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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.

QUINCY BURLEY,

Defendant and Appellant.

G050426

(Super. Ct. No. FVA1100716)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
Cara D. Hutson, Judge. Affirmed.

Zulu Ali and Maleha Khan-Avila for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and
Adrienne S. Denault, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Quincy Burley was charged with committing two snatch and run robberies that occurred about 30 minutes apart in Rialto. Before trial, both victims identified appellant as their robber. However, at trial, the victim of the first robbery was unable to identify appellant, and the jury was unable to reach a verdict on the charges stemming from that incident. The jury did find appellant guilty of the second robbery, though. On appeal, appellant argues the second victim's pretrial identification was based on unduly suggestive facts, the trial court erred in refusing to give his requested instruction on cross-racial identification, and the prosecutor committed misconduct by failing to disclose information about the identification process. Appellant also contends the court erred in denying his motions for severance and a new trial, as well as his request to dismiss a prior strike conviction. Finding no basis for reversal, we affirm the judgment.

FACTS

On the afternoon of May 10, 2011, Katherine Martinez, then in tenth grade, was walking home from school alone when a man came up to her from behind and put his arm around her neck. While holding a knife or box cutter up to Martinez's throat, the man threatened to kill her if she did not surrender her necklace. Martinez balked initially, but when the man pressed his weapon against her skin, she said "okay." He then came around to her front, ripped off her necklace and ran away. Martinez went home and called 911. She described her assailant as a thin-lipped, dark-complected black man with short shaved hair who was about 18 to 19 years old, five-foot nine and 150 pounds. She said he was wearing gloves, dark baggy pants and a jacket over a hooded sweatshirt.

The second robbery occurred about 30 minutes later, two blocks away. Carmelita Price, a native of the Philippines, was talking on her cell phone at a bus stop when a black man came up to her and tore off her necklace. Although the man approached Price from the side, he was directly facing her when he snatched the necklace, so she was able to get a good look at him. After taking Price's necklace, the

man ran away with a second black man who was in the area. Price initially told police her robber was about 15 to 16 years old but she later estimated he was between 17 and 19. She said he had short hair and an average complexion and was wearing a gray shirt and dark pants.

On May 12, two days after the robberies, Rialto Police Officer O'Neil Becnel assembled a six-pack photo lineup containing appellant's picture and showed it to Martinez. She immediately identified appellant as her robber. The police then went to appellant's residence, which was just a few blocks from where the robberies occurred, and detained him. They brought Martinez over to conduct an in-field show-up and again she positively identified appellant as her robber. Appellant was then arrested and taken into custody. At that time, he was 20 years old, five-foot ten and weighed 145 pounds.

It just so happened that while appellant was getting processed at the Rialto police station, Price was at the station giving an interview with Police Officer Cindi Sandona. The interview took place in a closed room that is located near the station's holding cells. According to Price, Sandona showed her photos of several possible suspects, but she did not recognize any of them. Then, after the interview was over, Sandona walked her over to appellant, who was alone in a locked cell. Upon seeing appellant, Price immediately recognized him as her robber and demanded that he give her back her necklace.

Sandona testified she could not remember showing Price any photos during her interview, although she may have and did not know for sure. Sandona further stated that when she and Price left their interview room, they encountered appellant and Officer Becnel by chance in the hallway near the payphones, at which time Price identified appellant as her robber. Sandona said appellant was not in a holding cell at that time, although Becnel proceeded to place him in one. Becnel testified similarly. He said he had just finished letting appellant make a phone call and was in the process of returning

him to his cell when Price and Sandona came out of their room and Price spontaneously identified appellant. Price continued to talk to appellant as he was being led into his cell.

Although the circumstances surrounding the identification process are in dispute, the record is clear that after Price identified appellant, Sandona took her back into the interview room and asked her why she believed appellant was her robber. Price said everything about him looked familiar, particularly his face and hair. She said she was “a hundred percent sure” appellant was the man who took her necklace.

Appellant was charged with robbing Price and robbing, assaulting and making a criminal threat against Martinez. Before trial, he moved to sever the count involving Price from the other counts and suppress both victims’ identifications as being unreliable and unduly suggestive. The trial court denied both motions.

