasco turned to Hulbert and asked “what did he say to you” and before Hulbert answered, he said “Ma’am, I didn’t say nothing to her.” Velasco told him that he had better watch what he said, and then Hulbert used the racial slur. He was angered by this and exchanged words with Velasco and Saavedra. He told the owner he was going outside, and Saavedra followed him. He asked Saavedra why he was following him, and Velasco came out of the store and started screaming at him. Defendant yelled back and he and Saavedra started pushing each other, and Velasco came between them.

According to defendant, he then tried to walk away. He saw Saavedra reach into a trash can and break a bottle on it. At that point, defendant testified, he was terrified and tried to get to his bicycle, which was parked near Saavedra. Saavedra came after him with the broken bottle, and Velasco tried to stop him. After she did so, he rode away. He did not pull out the box cutter out at any time and did not have a knife. He admitted lying to Hampton at the Armory because he mistrusted the police. He said he was now telling the truth.

During cross-examination, defendant stated that he could also have been at the market earlier in the day. He also testified that he did not call out to the owner of the market, who he considered a friend, when Saavedra purportedly came at him with the broken bottle.

At the conclusion of trial, the jury found defendant guilty and found the great bodily injury enhancement true. In a bifurcated proceeding, the court found the prison priors true. Defendant’s posttrial motions were denied. The court sentenced defendant to eight years in prison, comprised of the low term of two years on the assault charge, a consecutive three-year term on the great bodily injury enhancement, and one-year consecutive for each prior.

II DISCUSSION

Defendant's Statement

Defendant argues that his statements to Hampton outside the Armory should have been excluded because he was not read *Miranda* warnings. The court denied defendant's motion to suppress his statements that he had been at the library before coming to the Armory and had not been to the market in several weeks. Respondent, as it did below, argues that defendant was not in custody at the time of the statements.

Miranda does not apply to every encounter between the police and a suspect; it comes into play only if custodial interrogation is involved. "Absent 'custodial interrogation,' *Miranda* simply does not come into play. [Citations.] *Miranda* does not 'prohibit the police from merely listening to . . . volunteered statements' uttered by a person, whether or not in custody, 'and using them against him at the trial' —nor does the Fifth or Fourteenth Amendment. [Citation.] Hence if 'custodial interrogation' is lacking, *Miranda* rights are not implicated . . ." [Citation.]" (*People v. Mickey* (1991) 54 Cal.3d 612, 648.)

Whether a defendant is in custody, and therefore subject to *Miranda*'s protections, is a mixed question of fact and law. (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) The trial court's findings of fact are entitled to great weight when supported by substantial evidence, but its conclusions of law — in this case, whether defendant was in custody — are reviewed independently. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

"The test for whether an individual is in custody is 'objective . . . : "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.'" [Citations.]" (*People v. Ochoa, supra*, 19 Cal.4th at p. 401.) If a reasonable person would have felt free to leave, given the circumstances, the suspect is not in custody under *Miranda*. (*Id.* at p. 402.)

No single factor is determinative in deciding whether a suspect was in custody, and we consider them as a whole. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.) “Courts have identified a variety of relevant circumstances. Among them are whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person’s conduct indicated an awareness of such freedom; whether there were restrictions on the person’s freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation. [Citations.]” (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.)

Taken as a whole, we do not find that the police interrogation of defendant was custodial. While Hampton had conducted an officer safety patdown of defendant, and thus was unquestionably focused on defendant, his questions were investigatory in nature. Hampton’s gun was not drawn, handcuffs were not used, and the questions were very brief. He was either alone or with one other officer during the relevant time period. No coercive techniques were used, nor were Hampton’s questions accusatory or designed to pressure defendant. While defendant was not explicitly informed that he could leave, he was not restrained, pressured or coerced to remain. On balance, the facts support the trial court’s conclusion that defendant was not in custody at the time. Investigatory inquiries made during a temporary detention are not custodial interrogation for purposes

of *Miranda*. (*People v. Farnam* (2002) 28 Cal.4th 107, 180.) Such a detention is what occurred here.

Further, even if we were to find that defendant's statements were improperly admitted, there was no prejudice as a result. The improper admission of a statement subject to *Miranda* is reversible error unless harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if the jury had not heard Hampton's report of defendant's statements, which at most reflected a consciousness of guilt, it would have had the testimony of Velasco, the victim, who testified that defendant had cut her. Furthermore, her statement that she had seen defendant leave on a bicycle was consistent with Hampton's statement regarding how he encountered defendant later. The jury would also have heard defendant's post-*Miranda* statement admitting that he had been to the market that night, but had not been in any type of altercation. Had defendant elected not to testify, the jury would certainly have found this statement not credible, given the other evidence and surrounding facts. Had defendant testified, as he did, to his broken-bottle theory of Velasco's stabbing, his post-*Miranda* statement would have demonstrated the same consciousness of guilt as the statements he sought to suppress. We are persuaded that any error was harmless beyond a reasonable doubt.

