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

THE PEOPLE,

Plaintiff and Respondent,

v.

JAN-RANDOLPH ESPANOL,

Defendant and Appellant.

C067551

(Super. Ct. No.
09F05389)

A jury convicted defendant Jan-Randolph Espanol of assault with a deadly weapon (a baseball bat). (Pen. Code, § 245, subd. (a)(1).) The trial court suspended imposition of sentence and placed defendant on probation. Defendant timely filed this appeal.

On appeal, defendant contends the trial court improperly denied his motion for a new trial predicated on newly-discovered evidence. As we shall explain, and contrary to defendant's view, the trial evidence against him was strong, and the new evidence did not tend to undermine the evidence that defendant

himself committed the assault with the bat. The trial court-- which was in the best position to assess the strength of the evidence--did not abuse its discretion in concluding there was no reasonable possibility that the new evidence would have made a difference in the trial's outcome.

Accordingly, we shall affirm the judgment.

BACKGROUND

Given the nature of the briefing, we provide a thorough summary of the evidence. It shows that an otherwise pleasant Memorial Day weekend outing at the American River was marred by violence: After the victim objected to a man leering at his girlfriend, he was beaten by a group that included defendant.

Prosecution Case

Michael Rasmussen testified he was 21 years old and had attended Casa Roble High School for two years. On the afternoon of May 23, 2009, he had been at the river with his girlfriend Allison Robeson, near the Sunrise Boulevard bridge. At about 6:00 p.m., they walked back to their car. He saw two men in a Mercedes. The driver, a "White male" in his 20's, stuck his head out of the window and ogled Robeson. Rasmussen identified defendant in court as the passenger. Both men in the Mercedes were shirtless, and defendant had "a lot of tattoos on his neck and his arms and stuff."

Rasmussen testified that he asked the driver "'what's up', you know, because he was blatantly, you know, looking." After Rasmussen spoke and made a gesture, the men got out of the

Mercedes, and Rasmussen saw a red Chevrolet Tahoe "turning around down the street to come back" towards him. Rasmussen admitted telling the police that he waved his arms and shrugged his shoulders when he said "'what's up.'"

The passenger and driver of the Mercedes approached Rasmussen, and the driver tried to "aggravate[e]" the situation, but Rasmussen remained silent. Two people then got out of the Tahoe and approached Rasmussen. The Tahoe driver was "about six-two, 190 pounds, white male, shirtless," but Rasmussen only had a vague memory of the Tahoe passenger. When all four men were facing Rasmussen, they tried to pick a fight, but he remained silent. The Tahoe driver then punched Rasmussen in the face, knocking out a tooth. Two other men, including defendant, attacked Rasmussen, who was knocked to the ground. Although he was curled up to protect his head, Rasmussen "could see through the gaps of my arm who was hitting me."

Rasmussen testified the attack seemed to ease, but then (after Rasmussen displayed a switchblade) defendant went to the Mercedes and retrieved a baseball bat--similar to a wooden Louisville Slugger--and began hitting Rasmussen while he was on the ground, and hit him 10 to 15 times.

The assailants then left the area, with defendant again a passenger in the Mercedes. However, Rasmussen had seen a police report indicating he had identified defendant as the driver of the Mercedes, and it is possible he did say that to an officer. He told the officers the bat-wielder was "Hispanic, Asian or

possibly, like, Samoan," and described the others as "just white, Caucasian."

Robeson drove Rasmussen to the hospital, and at trial he described his various injuries.

Rasmussen testified he had known defendant as "Jaran Espanol" at Casa Roble High School, but had not recognized him *during* the attack. He did not recall going to the same middle school as defendant. After the attack, Rasmussen talked with friends and family about what had happened, and eventually spoke with his former classmate, Jacob Ciongoli. Rasmussen described the Mercedes to Ciongoli as a "newer class model" having the same "big shiny chrome rims" that Rasmussen had on his car, and described the Tahoe "as a big red Tahoe with big after-market silver rims." Ciongoli said he recognized those vehicle descriptions and knew the drivers, defendant and "Kyle" from high school.

