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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRONE ELEBY,

Defendant and Appellant.

2d Crim. No. B228840
(Super. Ct. No. NA083009)
(Los Angeles County)

Tyrone Eleby appeals his conviction for second degree burglary of a vehicle. (Pen. Code, § 459.)¹ In a bifurcated trial, he admitted two prior felony convictions within the meaning of the Three Strikes law (§§ 667, subs. (b)-(i), 1170.12, subs. (a)-(d)), and that he had served six prior prison terms (§ 667.5, subd. (b)). He was sentenced to 12 years in prison, consisting of the three-year upper term for the burglary doubled to six years for one prior strike (with the other strike being stricken for purposes of sentencing) plus one year for each of the six prior prison terms.

Eleby claims insufficient evidence to support his conviction, and that the trial court erred by admitting fingerprint evidence and limiting cross-examination of the

¹ All statutory references are to the Penal Code unless otherwise stated.

prosecution's fingerprint expert. He also claims he received ineffective assistance of counsel, and seeks in camera review of the trial court's hearing on his *Pitchess* motion.²

FACTS

At approximately 6:00 p.m. on June 28, 2009, Steve Davalos parked his Chevrolet Tahoe SUV around the corner from his home. He closed the windows and locked the vehicle. When Davalos returned to the vehicle the next morning, a window had been broken, and several items of property were missing, including the stereo, CDs, an iPod, shoes, and shorts. Davalos reported the incident to the police.

A police criminologist dusted the vehicle for fingerprints, and found two latent fingerprints on the upper portion of the inside of a passenger side window that had been dislodged from the vehicle. In the opinion of the criminologist, a person had exerted pressure on the outside of the window until it could be pushed inward. The person then inserted his or her fingers on the inside of the window and pulled the window out of the vehicle, allowing the person to unlock the door. The window was found intact on the ground with its inside facing up.

Fingerprint expert Heather Cochran entered one of the fingerprints lifted from the broken window into the Automated Fingerprint Identification System (AFIS) database. AFIS reported approximately 50 possible matches. Cochran compared the print from the window with one of the AFIS prints which was a known fingerprint of Eleby. Cochran concluded that there was a match, and her conclusion was verified by two other examiners. Later, Cochran also "rolled" Eleby's fingerprints and found a match with the fingerprint on the window.

Davalos and Eleby lived near each other but were not acquainted. There were no eyewitnesses to the burglary.

² (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

DISCUSSION

Substantial Evidence Supports Conviction

Eleby contends there was insufficient evidence to support his conviction because the only evidence linking him to the burglary was a fingerprint on the inside of a window of the Davalos vehicle. He argues that the fingerprint could have been placed on the window after the burglary and before its discovery rather than during the commission of the burglary. We disagree and conclude that substantial evidence supports the conviction.

In reviewing a claim of insufficient evidence, we consider the entire record in the light most favorable to the judgment, to determine whether there was reasonable and credible evidence of solid value sufficient for a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) We presume all facts in favor of the judgment which the jury could reasonably deduce from the evidence, and will uphold a judgment based on substantial evidence even if the evidence also might reasonably be reconciled with a contrary finding. (*Ibid.*; *People v. Guerra* (2006) 37 Cal.4th 1067, 1129.) A judgment will be reversed only if there is no substantial evidence to support the verdict under any hypothesis. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

It is well established that fingerprints are considered strong evidence of identity and, standing alone, may be sufficient to identify the perpetrator of a crime. (*People v. Andrews* (1989) 49 Cal.3d 200, 211, overruled on other grounds in *People v. Trevino* (2001) 26 Cal.4th 237.) It is for the jury to weigh the evidence and draw an inference as to how the defendant's prints came to be on a particular item. (*People v. Massey* (1961) 196 Cal.App.2d 230, 234; *People v. Preciado* (1991) 233 Cal.App.3d 1244, 1247.)

In *People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1586-1587, the court concluded that fingerprints found on a window which was the point of entry for the burglar was sufficient for a conviction. Although the defendant had visited the apartment before the burglary, there was no evidence of his presence between a cleaning of the

window and the burglary. (*Id.*, at p. 1588.) Similarly, in *People v. Preciado*, *supra*, 233 Cal.App.3d at pages 1246-1247, the court concluded that a defendant's fingerprints on a box in a burgled apartment was sufficient for a conviction because the victim did not know the defendant, and the box had never left the home.

Eleby argues that there was a 12-hour period between the time Davalos left his locked vehicle for the evening and discovered the burglary early the following morning, and that the broken window was accessible to any person for some portion of that time. We agree that the window was accessible to anyone walking down the street in the middle of the night, but the only identifiable fingerprints found on the inside of the window were those of Eleby.

