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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

TONEY A. JOHNSON,

Defendant and Appellant.

A142683

(San Mateo County  
Super. Ct. No. SC076363A)

This is appeal from judgment after a jury convicted defendant Toney A. Johnson of robbery, kidnapping and possession of a firearm by a felon. The sole challenge raised by defendant on appeal is to the trial court's admission of evidence that police found a loaded handgun in his residence after the charged crimes were committed that, according to defendant, was used to improperly impugn his character. According to defendant, admission of this evidence violated both statutory and constitutional law, and caused him undue prejudice. We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

On August 21, 2012, a criminal information was filed in San Mateo County Superior Court, charging defendant with the following crimes: (1) felony kidnapping to commit robbery (Pen. Code, § 209, subd. (b)(1)) (count one); (2) felony kidnapping (Pen. Code, § 207, subd. (a)) (count two); (3) felony second-degree robbery (Pen. Code, § 212.5, subd. (c)) (count three; a lesser included offense as to count one); (4) felony assault with a firearm (Pen. Code, § 245, subd. (a)(2)) (count four); and (5) felony possession of a

firearm by a felon (Pen. Code, § 12021, subd. (a)(1)) (count five).<sup>1</sup> As to counts one through four, the information further alleged that defendant personally used a firearm within the meaning of section 12022.5 or section 12022.53. With respect to all counts, the information alleged three prior serious felony convictions (§ 667, subd. (a)), one prior prison term (§ 667.5, subd. (b)), and six prior strike convictions (§1170.12, subd. (c)(2)). Trial by jury began on August 26, 2013, at which the following evidence was presented.

**I. The Prosecution’s Case.**

At around 5:00 p.m. on December 6, 2007, Robin Simmons (hereinafter, victim) was preparing to leave her office, located on the second floor of a two-story building at 360 Oyster Point Boulevard in South San Francisco. Believing she was the only person left in the building, the victim turned off all the lights before walking to the exit. As the victim descended the staircase and looked out the window, she was surprised to see an SUV parked outside. Believing another person must still be in the building, she turned around to go back upstairs to turn back on a light. While ascending the stairs, the victim bumped into a man on his way down. The victim apologized and kept going, but the man asked her to stop. She turned around and saw a Black man with a mustache who appeared to be in his forties pointing a small black handgun in her direction. This man told the victim to turn around so she could not see him, and she complied. The victim was left with the impression, however, that the man’s mustache was peculiar, later describing it as “silly looking” and possibly a disguise, like a “piece of tape” stuck “very straight” across most of his upper lip.

The man instructed the victim to return to her office and open the door. However, once there, the victim was unable to find her door key in the darkness. The man thus instructed her to walk to a lighted exit sign so that she could find it. Believing she had a chance to escape, the victim opened the exit door and screamed, but the man was able to pull her back inside by grabbing her collar from behind. The victim then tumbled

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<sup>1</sup> Unless otherwise stated, all statutory citations herein are to the Penal Code.

backwards onto the hallway floor, injuring her wrist. The man told her to return to her office door and unlock it, which she did.

After following the victim inside, the man shut the door and wiped the doorknob with a handkerchief or bandana, and then asked where he could find laptop computers. The victim responded that her office had only desktop computers, so he instead demanded her money, credit cards and PIN number. She complied, giving the man a bank card and credit card, as well as her PIN number. The man then ordered her to lie on the ground on her stomach and to wait at least 15 minutes before calling for help. After pacing around in an agitated manner, the man eventually left. The victim called 911 as soon as she heard the downstairs door open and close.

After arriving at 360 Oyster Point Boulevard in response to the victim's 911 call, police officers were let in by a building employee who directed them to a black bandana with a floral design around the border found by the door. The officers took this bandana as evidence and later submitted it to the San Mateo County forensic laboratory for testing. At trial, one of the lab technicians testified that the DNA retrieved from the bandana had one primary donor, to wit, a single male individual. When the DNA profile information was entered into the California Department of Justice computer system, it was found to be a match for defendant, aka "Toeny Alfaso Johnson."<sup>2</sup> Law enforcement subsequently obtained a DNA sample from defendant, which, after further testing, was determined by lab technicians to be a complete match for the DNA on the black bandana found at the crime scene.

Police later found a photograph of defendant taken by the Department of Motor Vehicles, which they placed in a six-photo array and presented to the victim. The victim chose defendant's photograph among the array as the only one that appeared familiar, specifically noting that she recognized the suspect's distinctive mustache.

