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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
KENNETH LYNN SMITH, JR.,  
  
Defendant and Appellant.

C065163  
  
(Super. Ct. No. 09F07633)

A jury found defendant Kenneth Lynn Smith, Jr., guilty of second degree robbery (Pen. Code, § 211), and misdemeanor false representation of identity to a peace officer (*id.*, § 148.9, subd. (a)). A prior prison term allegation was found true. (*Id.*, former § 667.5, subd. (b).) Sentenced to a six-year state prison term, defendant appeals, contending the trial court was not impartial, rendering the trial fundamentally unfair under the Sixth and Fourteenth Amendments of the United States

Constitution. Concluding that the trial court acted impartially and without misconduct, we shall affirm the judgment.

### **FACTUAL BACKGROUND**

On October 9, 2009, Saul Morales cashed his \$620 paycheck at the A-1 Liquor Store in South Sacramento. Once Morales cashed his check and put the money in his pocket he went outside to the car to wait for his brother, who was still in the store. While Morales waited, two men approached and began punching him in the face.<sup>1</sup> As one of the men punched Morales, the other man took the money from Morales's pocket; the two men then ran off.

During their investigation, the police learned that the A-1 Liquor Store had a surveillance camera that recorded the incident. After reviewing the video, Morales identified the two culprits. Later, in a field show up, Morales identified defendant as one of the men who had beaten him and taken his money. At trial, Morales again identified defendant.

### **DISCUSSION**

Defendant argues the trial court acted in a partisan way, which amounted to a fundamentally unfair trial under the Sixth and Fourteenth Amendments of the United States Constitution. Specifically, defendant contends the trial was unfair because (1) the trial court's and the jury's extensive questioning of witnesses amounted to adding two party litigants; (2) the trial

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<sup>1</sup> Codefendant Edmond Johnson was acquitted at trial.

court rewrote Evidence Code section 772;<sup>2</sup> and (3) the trial court's refusal to allow defense counsel to review the jury's questions before they were posed to witnesses (a) allowed in inadmissible evidence, and (b) denied defendant the right to present a defense. We conclude that none of defendant's arguments have merit.

### ***Background***

Prior to the commencement of trial, the trial court explained to counsel the procedure that would be followed. Specifically, the trial court would allow the attorneys to have "two opportunities to question the witness," giving the attorneys a direct, a cross-, a redirect, and a recross-examination. Thereafter, the trial court would solicit written questions from the jurors. The trial court would then "state the question . . . to the witnesses on behalf of the juror," if the question did not call for inadmissible evidence. If the trial court believed that the juror question raised an issue for attorney discussion, the court would confer with the attorneys at sidebar.

The trial court noted that 95 percent of the time, it would ask the juror's question without the "necessity of consulting with the lawyers." The trial court explained that, if it asked a juror's question, the attorneys could "fairly assume that I [(the trial judge)] don't feel that the question is objectionable." Nevertheless, the trial court stated that if an

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<sup>2</sup> Undesignated statutory references are to the Evidence Code.

attorney did have an objection to a juror's question, the attorney could still object. Additionally, the trial court would allow the attorneys to object to a juror's question outside the jury's presence, "usually [at] the next recess"; if the court was persuaded it was "wrong in asking the question or part of the answer was, upon reflection, inadmissible," the court "would consider striking testimony and admonishing the jury or taking some measure along those lines." Following juror and court questions, the court would allow the attorneys to continue questioning the witnesses.

After the jury was selected, the trial court explained to the jury the same trial procedure that the court had explained to the attorneys. The court also told the jurors, *sua sponte*, that the court may "discuss the question with the attorneys and decide whether it may be asked. Do not feel slighted or disappointed if your question is not asked. Your question may not be asked for a variety of reasons, including the reason that the question may call for an answer that is inadmissible for legal reasons." (CALCRIM No. 106.) The court continued, "Also, do not guess the reason your question was not asked or speculate about what the answer might have been. Always remember that you are not advocates for one side or the other in this case. You are impartial judges of the facts." (*Ibid.*)