The jury could reasonably infer that Eleby was the burglar based solely on evidence that his fingerprint was found on the inside of a window on the victim's vehicle. There is no reasonable explanation for the presence of the fingerprints other than that Eleby was the burglar. There is no evidence or contention that Eleby may have touched the inside of the window before or after the burglary, and there is also no evidence or contention that exposure to the open air and passersby undermined the accuracy of the identification of Eleby's fingerprints.

Eleby relies on *Mikes v. Borg* (9th Cir. 1991) 947 F.2d 353 where the Ninth Circuit reversed a murder conviction based solely on the presence of defendant's fingerprints on a turnstile post. The court recognized that fingerprint evidence alone may support a conviction under some circumstances, but concluded that, "in fingerprint-only cases in which the prosecution's theory is based on the premise that the defendant handled certain objects *while committing the crime in question*, the record must contain sufficient evidence from which the trier of fact could reasonably infer that the fingerprints were in fact impressed at that time and not at some earlier date. [Citations.] In order to meet this standard the prosecution must present evidence sufficient to permit the jury to conclude that the objects on which the fingerprints appear were inaccessible to the defendant prior to the time of the commission of the crime." (*Id.* at pp. 356-357, fn.

omitted.) In *Mikes*, the court concluded that the fingerprints may have been placed on the turnstile prior to the murder. (*Id.* at p. 359.)

Apart from being an intermediate federal appellate court opinion which is not binding authority on California courts (*Rohr Aircraft Corp. v. San Diego County* (1959) 51 Cal.2d 759, 764-765), *Mikes* is readily distinguishable from the instant case. Unlike in *Mikes*, here there was sufficient evidence for the jury to "reasonably infer that the fingerprints were in fact impressed at [the time of the offense] and not at some earlier date," or later date and that "the objects on which the fingerprints appear were inaccessible to the defendant prior to the time of the commission of the crime." (*Mikes v. Borg, supra*, 947 F.2d at pp. 356-357.)

Fingerprint Evidence Admissible Under Kelly/Frye

Eleby contends the trial court erred by denying his motion to exclude the fingerprint identification without conducting a *Kelly/Frye* hearing.³ He argues that a recent study has concluded that the standard fingerprint identification methodology has not been scientifically validated and, therefore, is unreliable. We disagree.

The so-called *Kelly/Frye* test is used to determine the "admissibility of expert testimony based upon the application of a new scientific technique." (*People v. Kelly, supra*, 17 Cal.3d at p. 30.) The test has three elements: (1) The new procedure must have gained "general acceptance in the relevant scientific community," (2) the witness must be qualified to give an opinion on the subject, and (3) the correct scientific procedures must have been followed in the particular case. (*People v. Henderson* (2003) 107 Cal.App.4th 769, 776.) The *Kelly/Frye* test applies only to expert evidence which is based "on a technique, process, or theory which is *new* to science and, even more so, the law." (*Ibid.*, fn. omitted.)⁴

³ (*People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.)

⁴ In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, the United States Supreme Court held that *Frye* was abrogated by rule 702 of the Federal Rules of Evidence (28 U.S.C.). In *People v. Leahy* (1994) 8 Cal.4th 587, 591, the California Supreme Court held that "the *Kelly/Frye* formulation (or now more accurately, the *Kelly*

Unquestionably, fingerprint identification is not a new scientific technique, and our Supreme Court has repeatedly rejected challenges to the admissibility of fingerprint identification evidence on the ground that it fails to meet the appropriate standard. (*People v. Farnam* (2002) 28 Cal.4th 107, 159-161; *People v. Webb* (1993) 6 Cal.4th 494, 523.) We are bound by the Supreme Court's decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

We are mindful that the views of the scientific community may change over time and that a forensic science is not "immune from *Kelly* scrutiny merely by reason of long-standing and persistent use." (*People Leahy, supra*, 8 Cal.4th at p. 606.) In his motion, Eleby offered testimony by Dr. Simon Cole and a recent report by the National Academy of Sciences ("NAS Report"). The NAS Report criticized the current state of forensic sciences and identified weaknesses in several fields, including fingerprint identification. The NAS Report did not assess the reliability of fingerprint identification, but concluded that more research needs to be conducted to improve the scientific underpinnings of the methodology. Relying on the NAS Report, Dr. Simon Cole testified that there were no adequate scientific studies validating the accuracy of fingerprint analysis, but he, too, declined to give an opinion on the reliability of fingerprint identification.

In denying the motion, the trial court concluded that, despite the need for additional scientific research, the current methodology remains generally accepted by the scientific community. The court also stated that the existence of a "human element" in the process which inevitably creates some fallibility is not a basis to exclude the evidence or question its general acceptance by the scientific community.

