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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL WAYNE TUCEK,

Defendant and Appellant.

F049306

(Super. Ct. No. SCR005088)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Charles A. Wieland, Judge.

Ross Thomas, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Stanley Cross, Acting Assistant Attorney General, and Stephen G. Herndon and David Andrew Eldridge, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant, Michael Wayne Tucek, challenges his conviction for assault with the infliction of great bodily injury on a person who was at least 70 years of age. (Pen. Code,¹ §§ 245, subd. (a)(1) and 12022.7, subd. (c).) Appellant contends the photo lineup procedure was impermissibly suggestive and thus he was denied due process by the admission of the victim's extrajudicial and in-court identifications. Appellant further argues that the sentencing court erred in imposing an upper term based on findings of aggravated facts not found true by the jury's verdict in violation of *Blakely v. Washington* (2004) 542 U.S. 296.

Contrary to appellant's position, the identification procedure was not unduly suggestive. However, appellant was improperly sentenced under *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856]. Accordingly, the judgment of conviction will be affirmed and the judgment of sentence will be reversed.

BACKGROUND

On December 4, 2004, 74-year-old William Merryfield confronted 13-year-old Ashley after she and two friends took the key to William's tractor. According to Ashley, William slapped her face.

Ashley returned home and told appellant, a family friend, what had happened. Appellant left shortly thereafter.

That afternoon William and his wife were working on their property when a red car drove up and parked. A man, whom William later identified as appellant, stepped out of the car, quickly approached William, and punched him in the eye. The first blow knocked William to the ground. Appellant then continued to punch and kick William.

William spent nine days in the hospital as a result of the assault. On December 9, while William was hospitalized, Sheriff's Detective Jack Wayman showed him a photo

¹ All further statutory references are to the Penal Code.

lineup. This array consisted of photographs of six men, including a six- or eight-year-old photograph of appellant. William looked at this photograph array for 30 to 40 seconds but made no identification. William testified that he was hardly awake at the time because he was heavily sedated with pain medication.

On December 14, after William's release from the hospital, Detective Wayman showed him another array of six photographs. This time William identified appellant as his assailant. He testified that he identified appellant "almost instantly."

The second photograph of appellant was a recent booking photo and looked considerably different from the first one. In the first photograph appellant has a much fuller face, wavy and curly dark hair almost to his shoulders, a dark mustache, and a salt and pepper beard. In the second photograph appellant's hair is gray, short cropped and receding, and he has a very trimmed gray mustache and goatee. Appellant's photograph was in a different position in each array. However, to keep the backgrounds neutral on the second array, appellant's head had been cut out and pasted onto another man's neck.

Appellant moved to suppress William's identification. The trial court denied the request. The court stated "I don't think that that lineup, either one of them, is suggestive any more so than any other lineup, much less unduly suggestive."

William made an in-court identification of appellant at trial. He testified that his recollection of appellant was from the "scene of the crime," not from the photo lineup.

DISCUSSION

1. *Appellant did not demonstrate the existence of an unreliable identification procedure.*

Appellant contends that William's extrajudicial and in-court identifications of him as the assailant were tainted by an unduly suggestive process. According to appellant, this position is supported by several factors. Appellant notes that William saw his attacker only momentarily before suffering a severe blow to the head, appellant's image was the only one included in both arrays, William was heavily drugged when he viewed

the first lineup, and appellant's picture in the second array was the only one that was altered. Thus, appellant argues, the trial court erred in refusing to exclude that identification evidence.

In order to determine whether identification evidence violates a defendant's right to due process, the court considers (1) whether the identification procedure was unduly suggestive and unnecessary and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) In ruling on the reliability of the identification, the court takes into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. (*Ibid.*)

The defendant bears the burden of showing unfairness as a demonstrable reality, not just speculation. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) On appeal, the claim that an identification procedure was unduly suggestive is subject to the independent standard of review. (*People v. Kennedy* (2005) 36 Cal.4th 595, 609.)

Appellant notes that his image was the only one included in both arrays. Appellant argues that, by repeatedly displaying his picture, the police implicitly advised William that they believed appellant to be the assailant.