After the attorneys were finished examining the first witness, which was conducted in the manner the trial court had described—two directs, two crosses, juror and court questions,

and attorney follow-up questions—defendant’s counsel informed the court, out of the jury’s presence, that he had matters to discuss. Defendant’s counsel was concerned about the number of questions the jurors and court posed to the witness and, because of this, asked if the attorneys could see the questions prior to the court’s reading of the question. The trial court denied defense counsel’s request, stating that the jury ultimately determines the outcome of the case and if “a juror needs some information in order to make an intelligent decision,” the court was going to permit the question if it was not objectionable. Defense counsel then expressed his concern that the court was “taking sides” and “not remaining neutral”; the court remarked that it was “not trying to help one side or the other” and that it would give instructions to the jury reminding them of that.<sup>3</sup>

### **I. Extensive Questioning of Witnesses**

Defendant first asserts that the trial court and the jury became party litigants through their extensive questioning, in effect removing their impartiality. We disagree.

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<sup>3</sup> The court next instructed the jury that “[o]ccasionally during the trial, I [(the trial judge)] will interrupt the lawyer’s questions to ask some questions of my own, but I want to make sure that you understand that I do not mean to sway the jury to favor one side or the other in the case. I want to take this moment right now to assure you in the strongest possible terms to look at this case objectively, and don’t base any decision you make on the personalities of any of the participants in the trial, myself included. My goal is to preside over a fair trial.”

"Numerous courts . . . have recognized that it is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact and to assure that ambiguities and conflicts in the evidence are resolved insofar as possible." (*People v. Carlucci* (1979) 23 Cal.3d 249, 255 (*Carlucci*); see also § 775.) "'A trial judge may examine witnesses to elicit or clarify testimony. [Citations.] . . . The trial judge, however, must not become an advocate for either party or under the guide [*sic*] of examining witnesses comment on the evidence or cast aspersions or ridicule on a witness.'" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1305 (*Cummings*), quoting *People v. Rigney* (1961) 55 Cal.2d 236, 241.) "For the same reason, the judge has discretion to ask questions submitted by jurors . . . ." (*Cummings*, at p. 1305.)

Defendant points to no specific instances where the trial judge or the jurors overstepped their boundaries from impartiality to advocacy. Defendant instead argues the cumulative effect of all the questions asked by the court and jury amounted to partisan conduct.

Defendant supports his argument by quoting from *People v. Handcock* (1983) 145 Cal.App.3d Supp. 25, 30, "The right of a court to call or question witnesses is not unlimited, 'nor subject only to the whim or caprice of the trial judge.'" However, defendant misinterprets the law in *Handcock* because he fails to address that decision's very next sentence, "Extreme

care must be observed by the court so as not to shift the balance of the case either for or against a party . . . ." (*Handcock*, at p. 30.) Therefore, *Handcock* does not stand for the principle that there is a limit to the number of questions a court may ask, as defendant would have us believe, but rather *Handcock* illustrates that when a court questions a witness it must do so in a "fair and impartial . . . manner . . . to avoid conveying to the jury an impression that [the court] thinks the defendant is guilty of the offense with which he is charged . . . ." (*Ibid.*) While the court and jury here may have asked a number of questions of each witness, "[a] judge does not become an advocate merely by asking questions.'" (*People v. Raviart* (2001) 93 Cal.App.4th 258, 272 (*Raviart*).)

Although defendant has not pointed to any specific instances where the trial court or the jurors may have exceeded the bounds of their duties, this court has reviewed the trial transcript including each instance of the trial court's participation in the questioning of witnesses. After review, we conclude the trial court's involvement did not constitute misconduct.

The trial court's questions were meant to clarify and elicit testimony by the witnesses, rather than to assume the role of an advocate. (See *Carlucci*, *supra*, 23 Cal.3d at p. 255; see also *Raviart*, *supra*, 93 Cal.App.4th at pp. 271-272; *People v. Cook* (2006) 39 Cal.4th 566, 597 (*Cook*).) The trial court explicitly recognized that, if "a juror needs some information

in order to make an intelligent decision," the court was going to ask questions so the juror could do so. In making this statement, the court noted that the jury ultimately decides the outcome of the case, and if the jury needs clarification or needs more information to make a decision the court was going to facilitate that. We find no instances where the trial court made "discourteous and disparaging remarks so as to discredit the defense or create the impression it [was] allying itself with the prosecution." (*People v. Santana* (2000) 80 Cal.App.4th 1194, 1206-1207, italics omitted.) In fact, the trial court asked some questions that it felt were "beneficial to the defense." For example, the court asked questions demonstrating that the victim may have identified defendant as a suspect because, prior to the identification, the victim was told the suspects had been caught.