Rasmussen and Ciongoli searched online and printed a MySpace photograph of defendant. From that photograph, depicting "the tattoos on the neck" including a "checkered flag" tattoo, Rasmussen recognized defendant as the bat-wielding assailant. However, on cross-examination Rasmussen admitted he had told the police he could not identify any of the tattoos.

Rasmussen testified a detective showed him two photographic lineups. From one, Rasmussen identified "Kyle" as the driver of the Tahoe, and from the other Rasmussen identified defendant as the bat-wielding assailant.

Jacob Ciongoli testified he knew both Rasmussen and defendant ("Jaran Espanol") from Casa Roble High School. When Rasmussen described a "lowered red Tahoe," Ciongoli asked if it had 22-inch chrome rims, which Rasmussen confirmed, and because of the rims, Ciongoli connected the Tahoe to a silver Mercedes he knew from high school. He associated the Tahoe with Kyle Sund-Bowen and the Mercedes with defendant, and associated the two men with each other from high school. Rasmussen's sister checked MySpace and found a picture of the Tahoe when she typed in Sund-Bowen's name, and when they typed in "Jaran Espanol," they found a picture that Rasmussen immediately identified as his assailant.

Allison Robeson testified that after Rasmussen said "'what's up,'" "two people jumped out of the Mercedes, and two people jumped out of a Tahoe" and began challenging Rasmussen to fight. She identified defendant in court as the Mercedes passenger, "Hispanic -- Asian is how I took it at the scene, with tattoos on the neck[,] "kind of petite, short -- a little bit short thin[,] and the driver was tall "bleached blond hair, combed forward, with tattoos all over his chest." Defendant was shirtless and she had a clear view of his chest. The Mercedes driver struck the first blow, hitting Rasmussen in the mouth, and after Rasmussen was on the ground covering his head, Robeson saw defendant stomping him. After the group stopped kicking Rasmussen, he held a folded knife, and after a man who had not been part of the beating said, "Oh, you got a knife?" "that's when the Defendant brought the bat back from the car and

starting beating him with it." Defendant struck Rasmussen with the bat about eight to 10 times, "all along the left side of his body from head to toe." The beating took place at about 6:30-7:00 p.m.

Robeson testified she was present when Ciongoli said he recognized the descriptions of the vehicles. She had gone to a different high school and had not known defendant before, and she did not recognize the picture associated with "Kyle," but when "they looked up Jaran" she recognized defendant. Robeson later identified defendant's photograph in a lineup presented to her by a detective, and stated he was the bat-wielder.

Deputy Eugene Hardy testified he arrived at 7:37 p.m., and spoke with Robeson, who was very upset. She described the vehicles involved and later "[p]retty much any red Tahoe with rims on I stopped during the night or a silver Mercedes I stopped to see who was in the car" but none of those 30 or so stops he conducted proved fruitful. Robeson had described "A young Asian male with tattoos" all over his chest who had wielded a bat.

Deputy Benjamin Green testified Rasmussen gave him a description of the vehicles and described "the primary attacker" as a short and stocky "Asian male adult" with tattoos on his arms and upper body, and the "secondary attacker" as a tall blond "white male adult." Three days later, Rasmussen called Green to report he had identified the two attackers with the aid of a friend, by using MySpace. Rasmussen never told Green he knew his attackers from school, and on the day of the attack he

told Green he had never seen the "Asian guy" before. Rasmussen told Green "the Asian guy" had been "looking inappropriately" at Robeson from the driver's seat of the Mercedes, not the tall blond man. Two license plates were reported to Green, one of which proved to belong to a black Toyota pickup truck.¹