Questions Regarding the Japanese Interpreter

Defendant next argues that his rights were violated when the trial court failed to ensure that a Japanese interpreter correctly interpreted Takayama's testimony at trial. Prior to the testimony, the judge instructed the jurors⁶ that even if they also spoke Japanese, they were to rely on the translation provided by the interpreter.

During a break in testimony, Juror No. 163, who spoke Japanese, approached the judge and clarified that "even if there was a misinterpretation," the juror

⁶ A modified version of CALCRIM No. 121 was also given to the jury at the conclusion of evidence.

was to use the interpreter's interpretation. The judge confirmed that this was the case. Defense counsel questioned whether the judge should further inquire about any differences in interpretation, but did not make any formal objection nor request a hearing.

We have described Takayama's testimony *ante*. In sum, the time of day was at best unclear, but seemed to be during the afternoon, according to the interpreted testimony. Castellanos, the defense investigator, also testified as to what Takayama had said during their earlier interview, specifically, that it was evening. During closing arguments, defense counsel said Takayama had heard the glass break and the scream in the evening, while during rebuttal, the prosecutor said she had heard it in the afternoon.

After trial, defendant filed both motions for new trial and to disclose juror information. Defense counsel's declaration stated: "Juror No. 163 spoke with an attorney from the Office of The Public Defender and related that there was a problem with the translation provided by the Japanese Speaking Interpreter. Specifically, that Michiko Takayama during her testimony testified that she had been mistaken, or got it wrong, and that it was during nighttime or evening hours that she saw the [B]lack male on his bike and heard the sound of the breaking glass, on the day of the charged incident. That the above statement was never translated from Japanese into English and never heard or understood by any of the other jurors, counsel, or the court."

The court denied defendant's motion for new trial. Among other reasons, the court stated it had no manner of determining whether a certified Japanese interpreter or the juror was more proficient in Japanese. The court also considered the nature and importance of Takayama's testimony in denying the motion.

Even if we assume that defendant's argument is correct, such error is not reversible per se. Defendant admits that if any error was harmless beyond a reasonable doubt, the judgment may be affirmed. (*Chapman v. California* (1967) 386 U.S. 18.) We conclude that any error was indeed harmless.

The case law supports our conclusion. In *People v. Johnson* (1975) 46 Cal.App.3d 701 (*Johnson*), the prosecution's key witness testified in pretrial proceedings through a Spanish interpreter. (*Id.* at p. 703.) The witness was subsequently unavailable for trial. (*Ibid.*) The defense sought to exclude the testimony from trial, offering evidence that a bilingual police officer criticized the accuracy of the translation. (*Ibid.*) The judge refused to exclude the evidence, holding that an interpreter's translation was not subject to "collateral attack." (*Id.* at pp. 703-704.) The appellate court reversed, finding that the trial court should have reviewed the evidence from the police officer. (*Id.* at p. 704.) Because the testimony was critical to the prosecution's case, and because it was called into question by a reliable source, the court found the error prejudicial and reversed the lower court's judgment. (*Id.* at p. 705.) In *Johnson*, however, it was undisputed that the evidence in question was provided by a key witness for the prosecution. That is not the case here.

In this case, it is undisputed that Saavedra and defendant had an altercation that defendant had a box cutter knife in his possession at the time, and that after the altercation, Velasco's arm and chest were cut. Defendant's best case scenario would have been Takayama's testimony that it was evening when she heard a bottle break and a woman scream and then saw an African-American man departing on a bicycle. Even if Takayama had so testified, she did not see any of the events that caused those sounds, nor was she able to identify defendant. She was at best an "ear witness" who might or might not have heard the relevant events. Her testimony could not offer anything to truly bolster defendant's theory of the broken bottle wielded by Saavedra, and it still would have been contradicted by Velasco's and Hulbert's testimony, which the jury obviously believed. Thus, we find any error regarding the interpretation of Takayama's testimony harmless beyond a reasonable doubt.

Disclosure of Juror Identification Information

Defendant also argues the court improperly refused to disclose juror information so that the interpretation issue could be further investigated. For the same reason that denying defendant's motion for a new trial was harmless, the result is the same here. Even if everything defendant claims regarding Takayama's testimony was true, it simply was not particularly probative of his guilt. We therefore conclude any error was harmless.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.