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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.

JONATHAN CABRERA,

Defendant and Appellant.

2d Crim. No. B244583
(Super. Ct. No. BA1394770)
(Los Angeles County)

Jonathan Cabrera appeals his conviction by jury of first degree residential burglary. (Pen. Code, § 459.)¹ Appellant admitted a prior strike conviction (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)), a prior serious felony conviction (§ 667, subd. (a)), and a prior prison term enhancement (§667.5, subd. (b)). The trial court sentenced him to 13 years state prison. Appellant contends that the trial court erred in denying his motion for new trial and abused its discretion in excluding evidence that his twin brother was convicted of burglary in 2009. We affirm.

Facts

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

On the morning of March 2, 2012, Louis Hunt awoke to someone banging on the front and back doors of his apartment. Hunt saw appellant open the bedroom door and enter. Hunt looked appellant in the face and said "fuck you." Appellant and a second man fled the apartment.

Hunt gave chase but lost the men. He called 911 and described the burglar as a black male in his mid twenties with long curly hair in a ponytail. Los Angeles Police Department Officer Dana Johnson responded to the call and found a red and black checked scarf on the ground outside the door. A laptop, an iPod, a cell phone, and a briefcase were missing from a roommate's bedroom. The apartment surveillance video showed a young black man running down the apartment alley carrying the stolen property. The man matched Hunt's description of the burglar.

Around midnight on March 5, 2012 (three days after the burglary), Hunt again heard banging on the front door. Looking through the peephole, Hunt saw appellant and a second man outside the door. Appellant looked towards the door and lifted a bandanna over his mouth. Hunt called 911 and said that the burglar was back and "he's got long, curly black hair in a ponytail."

Los Angeles Police Department Officers Alex Franco and Juan Rinco responded to the call and detained appellant and two other men near the apartment. Hunt identified appellant as the burglar who entered his bedroom three days earlier.

Appellant defended on the theory that his twin brother, Justin Cabrera, committed the burglary. Apartment video surveillance photos showed that the burglar had a tattoo on his left forearm. Appellant did not have a tattoo on his forearm but his twin brother did. Appellant's sister, Christina Cabrera, identified Facebook photos of Justin with an arm tattoo.

New Trial Motion

Appellant claims that the trial court erred in denying his motion for new trial based on enhanced photos of the surveillance video depicting the burglar's tattoo. Counsel declared that appellant's "family gave me vague information

concerning Justin Cabrera" and did not locate Justin until after the trial. Counsel photographed Justin's forearm, attached enhanced video surveillance photos to the motion, and declared: "It *still* appears to me that the person depicted in the surveillance video is not the defendant, but is his brother JUSTIN CABRERA." (Italics added.) Denying the motion for new trial, the trial court found that the enhanced photos did not "add anything new to this case. I don't think its newly discovered. . . . I just don't think the pictures show anything of substance."

We review for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1159.) To obtain a new trial based on newly discovered evidence, the defendant must show that (1) the evidence, not merely its materiality, is newly discovered, (2) the evidence is not cumulative to that already presented, (3) the evidence would render a different result probable on a retrial of the case, and (4) defendant could not with reasonable diligence have discovered and produced the evidence at trial. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

Appellant knew about the tattoo but waited until the jury returned its verdict before obtaining an order to photograph Justin and prepare the enhanced surveillance video photos. The enhanced photos were not newly discovered evidence. At trial, defense counsel argued that the surveillance video depicted Justin, who unlike appellant, had a "distinctive" tattoo on his left arm. In rebuttal, the prosecution argued that the burglar in the surveillance video had a distinctive mark on his nose as does appellant. Justin did not have a mark on his nose.

The trial court concluded that enhanced photos of the surveillance video were cumulative and not newly discovered evidence. We defer to the trial court's ruling because its familiarity with the facts and circumstances of the case places it in a far better position than a reviewing court to determine the effect and value of the proffered evidence. (*People v. Raquel* (1954) 125 Cal.App.2d 384, 385.) " ' "The determination of a motion for a new trial rests so completely within the [trial] court's discretion that its action will not be disturbed unless a manifest and

unmistakable abuse of discretion clearly appears." ' [Citations.]" (*People v. Delgado, supra*, 5 Cal.4th at p. 328.) No abuse of discretion occurred here.