Jason Randall testified he had been looking at real estate in the area and then drove near the river to see what it looked like. A group of three or four shirtless, tattooed youths, all white, brushed past him, and as he kept an eye on them, he heard what sounded to him like challenges to fight. He also saw a "darker, Asian, shorter, stockier" man walking toward a silver Mercedes, and thought he might have been "Pacific Islander. I don't know." This man got a "black billy club" or "small baseball bat" from the trunk of the Mercedes, during a pause in the altercation. Then Randall testified, "I couldn't actually see the club being swung. I just heard the words, and then I heard the sound of landing blows." Randall would "not positively" identify defendant in court, but testified defendant "matches roughly the characteristics that I described in my testimony." He did not notice any tattoos on the person at the time, only tattoos on the White men, but also testified he could not see the man's neck or chest because he was too far away and the man may have worn a shirt. When the vehicles drove off, the occupants appeared to see Randall noting the license plates, so

¹ This black Toyota truck will prove significant, as we explain in our discussion of defendant's new trial motion, *post*.

after they passed him "they stopped the cars, they all piled out, and got out of the car and started gesturing towards" Randall by extending their arms and puffing their chests; the "Pacific Islander" from the Mercedes did most of the gesturing.

Detective Keith Biggers testified he showed Rasmussen and Robeson photographic lineups on June 3, 2009. In one lineup, Rasmussen picked out Sund-Bowen's photograph as someone who might have been present, but did not attack him. In the other, Rasmussen picked out defendant's picture with no hesitation, and identified him as the bat-wielder.

Defense Case

The defense theory was that defendant, whose jaw was broken days *before* the assault on Rasmussen, had been in Daly City at the time of the assault, recuperating with his family.

Dr. Richard Jackson, an oral surgeon, testified he saw defendant on May 29, 2009. By the time Dr. Jackson saw him, defendant's range of motion was normal, as his jaw fracture was a "hairline crack" that "was not displaced or open." Defendant's face was *not* swollen and no treatment was required, other than "soft diet and just antibiotics because it wasn't displaced." An emergency room nurse testified defendant was treated on May 20, 2009, for "jaw pain with some swelling," and X-rays revealed a "non-displaced mandible fracture." Defendant said he had been struck with brass knuckles a couple of days before. Jacob Justus, a friend of defendant's, saw him get hit with a metal object by a man claiming to be a peace officer, in

the summer of 2009. Defendant's face appeared to be injured, even two weeks after the attack.

Defendant's mother, Tessie Espanol, testified defendant's jaw was broken on May 20, 2009, and he was treated at Mercy San Juan Hospital. His face was "swollen, blue and red" "From his ear to the chin," he was not able to talk clearly, and was taking pain medication. Because she was not able to care for him, she drove him to his father's house in Daly City on the night of May 22, 2009, and defendant stayed there for a month or more. During that time he returned to Sacramento on May 29, for a doctor's appointment to get a referral for an oral surgeon. Nobody in the family had owned a silver Mercedes or red Tahoe, and she had never seen her son driving either vehicle.

Other relatives corroborated the alibi, with greater or lesser confidence. Anthony Rivas, defendant's brother-in-law, testified defendant came to stay in Daly City a couple of days after May 18, 2009 (the date Rivas's daughter was born), and stayed for a couple of months, but on cross-examination, he conceded defendant might have arrived in Daly City as long as a week later. Katherine Espanol, Rivas's wife, testified defendant arrived in Daly City "the day after I got discharged from the hospital, so which [*sic*] was May 20th," but conceded he may have arrived on May 24 or 25. Richard Espanol, defendant's father, testified defendant was at his house in Daly City on May 23, 2009. He knew the date because he had a receipt for soup he bought for defendant, who needed soft food due to the jaw injury, and he claimed he kept the receipt for business reasons,

although he had never mentioned the receipt before. Luzviminda Espanol, defendant's stepmother, testified she always kept receipts, and bought soup for defendant when he came to stay in Daly City after his jaw injury. She, too, conceded that she had not mentioned the receipt before trial.

Sergeant Richard Rider testified that in response to a witness report of a license plate, he found a black Toyota pickup truck at the Carmichael address of the registered owner, Patricia Cheney.² Near the truck, Sergeant Rider saw a White female adult and a shirtless White male adult, in his mid-20's, but he did not recall seeing any tattoos.