Trial commenced in May 2012, roughly one year after the robberies occurred. When Martinez was asked if she could identify her robber in the courtroom, she pointed to a female who was sitting in the audience. She also admitted having some difficulty identifying appellant at the preliminary hearing. Price, in contrast, did not have any problems identifying appellant at trial. Explaining how she was able to do so, she testified, “I really saw his face [during the robbery], and I can remember his face because I was looking at him.” Price did admit, however, that she sometimes has a hard time expressing herself in English because it is not her primary language. She said she was a teacher in the Philippines for 36 years before she retired and came to the United States in 2008.

In closing argument, defense counsel argued this was a “clear case of misidentification.” Defense counsel theorized Officer Sandona was lying when she testified she could not remember if she showed Price any photos during her interview. The more likely scenario, counsel argued, was that Sandona showed Price a group of photos that included appellant’s picture, but Price wasn’t able to identify appellant from his picture, so she took Price to appellant’s cell and had her identify him there.

The jury was unable to reach a verdict on the counts involving Martinez, and those counts were subsequently dismissed. However, appellant was convicted of robbing Price and found to have suffered a prior strike conviction. After denying appellant's motions for a new trial and to dismiss the prior, the court sentenced him to nine years in prison.

Severance Motion

Appellant contends the trial court abused its discretion in refusing to sever the count involving Price from the counts involving Martinez. We disagree.

In the interest of judicial economy, there is a preference that all of the charges against the defendant be handled in one proceeding. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) Absent a clear showing that joinder resulted in prejudice to the defendant, we will not disturb a trial court's refusal to sever charges which, as here, were properly consolidated in a single case. (*Ibid.*) "If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges. [Citation.]" (*People v. Soper* (2009) 45 Cal.4th 759, 774-775.)

Evidence of one charged crime would be cross-admissible in the separate trial of another charged crime if the evidence is 1) relevant to prove a fact other than the defendant's criminal disposition, such as identity or intent, and 2) the evidence is not unduly prejudicial. (Evid. Code, §§ 1101, subd. (b), 352; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) "For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.]" (*Id.* at p. 403.) The inference may be based on a single, signature-like characteristic of the crimes (*ibid.*) or a group of less distinctive features that "yield a distinctive combination when considered together." (*People v. Miller* (1990) 50 Cal.3d 954, 987.)

The robberies in this case both targeted vulnerable women (one young, one old) who were out in public. In both instances, the robber, a young black man, suddenly came upon the victims, took their necklaces and got away on foot. This is not a common crime. Although only the Martinez robbery involved a weapon and threats, both women were victims of a brazen snatch and run bandit. Moreover, both robberies occurred close in time and close to appellant's residence, and both victims positively identified appellant as the perpetrator. Taken together, these circumstances constituted a distinctive combination of features to support the inference that appellant committed both of the robberies. Therefore, the first prerequisite for cross-admissibility was satisfied.

Turning to the issue of prejudice, it is no doubt true that the Martinez robbery was more threatening than the Price robbery. However, both robberies were shocking in the sense that they occurred in broad daylight and against unsuspecting victims. As compared to the evidence concerning the Price robbery, we see no reason why the evidence concerning the Martinez robbery would have been so inflammatory as to provoke an irrational response from the jury. Therefore, the counts respecting the alleged victims would have been cross-admissible.

While we recognize prejudice can inure to a defendant if a weak case is joined with a strong one (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315), that is not the case here. Here both victims got a close-up look of the robber during the alleged offenses, and both identified appellant before trial. Even though Martinez was unable to identify appellant at trial, the relative strength of the evidence as to the victims was not so disparate as to create an undue danger of prejudice by virtue of a joint trial. Indeed, the fact the jury deadlocked on some of the charges indicates it considered the charges individually and did not blindly assess appellant's guilt based solely on the nature or the number of allegations he faced. Consequently, the trial court did not abuse its discretion in denying appellant's severance motion. Trying all the charges in a single case did not render his trial unfair or violate due process.

Instruction on Cross-Racial Identification

Prior to trial, appellant moved for a special jury instruction on the issue of identification. Because the victims were not of the same race as the perpetrator, appellant requested the jurors be instructed to consider the “cross-racial or ethnic nature of the identification[s],” in determining whether they were reliable. But during the trial, appellant withdrew this request, so he has no basis to complain. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.) In any event, one of the issues the jurors were instructed to consider in assessing the reliability of the identification testimony is that “the witness and the defendant [were] of different races.” Since this language encompassed the substance of appellant’s proposed – then withdrawn – instruction, any error in failing to give it was surely harmless. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 22-24.)