Around this same time period, defendant was arrested in Fairfield on an unrelated matter. When police searched defendant's residence in connection with this matter, they

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<sup>2</sup> Another police officer testified that "Toeny Alfaso" and "Tony Alfonso" were both names linked to defendant in law enforcement records.

found a loaded .22-caliber Jennings firearm inside a men's jacket in defendant's bedroom closet. This firearm was subsequently shown to the victim, who confirmed it resembled the firearm used by the perpetrator on the night in question. In particular, the victim noted that she recognized the firearm's small size, its shape, black color, and the "little thing on the ends."

Years later, at the 2013 trial, the victim testified that she only briefly saw defendant's face during the crime, but recalled that he had a distinctive, "silly-looking" mustache that she suspected was part of a disguise. She described this mustache as resembling a "piece of tape" placed in a "very straight" line over "most of his upper lip." The victim also testified that, when the perpetrator forced her to go to her office, she saw him wipe the doorknob with a piece of cloth that, to the best of her memory, appeared to be a bandana or handkerchief with a floral pattern around its border. The victim initially stated that she believed this cloth was white; however, she later acknowledged being uncertain about many details of the 2007 crime, and indicated that the most accurate information she could provide was the information she gave to police on the night in question.

## **II. The Defense Case.**

Defendant's optometrist, Dr. John Eng, testified that defendant was farsighted and, while he did not need eyeglasses for normal everyday activities, he "would have more difficulty" with "any fine detail vision at a near distance." Dr. Eng acknowledged that an individual with defendant's eyeglass prescription would generally be able to use stairwells in the dark in a manner similar to that of an individual with normal vision.

Kenneth Henderson, operations administration manager for All Points Petroleum, testified that defendant was an employee of his company from April 2005 until September 2007.

## **III. The Verdict, Sentence and Appeal.**

After trial, the trial court granted the prosecution's motion to dismiss count four. The jury then found defendant guilty of felony kidnapping to commit robbery (count one), felony second-degree robbery (count three), and possession of a firearm by a felon (count

five), and found true the enhancement allegations that defendant personally used a firearm as to counts one and three.<sup>3</sup> The trial court thereafter found true the enhancement allegations that defendant had two prior serious felony convictions (§ 667, subd. (a)), six prior strike convictions (§ 1170.12, subd. (c)(2)), and one prior prison sentence (§ 667.5, subd. (b)). The trial court then sentenced defendant to a total term of 50 years to life in prison. This timely appeal followed.

## DISCUSSION

Defendant has raised one evidentiary issue for our review. Specifically, defendant challenges as prejudicial error the trial court's admission of evidence that, subsequent to the crimes charged in this case, police searched his residence in connection with another case and found a loaded .22 caliber handgun in a jacket in his bedroom closet. The following legal principles apply to his challenge.

Generally, all relevant evidence is admissible. (*People v. Champion* (1995) 9 Cal.4th 879, 922.) Relevant evidence is that which has any tendency in reason to prove or disprove any disputed fact material to the outcome of the case. (Evid. Code, § 210.) “The test of relevance is whether the evidence tends ‘logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive. [Citations.]’ [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence. [Citations.]’ [Citation.]” (*People v. Hamilton* (2009) 45 Cal.4th 863, 940.) This broad discretion extends to trial court rulings on the admissibility of potentially inflammatory evidence, the exercise of which we will not disturb on appeal absent a showing that the discretion was exercised in an arbitrary, capricious or patently absurd manner, resulting in a manifest miscarriage of justice. (*People v. Brown* (2003) 31 Cal.4th 518, 547; *People v. Avitia* (2005) 127 Cal.App.4th 185, 193. See also Evid. Code, § 352 [“The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that

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<sup>3</sup> Count two, a lesser included offense in relation to count one, was not reached by the jury.

its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury”].)

Here, defendant contends the trial court abused its discretion and violated both statutory and constitutional law by admitting highly prejudicial evidence relating to the gun found at his residence about a month after the charged crimes were committed. Defendant reasons that evidence like this, relating to a criminal defendant’s uncharged bad acts, is not admissible under Evidence Code section 1101, subdivision (a) (hereinafter, section 1101(a)), and that the court’s admission of it in this case violated his due process rights.<sup>4</sup> We disagree.