A Metro PCS employee testified the company's records for a mobile telephone listed "Jhan Rsndolph" as the subscriber, with an address in Daly City. On May 23, 2009, at about 11:50 a.m., the phone accessed a cell tower in Sacramento. At about 1:32 p.m., it accessed a tower in San Francisco, and some later calls or attempted calls were outside the "home switch" of Sacramento.

Dr. Robert Shomer, a psychologist, testified about problems with eyewitness identification. He estimated he had qualified as an expert on the subject "close to a thousand times" since 1974. Stress, such as from a violent incident, degrades a person's ability to identify a subject, as does the fact the subject is of a different race than the witness, and the fact a weapon is involved. The fact a friend or trusted person

² There are two different spellings of Cheney throughout the record. For ease of reference, we will adopt the more widely used spelling of Chaney, henceforth in this opinion.

suggests something can influence one's memory. Once a person finds someone who looks familiar, they may "believe that because that familiarity is there, familiarity must have come from the crime." Based hypothetically on what he knew of the facts of this case, Dr. Shomer opined that the "delayed announcement of familiarity," the presence of multiple attackers, and the fact a suspect was suggested to the witnesses, were all danger signals. The presence of a weapon and cross-racial factor decreased the probable accuracy of the identification. The fact Rasmussen and Robeson discussed the event may have caused a false consensus. There were "many classic red-flag factors present" in this case.

Argument, Deliberations, and Verdict

The People argued Robeson and Rasmussen were credible, the identifications were accurate despite Dr. Shomer's views, and the alibi defense lacked credibility.

The defense argued defendant was in Daly City at the time of the assault, and emphasized Dr. Shomer's testimony about problems with eyewitness identification. The defense also emphasized the initial reports were of a short and stocky assailant, whereas defendant is 5'10" and slender. The defense also pointed out that Deputy Rider investigated a license number, and found a young shirtless White man near the black Toyota pickup truck, and suggested that man was associated with the attack. The defense pointed to inconsistencies in the testimony, to bolster the argument that Rasmussen and Robeson were simply mistaken.

During deliberations, the jury asked to see defendant's hospital records, which were not in evidence, and heard readbacks of Robeson's testimony, Luzviminda Espanol's testimony, and Anthony Rivas's testimony; deliberations lasted less than a day and a half.

On November 4, 2010, the jury found defendant guilty as charged of assault with a deadly weapon.

New Trial Motion, Disposition, and Appeal

On January 11, 2011, defendant moved for a new trial, in relevant part based on newly-discovered evidence. The purported new evidence was contained in a defense investigator's report submitted under penalty of perjury. But, as the trial court found, the declaration did not merely state *facts*, it was replete with suspicions, conclusions and inferences, as follows:

On November 17, 2010, the investigator spoke with Paris Shaw, Patricia Chaney's daughter. On a later visit, Chaney told the investigator Shaw "frequently" went to the river in the truck with her friends, and on that later visit the investigator saw "a white four-door Mercedes-Benz with chrome wheels" parked at Chaney's house. This Mercedes was registered to Corey and Troy Geroy, Shaw's friends, and it *may* have been present at the Chaney house on prior visits by the investigator. "Research on the MySpace website revealed connections between Paris Shaw, Corey Geroy, Troy Geroy, and Kyle Sund-Bowen, the owner of the red Chevy Tahoe suspected to be involved, as well as several other males matching the descriptions of those involved in the incident." On December 16, 2010, Shaw spoke to the investigator