Alleged Doyle Error

Appellant argues reversal is required because the jury learned he invoked his constitutional rights during police questioning. We disagree.

The issue arose while the prosecutor was questioning Officer Becnel about appellant’s arrest. Becnel testified that after he took appellant to the police station, he read him his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), and appellant agreed to talk to him. Appellant claimed he was at a country club with his girlfriend on the day of the robberies. However, after Becnel asked appellant if he could call his girlfriend to verify that, appellant immediately shut down and said he wanted a lawyer. Accordingly, Becnel ceased all questioning.

Defense counsel did not object to this testimony. However, during the next break in the proceedings, the court informed counsel it suspected Becnel’s testimony violated *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), because it referenced appellant’s decision to stop talking and seek legal counsel. The prosecutor conceded *Doyle* error may have occurred. However, she claimed the reference was inadvertent, and she never intended to make an issue of appellant’s decision to invoke his constitutional rights

during police questioning. The court accepted the prosecutor's representation in that regard. After conferring with counsel, it decided it would give a curative instruction to the jury at the end of the case.

The court's final instructions informed the jurors that appellant had "an absolute constitutional right to invoke his rights under *Miranda*. Exercising this right does not create a presumption of guilt or an inference of guilt nor does it relieve the prosecution of its burden of proving every essential element of the crime beyond a reasonable doubt. You are not to consider in your deliberations any reference to the defendant's post-arrest silence or demeanor in the exercise of his *Miranda* rights."

Following the verdict, appellant moved for a new trial on the basis the alleged *Doyle* error violated his right to a fair trial. He argued, as he does now, that the court's curative instruction was insufficient to cure the damage caused by Officer Becnel's reference to appellant's decision to invoke his constitutional rights during questioning. However, our Supreme Court has stated that, when a *Doyle* violation occurs, an "appropriate instruction to the jury ordinarily ensures that the defendant's silence will not be used for an impermissible purpose. [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 959.) This is especially true here where there was no objection so the jury's attention was not drawn to the fact. Not only was the judge's curative instruction appropriate in this case, there is nothing in the record to suggest the jury failed to follow it.

More fundamentally, our high court has made it clear that unless the prosecutor is actually allowed to use the defendant's postarrest silence against him, by inviting the jury to draw adverse inferences from the exercise of his constitutional right against self-incrimination, *Doyle* is not violated in the first place. (*People v. Thomas* (2012) 54 Cal.4th 908, 936.) Here, the prosecutor made no attempt to exploit appellant's decision to exercise his right to stop talking and request an attorney during his interview

with the police. In fact, she did not try, nor was she permitted, to make any comments whatsoever about that issue. As such, “there was no violation of the *Doyle* rule.” (*Ibid.*)

Main Identification Issues

That brings us to the heart of the appeal. Appellant contends the identification procedures utilized with respect to Price were so impermissibly suggestive her subsequent identifications of appellant were inadmissible and legally insufficient to support the jury’s verdict. He also asserts the prosecutor committed misconduct under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) by failing to disclose the photos Price was allegedly shown during her initial interview with Officer Sandona.

These claims were thoroughly litigated in connection with appellant’s new trial motion. At that time, the trial court recognized Price’s testimony was arguably inconsistent with the police officers’ testimony in two respects. First, Price testified Sandona showed her a variety of photographs during their interview at the police station, but Sandona testified that, while that was possible, she had no memory of showing Price any photos whatsoever. Because Sandona had no recollection or record of having shown Price any photos, the trial court determined there was nothing for the prosecution to disclose on this issue. While recognizing Price testified that she was shown several photos, the court noted she had some difficulty speaking English and was hard to understand at times. Considering the record as a whole, the court was unwilling to find a *Brady* violation based “solely on the testimony of a witness . . . who seems to have a problem with the command of the English language.”