Third Party Culpability Evidence

Appellant argues that the trial court erred in excluding evidence that his twin brother committed a burglary in 2009 using the same modus operandi. Absent direct or circumstantial evidence that Justin burglarized Hunt's apartment, the prior conviction evidence is not admissible. (*People v. Alcala* (1992) 4 Cal.4th 742, 792; *People v. Page* (2008) 44 Cal.4th 1, 38.) Evidence of Justin's motive or opportunity to commit the crime, "without more, will not suffice to raise a reasonable doubt about a defendant's guilt; there must be direct or circumstantial evidence linking [Justin] to the actual perpetration of the crime." (*People v. Hall* (1986) 41 Cal.3d 826, 833.)

Appellant claims that Justin's 2009 burglary involved the same modus operandi (i.e., banging on doors, testing door knobs) but it was not unusual or distinctive. Officer Johnson testified that burglars commonly knock on doors and test door knobs to see if anyone is home before entering a residence. There was no evidence that Justin was even near Hunt's apartment when the burglary was committed on March 2, 2012. The trial court concluded that evidence of Justin's 2009 burglary conviction lacked probative value and would confuse the jury. (Evid. Code, § 352.)

Appellant argues that Evidence Code section 352 is subordinate to his due process right to present a full defense. A defendant, however, has no due process right to present cumulative evidence. (*Crane v. Kentucky* (1986) 476 U.S. 683, 689-690 [90 L.Ed. 636, 644-645].) The application of ordinary rules of evidence, such as Evidence Code section 352 to exclude speculative or irrelevant evidence, does not violate a defendant's due process right to present a defense or right to a fair trial. (*People v. Page, supra*, 44 Cal.4th at pp. 36-37; *People v. Cunningham* (2001) 25 Cal.4th 926, 998-999; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

Assuming, arguendo, that the trial court erred in excluding evidence of Justin's prior burglary conviction, any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Hunt confronted the burglar in his bedroom, looked him directly in the face for two or three seconds and thus, his distinctive nose and chased the burglar out of the apartment. Hunt's description of the burglar matched appellant as did the surveillance photos. Three days later, appellant returned to the apartment with a bandana on his face and banged on Hunt's door to see if anyone was home. Hunt called the police, said the burglar was back, and identified appellant shortly after he was arrested outside the apartment.

Ineffective Assistance of Counsel

Appellant argues that trial counsel was deficient in not producing the enhanced video surveillance photos at trial. He also argues that the enhanced photos are "newly discovered" evidence. Assuming that the enhanced photos could not have been reasonably discovered before the jury returned its verdict, trial counsel could not be "ineffective" for doing the impossible.

To prevail on an ineffective assistance of counsel claim, appellant must show deficient representation and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) Appellant "must prove prejudice that is a "demonstrable reality," not simply speculation.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

It took no leap of logic for the jury to find that appellant burglarized Hunt's apartment on May 2, 2012, and returned three days later with a bandanna on his face to finish the job. Appellant claimed it was a case of mistaken identity but presented no alibi evidence. "Metaphorically, an actual innocence claim based on newly discovered evidence seeks a second bite at the apple, but unlike an ineffective assistance of counsel claim, . . . it does not contend the first bite was rotten." (*In re Lawley* (2006) 42 Cal.4th 1231, 1241.)

The record shows that appellant received a fair trial and was not prejudiced by the trial court's rulings or trial counsel's performance. None of the purported errors, either singularly or cumulatively, denied appellant a fair trial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1056.) A criminal defendant is entitled to a fair trial, not a perfect one. (*People v. Cain* (1995) 10 Cal.4th 1, 82.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Barbara R. Johnson, Judge
Superior Court County of Los Angeles

David W. Scopp, under appointment by the Court of Appeal, for
Defendant and Appellant.

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