and "claimed to only have white friends." Shaw declined to speak further and after repeated efforts to speak with her, the investigator "concluded that Paris Shaw was intentionally hiding from me. She was instructing her friends, mother and co-workers to lie for her in order to avoid my contact." The investigator believed Shaw was lying because although she said she had only White friends and said she did not know anyone with a red Tahoe, "I located several pictures on MySpace website pages where she is pictured with an Asian male and a Black male. She is pictured in several photographs with Kyle Sund-Bowen, who owned a red Chevy Tahoe." "My research on MySpace revealed numerous connections between Scott Kiley, a 23-year-old Asian male with tattoos, and Kyle Sund-Bowen and Corey Geroy." The investigator contacted Randall on January 4, 2011 and showed him pictures of Kiley, "a Pacific Islander. Randall could not say if he was involved or not. However, he did say that the Pacific Islander who was involved appeared 'older, larger, and huskier than the little kid he saw in court.'" Photographs of cars, persons, and apparent screen-captures from the Internet were attached to the investigator's report. The report refers to material the investigator found on the Internet, but nowhere explains its foundation.³

The People opposed the motion due to lack of diligence and because it was based on "a combination of speculation and

³ Nor did the defense supply a declaration by Randall, or any other supporting *evidence*: The new trial motion rested on the investigator's declaration, as we have summarized it.

conjecture": Randall did not identify Scott Kiley, there was no evidence the white Mercedes had been associated with Chaney's house at the time of the assault, and, "It is entirely possible that Mr. Kiley and other associates of the defendant or of Mr. Sund-[Blowen or Ms. Chaney [*sic*, Paris Shaw?] were present at the time of the attack. Nothing about that would change the fact the defendant was also present."

The trial court declined to decide whether defense counsel had been diligent.⁴ The trial court stated that Robeson and Rasmussen "positively identified" defendant as the perpetrator, while Randall testified about similarities between defendant and the perpetrator. The defense had vigorously attacked the identifications at trial, including by Dr. Shomer's expert testimony, and by presenting alibi evidence. The newly discovered evidence would not *exclude* defendant as one of the perpetrators, but at best might point to another person as one of the copерpetrators. Further, the evidence had a weak foundation, both because the information *postdated* the trial and because the investigator failed to prepare an objective report. The trial court also pointed out that the purported photograph of Scott Kiley attached to the investigator's report showed

⁴ The trial court reasoned that if trial counsel had *not* been diligent, but the new evidence were critical, defendant would have suffered from incompetence of counsel and would be entitled to relief from the judgment on that ground. Although this may be true in *some* cases (see *People v. Martinez* (1984) 36 Cal.3d 816, 824-826 (*Martinez*)), it is generally preferable for a trial court to resolve the question of diligence in each case.

that, unlike defendant, Kiley had the name "KILEY" emblazoned as a large tattoo across his upper chest, which probably would have been noticed by the witnesses to the assault.

Accordingly, the trial court denied the motion for new trial, concluding the proposed new evidence did not show "a reasonable chance that a more favorable outcome would have resulted if the evidence had been presented at trial."

Defendant then pled guilty in a trailing case, and the trial court suspended execution of sentence in both cases, placing defendant on probation.

Defendant timely filed this appeal.

DISCUSSION

On appeal, defendant contends the trial court abused its discretion in denying a new trial. We disagree.

A trial court may grant a new trial, "When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (Pen. Code, § 1181, subd. 8.) "[T]he trial court considers the following factors: "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.""

(*People v. Delgado* (1993) 5 Cal.4th 312, 328.) We review for an abuse of discretion. (*Martinez, supra*, 36 Cal.3d at p. 821.)

"In considering the likelihood of a different result on a motion for new trial, both the trial and appellate courts are asked 'to determine whether the inability of the defendant to present the evidence in question prejudiced the outcome of the trial. In viewing such an issue, we justifiably accord considerable deference to the trial judge, "because of '[its] observation of the witnesses, [and] [its] superior opportunity to get "the feel of the case."'" (*People v. Cua* (2011) 191 Cal.App.4th 582, 608.)