The second area where Price’s testimony diverged from the officers is with respect to whether appellant was in his holding cell when she identified him. During her testimony, Price made it sound like Sandona took her to appellant and asked if she could identify him while he was locked up in his cell. But Sandona and Becnel both testified that Price’s identification of appellant was an unplanned event. They also testified appellant was not in his cell at that time, although Price did continue to speak to appellant

as Becnel led him back to, and placed him inside, his cell. The trial court attributed this discrepancy to Price's inability to fully articulate herself in English. While finding no reason to question Price's credibility or integrity, the court believed she expressed herself "in the limited way she could," and the officers "filled in the rest of the blanks."

Looking at the photo issue first, the law is clear that *Brady* requires the prosecution to disclose evidence that is both favorable and material to the defendant on the issue of guilt or punishment. (*Brady, supra*, 373 U.S. at p. 87.) In this regard, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*Kyles v. Whitley* (1995) 514 U.S. 419, 437.) In fact, "any favorable evidence known to the others acting on the government's behalf is imputed to the prosecution. 'The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation.' [Citations.]" (*In re Brown* (1998) 17 Cal.4th 873, 879.)

However, "the rule requiring prosecutors in criminal proceedings to disclose information is limited to information known [or imputed] to the prosecution. [Citation.]" (*Mendoza v. Miller* (7th Cir. 1985) 779 F.2d 1287, 1297.) "[T]he prosecution has no duty [under *Brady*] to turn over to the defense evidence that does not exist. . . ." [Citation.]" (*United States v. Edwards* (5th Cir. 2006) 442 F.3d 258, 266-267; see, e.g., *United States v. Moore* (7th Cir. 1994) 25 F.3d 563, 569; *United States v. Sukumolachan* (9th Cir. 1980) 610 F.2d 685, 687.) So if Price was never shown any photos before she identified appellant, appellant's *Brady* claim necessarily fails at the outset.

The trial court resolved this factual question against appellant. Although Price testified Officer Sandona showed her photographs of several possible suspects, Sandona had no memory of doing so and seemed somewhat perplexed by Price's claim in this regard. Having heard and seen Price and Sandona on the witness stand, the trial court was uniquely situated to assess their credibility and determine what actually

happened. It is apparent from the trial court's ruling that it discounted Price's testimony somewhat, given her inability to fully express herself in the English language. While not calling Price's credibility into issue, the court found the record failed to substantiate appellant's claim about the alleged photographs. As a factual issue underlying appellant's *Brady* claim, that finding is entitled to considerable deference on appeal. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176.) We are in no position to second-guess the trial court's determination there were no photographs for the prosecution to disclose.

Even if Officer Sandona did show Price some photographs, it is speculative to presume their disclosure would have benefited the defense. Working on the assumption that his picture was included in the alleged photos, appellant asserts Price's failure to identify him was a significant exonerating event. But there was no evidence Price was ever shown a photo of appellant. In fact, it seems hard to believe that she was, given her version of events. Price testified that none of the photos she was shown resembled the man who robbed her, yet the second she saw appellant, she knew he was her assailant. This suggests appellant's picture was not included among the photos she was allegedly shown. Suffice it say, appellant has failed to show the alleged photos would have been materially favorable to his defense. Therefore, the prosecutor did not commit misconduct by failing to disclose them.

Appellant's complaints about the fairness of Price's identification also fail for lack of evidentiary support. Had the police taken Price to identify appellant while he was locked up in his cell, we would have little difficulty finding the identification was unduly suggestive. (See *In re Hill* (1969) 71 Cal.2d 997, 1005 [by taking a victim to identify the defendant while he was alone in a jail cell, the police were effectively telling him, "This is the man."].) But neither one of the officers who witnessed Price's identification testified to that effect.

To the contrary, Officers Becnel and Sandona testified Price ran into appellant by happenstance at the police station *while he was being led to his cell*. And although Price continued to observe and talk to appellant as he was subsequently placed inside his cell, she actually identified him before then, while he was outside his cell. Price testified to the contrary, of course, but the court credited the officers' testimony over her version of events. We are not at liberty to second-guess that call (see *People v. Cabrellis* (1968) 268 Cal.App.2d 337), nor would be inclined to do so, since the record indicates not only a language difficulty but a sequence of events probably unique in the witness' experience and likely to have been quite exciting. Price quite obviously did see appellant in his cell at one point in time, but as the Attorney General contends, it appears she "collapsed" the full sequence of events in her testimony and either forgot or left out the part about her having first seen appellant while he was outside his cell.