However, the fact that appellant was the only person common to both lineups did not per se violate his due process rights. (Cf. *People v. DeSantis, supra*, 2 Cal.4th at p. 1224.) Furthermore, appellant looked very different in the two photographs. The first one was at least six years old and was taken when appellant was heavier, had long dark hair as opposed to short-cropped gray hair, and a dark mustache and salt and pepper beard as opposed to a very trimmed gray mustache and goatee. Since the two

photographs were not obviously of the same person, the presence of appellant's photograph in both arrays was not unduly suggestive.

Appellant also points out that William was heavily sedated when he viewed the first lineup. According to appellant, this medicated state may have impacted the way William mentally processed the photographs and thus, William may have identified appellant in the second lineup simply because he had seen appellant's photograph earlier while in a drugged state.

Appellant provides no factual or legal basis for this claim. Rather, it is pure speculation. Thus, the fact that William was sedated when he viewed the first lineup does not assist appellant in establishing unfairness.

Appellant further objects to appellant's photo having been the only one in the second array that was altered. As noted above, appellant's head was pasted on another man's neck to provide a neutral background. Otherwise, appellant's photo would have stood out as the only booking photo. However, William testified that he did not notice anything "abnormal" about any of the photos. In fact, appellant admits that the alteration by itself was not necessarily suggestive.

Thus, even under the independent standard of review, it must be concluded that appellant did not meet his burden of establishing that the photo lineup was unduly suggestive. Accordingly, it is not necessary to consider other factors indicating reliability, such as the victim's opportunity to view the criminal at the time of the crime. That analysis comes into play only if the court first decides in favor of the defendant on the first part of the test.

2. *Imposition of the aggravated term infringed on appellant's federal constitutional right to a jury trial.*

The trial court sentenced appellant to the upper term of four years' imprisonment on the section 245, subdivision (a)(1) conviction. As a circumstance in aggravation, the court found that appellant engaged in violent conduct involving a serious danger to

society. (Cal. Rules of Court, rule 4.421, subd. (b)(1).) The court noted that, even if William unlawfully touched Ashley, appellant's actions were clearly not sanctioned by a lawful society and were not excused. Appellant was not the child's father and was not present when it happened and thus was not defending her. In essence, appellant "went looking for [William] and beat the hell out of him."

Appellant contends that the sentence must be reversed because he was denied his federal constitutional right to a jury determination that the factors supporting the trial court's imposition of the aggravated term were true beyond a reasonable doubt. Appellant is correct. In *Cunningham v. California*, *supra*, the United States Supreme Court held that the use of an aggravating fact, such as the one relied on here by the trial court, violates the Sixth Amendment.

Nevertheless, "[a]n appellate court is not restricted to the remedies of affirming or reversing a judgment. Where the prejudicial error goes only to the degree of the offense for which the defendant was convicted, the appellate court may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the necessity for a retrial. (See Pen. Code, § 1260; *People v. Harris* (1968) 266 Cal.App.2d 426, 434-435)' (*People v. Alexander* (1983) 140 Cal.App.3d 647, 666)" (*People v. Edwards* (1985) 39 Cal.3d 107, 118.)

By analogizing the above type of situation to the present case, it is tempting for us to simply reduce the imposed upper term to the middle term. However, while the United States Supreme Court in *Cunningham* invalidated the process by which the trial court here imposed the upper term, we cannot say for certain on this record that the same term may not be imposed anew, consistent with *Cunningham*.

Accordingly, the judgment of sentence is vacated with directions as follows: If the People do not bring the matter before the trial court for a contested resentencing hearing within 60 days after the filing of the remittitur in the trial court, the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a

sentence of the middle term and shall so modify the abstract of judgment. The People shall in writing notify the trial court and defendant's trial counsel of their intentions in this regard within 30 day after the filing of the remittitur; should the People state an intention to not contest the modification to the middle term or fail to timely notify the trial court, the trial court shall promptly modify the abstract of judgment as provided herein.

DISPOSITION

The judgment of conviction is affirmed. The judgment of sentence is vacated and the matter remanded to the trial court for further proceedings in accordance with this opinion.

Levy, Acting P.J.

WE CONCUR:

Gomes, J.

Hill, J.