We agree with the trial court. Some scholarly criticism of fingerprint identification does not establish any change in the opinion of the scientific community or warrant exclusion of the evidence under the *Kelly/Frye* standard. The purpose of the NAS Report was to highlight deficiencies in forensic science, not to recommend the

formulation) should remain a prerequisite to the admission of expert testimony regarding new scientific methodology in this state."

exclusion of evidence based on accepted forensic science. (See *United States v. Rose* (D.Md. 2009) 672 F.Supp.2d 723, 725.) And, although there is no published California authority, other courts have refused to exclude fingerprint identification evidence based on the NAS Report. (*Ibid.*; *Johnston v. State* (Fla. 2010) 27 So.3d 11, 20–23.)

No Error in Limiting Cross-Examination

Eleby contends the trial court violated his right to confront witnesses and present a defense by preventing the prosecution fingerprint expert to be cross-examined regarding an unrelated case involving the misidentification of fingerprints. We disagree.

The confrontation clause gives a defendant the right to cross-examine witnesses against him, but only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 739; see *Davis v. Alaska* (1974) 415 U.S. 308, 318.) Courts may limit cross-examination regarding "collateral credibility issues." (*People v. Ayala* (2000) 23 Cal.4th 225, 301.) A constitutional violation can occur only if a reasonable jury might have received a significantly different impression of the witness's credibility if the excluded cross-examination had been permitted. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.) It is also axiomatic that a trial court has broad discretion in determining whether the probative value of specific evidence is outweighed by concerns regarding undue prejudice, confusion or consumption of time. (Evid. Code, § 352; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125; *People v. Romero* (2007) 149 Cal.App.4th 29, 44-45.)

Here, the trial court precluded questions concerning a well-publicized case several years earlier in which the FBI incorrectly determined that a suspect's fingerprints matched those found at a bomb scene in Spain. The suspect was held for two weeks as a material witness until the Spanish National Police matched the fingerprint with fingerprints of another individual living in Spain. The FBI retracted its identification and issued an apology.

This evidence does not relate to the identification of Eleby's fingerprints. It was of no probative value and concerned a speculative and collateral issue. Any

knowledge the witness may have had was, at best, limited to published accounts which would have made any opinion on the FBI misidentification speculative. Moreover, the trial court allowed cross-examination of the possibility of human error, which the witness admitted, and of the existence of the negative conclusions in the NAS Report. Eleby makes no showing that the prohibited cross-examination would have produced a significantly different impression of the credibility of the prosecution's fingerprint expert. (*People v. Quartermain, supra*, 16 Cal.4th at pp. 623-624.)

No Ineffective Assistance of Counsel

Eleby contends that he received ineffective assistance of counsel at trial because counsel failed to call Dr. Cole or any other fingerprint analyst to testify regarding the fingerprint evidence. We disagree.

To prevail on a claim of inadequate assistance of counsel, a defendant must establish that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that he or she was prejudiced by the deficient representation. (*People v. Vines* (2011) 51 Cal.4th 830, 875-876; *Strickland v. Washington* (1984) 466 U.S. 668, 687.) Prejudice requires a reasonable probability that the defendant would have received a more favorable result without counsel's deficiency. (*Vines*, at pp. 875-876; *Strickland*, at p. 694.)

A decision to present or omit evidence is inherently tactical and we defer to counsel's reasonable tactical decisions and presume that his or her conduct falls within the wide range of reasonable professional assistance. (*People v. Hinton* (2006) 37 Cal.4th 839, 876; *People v. Stanley* (2006) 39 Cal.4th 913, 955.) We will reverse a conviction due to inadequate representation only if the record affirmatively discloses that counsel had no rational tactical purpose for his or her act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

Here, Eleby fails to demonstrate that trial counsel's performance was deficient or that he suffered resulting prejudice. Trial counsel reasonably could have concluded that presenting expert testimony would not have been helpful to the defense in light of the testimony of the prosecution's fingerprint expert. Counsel presented the

criticisms of Dr. Cole and the NAS Report in his cross-examination of the prosecution's expert and there may have been no basis to otherwise challenge her procedures. The record indicates that counsel's decision to focus on the deficiencies in fingerprint evidence through cross-examination rather than the use of a defense forensic expert was reasonable. (See *Harrington v. Richter* (2011) ___ U.S. ___ [131 S.Ct. 770, 790].)

In addition, Dr. Cole is not a fingerprint identification expert. His stated expertise concerned the scientific validation of current methodology and there is no basis in the record that he could have addressed the identification of Eleby's fingerprints in any manner or offer an opinion on the specific conclusions made by Cochran under the current methodology.

Independent Review of Pitchess Hearing

Eleby requests independent review of the trial court's in camera hearing on his *Pitchess* motion to determine whether any records were improperly withheld. (*Pitchess v. Superior Court, supra*, 11 Cal.3d 531.) We have conducted such an independent review and conclude the trial court did not abuse its discretion in finding no discoverable records. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229-1232.)

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James B. Pierce, Judge
Superior Court County of Los Angeles

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