The trial court also instructed the jurors, more than once, that they should "not take anything I [(the trial judge)] said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be." (CALCRIM No. 3550.) These instructions reminded the jurors of the impartial role of the trial judge whose "questions to witnesses were designed to clarify the evidence without favoring either side." (*Cook, supra*, 39 Cal.4th at p. 598.) Accordingly, we conclude no misconduct occurred.

## II. Section 772

Defendant next argues that the court's "partiality against the defense" was demonstrated by what defendant claims was a rewriting of section 772. Defendant has forfeited this claim by failing to so object in the trial court. In any event, we disagree with defendant's argument.

As pertinent, section 772, subdivision (a) states, "The examination of a witness shall proceed in the following phases: direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination."

Defendant argues that since the trial court's procedure was to allow only two initial rounds of attorney questions followed by jury and court participation, the court truncated the section 772 procedure. Defendant's claim, however, is contrary to the settled case law regarding court and jury participation. As previously mentioned, section 775 and relevant case law specifically allow for court and jury participation in trial. (*Carlucci, supra*, 23 Cal.3d at p. 255; *Cummings, supra*, 4 Cal.4th at p. 1305; § 775.) If we were to agree with defendant's argument, we would be adopting thereby a rule of law that restricts court and jury participation during trial.

Moreover, the trial court allowed the defense and the prosecution to resume their examinations following the court's and jurors' questions, thus continuing the mode of examination set out in section 772. Accordingly, we conclude the trial

court did not commit misconduct or violate section 772 through its procedure.

### **III. Trial Court's Refusal to Allow Defense Counsel to Review Jury Questions**

Lastly, defendant argues the trial court's refusal to allow defense counsel to review the jurors' questions before they were posed to witnesses (a) allowed in inadmissible evidence, and (b) denied defendant the right to present a defense. We disagree.

The trial court "has discretion to ask questions submitted by jurors or to pass those questions on and leave to the discretion of counsel whether to ask the questions." (*Cummings, supra*, 4 Cal.4th at p. 1305, italics added; see also *People v. Majors* (1998) 18 Cal.4th 385, 407.)

As *Cummings* illustrates, if the trial court or counsel review the questions submitted by jurors, the danger of inadmissible evidence being admitted is low. (See *Cummings, supra*, 4 Cal.4th at p. 1305.) Here, the trial court not only reviewed the submitted questions, but carefully screened them so as not to ask questions that would elicit inadmissible evidence.<sup>4</sup> In at least six instances, the trial court indicated that it had received a question from a juror that it was not going to ask because the question would elicit inadmissible evidence. Thus,

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<sup>4</sup> For example, the court did not ask a juror question because it was "not relevant to this trial" and explained that "defendants are on trial for what they are charged with on this particular day, and something that happened on a different day . . . would not be relevant to you [(the jurors)], so don't speculate about what the answer to that question might be."

the trial court asked only questions that it found unobjectionable, thereby avoiding any potential misconduct.

Defendant also argues that "since he could not review and object to the juror questions before they were asked, [he] was placed in the position of not being able to obtain an order excluding otherwise inadmissible evidence"; he "was effectively precluded from casting doubt on the testimony of an adverse witness"; and the court adopted a "procedure whereby it was willing to, and would, admit inadmissible evidence." All of these arguments are without merit. Defendant's assertions stem from not being able to object to the questions posed by the jurors and the court; however, the record does not support his contention. The trial court was not only willing to entertain objections from counsel—stating at the outset of trial that counsel could object outside the jurors' presence and reminding counsel that they could object "[at] any time"—but the trial court entertained objections made. Additionally, as previously mentioned, the court carefully screened the questions so as not to ask questions that would elicit irrelevant or inadmissible evidence. For all of the above reasons, the court's refusal to allow defense counsel to review the jurors' questions before they were posed to witnesses did not prejudice defendant.

Because we conclude that defendant was not precluded from objecting to the questions from the trial court and the jurors, and he was not prejudiced by not being able to review the jurors' questions prior to the questions being asked, it follows

that defendant's argument that he was denied the right to present a defense is without merit.

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_ BUTZ \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ RAYE \_\_\_\_\_, P. J.

\_\_\_\_\_ DUARTE \_\_\_\_\_, J.