As the California Supreme Court explains, “ ‘Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person’s character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person’s character or disposition.’ [Citation.] ‘Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. [Citations.] The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect.’” (*People v. Fuiava* (2012) 53 Cal.4th 622, 667.)

Here, as the People point out, the trial court did not admit the evidence of defendant’s gun possession as relevant to his propensity to commit crimes within the meaning of section 1101(a). Rather, the trial court admitted this evidence for its tendency to prove the disputed material fact of whether the gun found in defendant’s residence after the crime was in fact the gun used by the perpetrator against the victim during this crime.

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<sup>4</sup> Defendant, representing himself, raised a timely objection to admission of this evidence under Evidence Code 352, arguing its prejudice substantially outweighed its probative value.

(See *People v. Farnam* (2002) 28 Cal.4th 107, 156-157 [“Evidence that defendant possessed a knife two months after the [charged] crimes, coupled with the evidence that the perpetrator of the [charged] crimes used a sharp instrument, consistent with defendant’s knife, to slit a screen door and sever two telephone cords at the [crime scene], tended to establish that defendant was the perpetrator”].) Consistent with the court’s ruling, the victim thereafter testified that the firearm found in defendant’s residence a month after she was robbed and kidnapped looked “similar” to the gun used by the perpetrator on the night in question. The victim based her opinion on the similarities in color, size, and shape of the guns, as well as the manner in which the barrel stuck out beyond the rest of the gun body.

As defendant notes, the victim acknowledged on cross-examination that she had seen her neighbor’s .25 caliber gun, and was not capable of distinguishing this sort of gun from the .22 caliber gun found in defendant’s residence. There were also discrepancies or uncertainties in the victim’s testimony regarding the bandana or handkerchief used by the perpetrator to wipe the doorknob at the crime scene. At trial, the victim initially described the perpetrator’s bandana or handkerchief as, possibly, white with a floral pattern around its border. However, the victim ultimately acknowledged lacking a clear memory of many details of the crime, and indicated that the most accurate information she had was the information she gave to police on the night of the crime. And, according to one of these police officers, the victim did not provide any details regarding the appearance of the perpetrator’s handkerchief or bandana when they spoke to her on the night in question. Moreover, the cloth that police found at the crime scene was black rather than white.

While we accept defendant’s point that the victim’s memory of relevant events was in some regards lacking, as the California Supreme Court has explained: “Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury.” (*People v. Freeman* (1994) 8 Cal.4th 450, 491 [“Evidence that defendant possessed a plastic garbage bag shortly after the crime, coupled with the evidence that the shooter in the bar used a plastic garbage bag, tended to show that defendant was the shooter, which is a material fact in the case. Standing alone the inference may have been weak, but that

does not make the evidence irrelevant. The fact that many persons may similarly have possessed such bags may diminish the strength of the evidence, but it does not make it irrelevant”].) And, here, regardless of the victim’s acknowledged lack of familiarity with firearms, the jury could nonetheless reasonably infer from this record that defendant used the gun later seized from his residence to rob and kidnap the victim on the night in question – to wit, one of the key disputed facts of consequence in the action. (Cf. *People v. Riser* (1956) 47 Cal.2d 566, 577 [where the evidence was undisputed the murderer used a Smith and Wesson .38 Special, it was error for the trial court to admit evidence regarding defendant’s possession of other types of firearms].) Despite defendant’s protestations, this inference is well-grounded in the record, including the victim’s own testimony that the gun found in defendant’s home resembled the gun used by the perpetrator based on the similarities in gun size, shape and color. Nothing more was required to warrant admission of this evidence and, certainly, there was no miscarriage of justice by the trial court. (See *People v. De La Plane* (1979) 88 Cal.App.3d 223, 239 [“If a victim’s wound *could* have been caused by a specific type of weapon or instrument, such a weapon or instrument found in defendant’s possession is admissible in evidence” as relevant “on the theory that a trier of fact may reasonably draw an inference from defendant’s possession of the weapon or instrument to the fact that he used the weapon or instrument to commit the offense”].) The trial court’s ruling thus stands, and we need not address defendant’s further argument that admission of the evidence caused him undue prejudice.<sup>5</sup>

### **DISPOSITION**

The judgment is affirmed.

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Jenkins, J.

We concur:

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<sup>5</sup> Defendant’s July 9, 2015 motion to file a supplemental opening brief challenging the sufficiency of the evidence to support his conviction is denied.

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Pollak, Acting P. J.

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Siggins, J.

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