"The defendant bears the burden of demonstrating the existence of an unreliable identification procedure." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) Having carefully reviewed the record below, we simply do not believe appellant carried his burden in that regard. Indeed, according to the facts found true by the trial court, Price's identification of appellant was entirely fortuitous; it was not the product of police manipulation, nor was it unduly suggestive. Consequently, the trial court did not err in finding Price's identifications were legally admissible and sufficient to support the jury's verdict.

Appellant also assails the reliability of Martinez's pretrial identification, claiming her description of the robber's exact skin tone and the thickness of his lips was inconsistent with Price's description and what appellant actually looked like at the time he was arrested. But by focusing on the minor differences in the victims' descriptions, appellant overlooks the fact they described the robber as a young black male with short hair who was about five-foot nine and weighed roughly 150 pounds, which was consistent with appellant's appearance. The identification evidence was not, as appellant

claims, too inaccurate or unreliable to warrant its admission at trial. In any event, the admission of Martinez's pretrial identification did not cause appellant prejudice because the jury deadlocked on the counts involving Martinez and they were eventually dismissed. No cause for reversal has been shown.

Romero Issue

Lastly, we consider appellant's claim the trial court abused its discretion in refusing to dismiss his prior strike conviction in the interest of justice. Based on all the relevant circumstances, we find this claim unavailing.

At the time appellant committed the present offense, he was on probation for a robbery he committed in 2009, which was his first strike conviction. And before that, he suffered a juvenile adjudication for receiving stolen property. Despite this, defense counsel argued at sentencing that appellant deserved leniency because his girlfriend had recently given birth to his child, giving him new motivation to reform. Counsel also pointed out that appellant's father wasn't around that much while appellant was growing up and that appellant currently spends a lot of time reading the bible. The prosecutor argued for the maximum term, noting appellant's prior robbery occurred under circumstances very similar to the present case.

As it turned out, the trial judge knew all about the prior robbery because she is the one who granted appellant probation in that case. Looking back at that decision, the judge said it was a mistake and that she should have gone along with the probation officer's recommendation to sentence appellant to prison. The judge was clearly troubled by the fact that in the present case appellant engaged in the same type of conduct for which he was on probation. The judge also took notice of a letter that Price submitted for the sentencing hearing indicating she had suffered considerable emotional distress as a result of appellant's actions. For all these reasons, the judge denied appellant's request to dismiss his prior strike conviction and used it to double his base

term in accordance with the Three Strikes law. (See Pen. Code, §§ 667, subd. (e)(1) & (e)(2)(C); 1170.12, subd. (c)(1) & (c)(2)(C)).

Trial courts are empowered to dismiss a prior strike conviction if it would further the ends of justice. (Pen. Code, § 1385, subd. (a); *People v. Superior Court (Romero)* 13 Cal.4th 497, 507-508.) Under that standard, the court must consider both the constitutional rights of the defendant and the societal interest in ensuring the fair prosecution of criminal cases. (*Id.* at p. 530.) Ultimately, the court must determine “whether, in light of the nature and circumstances of his present felonies and prior [convictions], and the particulars of his background, character, and prospects, the defendant may be deemed outside the [spirit of the Three Strikes law], in whole or in part, and hence should be treated as though he had not previously been convicted of one or more [strikes].” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The trial court’s refusal to dismiss a prior strike conviction is reviewed for an abuse of discretion – a most deferential standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) In fact, only in “an extraordinary case – where the relevant factors described [above] manifestly support the [dismissing] of a prior conviction and no reasonable minds could differ” would the failure to dismiss constitute an abuse of discretion. (*Id.* at p. 378.)

This is not such a case. Appellant asserts his “age, background, character and prospects convey an individual who has learned from his mistakes and is now motivated to live a constructive and meaningful life.” But appellant’s record tells a different story. During his young life, he has engaged in a pattern of criminal behavior that indicates he is precisely the type of offender the Three Strikes law was intended to reach. He offended as a juvenile, reoffended as a young adult and then reoffended again in the present case by committing the same type of offense for which he was already on probation. In order to stem the tide of appellant’s criminal behavior and to ensure he understands the consequences of his behavior, the trial court was fully justified in

denying his request to dismiss his prior strike. The court's decision fully comports with both the letter and the spirit of the Three Strikes law, and therefore we have no reason to disturb it.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.