On appeal, defendant reargues the facts in an effort to show that the People's case was weak. However, all of the circumstances of the identifications were explored at trial, including inconsistencies by the witnesses and Dr. Shomer's expert opinion about so-called "red flags." The jury found Rasmussen and Robeson, partly corroborated by Randall, were credible and accurate in their identifications. Their testimony was positive, direct, and strong.⁵

Contrary to defendant's characterization on appeal, the conclusory and subjective report of the investigator did not reveal evidence that undermined the People's case. Putting aside the problems with the report's foundation, at best it

⁵ Defendant asserts the identifications were weak because neither Rasmussen nor Robeson mentioned that defendant's face was swollen. But the jury did not have to believe the defense testimony that defendant had visible injuries, given the medical evidence that he merely had a nondisplaced fracture.

suggested that some people associated with the black Toyota may also have been present by the river at the time of the assault, but it did not show that defendant and Sund-Bowen were *not* present. Nor is it likely anyone would misidentify Kiley as defendant, because, as the trial court noted, the purported photograph of Kiley showed that *unlike defendant*, Kiley had the word "KILEY" in a banner tattoo across his upper chest. Both Rasmussen and Robeson testified the bat-wielder was shirtless, and they likely would have noticed this discrepancy.

Defendant likens this case to *Martinez, supra*, 36 Cal.3d 816 and *People v. Soojian* (2010) 190 Cal.App.4th 491 (*Soojian*).

In *Martinez*, the key evidence connecting Martinez to a commercial burglary was his palm print found on a piece of equipment moved during the burglary. An employee testified he had painted that equipment the day of the burglary, which, if believed, showed defendant must have touched it *during* the burglary. Defendant had innocently touched the equipment in the prior two weeks, in connection with his work. He also had a corroborated--albeit not airtight--alibi. (*Martinez, supra*, 36 Cal.3d at pp. 819-820.) The new evidence was testimony by a former foreman at the business, stating the equipment had been painted earlier, but that he had not come forward earlier in part because of fear of losing his job. (*Martinez, supra*, at pp. 820-821.) Thus, his testimony directly contradicted the People's case. In reversing the denial of a new trial, the court stated:

"Numerous cases hold that a motion for a new trial should be granted when the newly discovered evidence contradicts the strongest evidence introduced against the defendant. [Citation.] The proffered testimony of [the former foreman] that the drill press was not painted the afternoon before the burglary meets this criterion, and reopens the critical gap in the prosecution's chain of proof. If the jurors even found a reasonable possibility that [his] testimony was true, it is unlikely that they would find defendant's guilt proved beyond a reasonable doubt." (*Martinez, supra*, 36 Cal.3d at p. 823.)

Here, there was no *testimony* or even *declaration* by Randall to the effect that defendant was not the bat-wielder, and the totality of the investigator's report, disregarding foundational problems, did not directly exculpate defendant. (Cf. *People v. Hall* (1986) 41 Cal.3d 826, 835-836 [error in excluding third-party culpability evidence harmless because Hall's "theory of Foust's culpability would not tend to exculpate him in any event. Because no testimony or circumstantial evidence limited the number of perpetrators, Foust's participation would not undermine the significant evidence linking defendant to the murder"].) Thus, this case is not similar to the *Martinez* case.

In the other case relied on by defendant, *Soojian, supra*, 190 Cal.App.4th 491, a single assailant attacked the victims. During trial, some evidence was found suggesting that single assailant was Soojian's cousin, and after Soojian was convicted, significant additional evidence inculcating the cousin was found. (*Soojian, supra*, at pp. 495-510.) Because there was only one assailant, such evidence, if believed, would necessarily exculpate Soojian. In contrast, the new evidence in this case (indulging the view that the investigator's defective

declaration contained any admissible evidence), even if it inculpated Kiley, did not in any way *exculpate* defendant.⁶

Accordingly, the trial court acted well within its discretion in concluding there was no likelihood the new evidence would have changed the result at trial.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.

⁶ We decline the People's invitation, reiterated at oral argument, to reconsider another part of *Soojian* disputed by the parties--the characterization of the standard for granting or denying a new trial. *Soojian* is clearly distinguishable from this case on its facts, and the result would not change even were we to re-characterize the standard.