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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW SAUNDERS,

Defendant and Appellant.

D061160

(Super. Ct. No. SCN294183)

APPEAL from a judgment of the Superior Court of San Diego County, Robert J. Kearney, Judge. Affirmed.

Andrew Saunders appeals a judgment entered after a jury verdict convicting him of burglary of an inhabited residence (Pen. Code, §§ 459, 460)¹ with a true finding that someone was present during the burglary (§ 667.5, subd. (c)(21)).² On appeal, he argues

¹ All statutory references are to the Penal Code.

² Saunders was also convicted of one count of receiving stolen property (§ 496, subd. (a)). He challenges only the burglary conviction on appeal.

the jury instructions did not sufficiently instruct that the fingerprint analyst's expert testimony was opinion, in violation of his Fifth, Sixth, and Fourteenth Amendment rights. We conclude Saunders forfeited this claim on appeal because he did not raise the issue at trial. Nevertheless, we conclude the trial court sufficiently instructed the jury that the fingerprint analyst's testimony was opinion, and no further instruction was required. He also contends the expert fingerprint testimony was inadmissible.

FACTUAL AND PROCEDURAL BACKGROUND

In the early morning of July 7, 2011, Marie Forbes awakened because she heard noises in her home. She went back to sleep when she did not hear anything more. When she arose in the morning, she saw some of her jewelry boxes normally kept in her bedroom, some jewelry and two watches were missing. Forbes called the police. In her garage, she found her car door open and her credit cards, cell phone, keys and garage door opener missing from her purse, which she had left in the car. A can of engine degreaser normally placed on a shelf in the garage was on the passenger floorboard of the car.

The police arrived and field evidence technicians lifted one partial latent fingerprint from the can of degreaser. The San Diego County Sheriff's Crime Laboratory concluded the fingerprint matched Saunders and searched his home. Police found Forbes's two watches in Saunders's bedroom. He was charged with burglary of a residence while a person was present, and receiving stolen property.

At trial, the People called Suzanne Kidd, a field evidence technician with the Oceanside Police Department, who testified she lifted the fingerprint from the can because she was told the can was not in its usual location. Kidd also testified she did not find other fingerprints during her investigation. She said the fingerprint was dusted with powdered graphite, lifted with a piece of tape, placed on a card, and submitted in an envelope to the Sheriff's Crime Lab.

Reyna Shelton, a latent print examiner at the Sheriff's Crime Lab, testified about the fingerprint analysis. She described how another technician entered Saunders's fingerprint into a computer fingerprint database that showed more than eight possible matches. Shelton was then assigned to analyze Saunders's "known" print from the database against the print found at the crime scene. She said she concluded the fingerprints matched, and her findings were "peer review[ed]" and verified by another technician's analysis. She also testified she was 100 percent sure the fingerprint from the crime scene was that of Saunders.

Saunders's counsel challenged Shelton's findings by asking her whether she could tell how long the prints had been on the can, whether the print was of the entire finger, the percentage of a fingerprint required to be sufficient for identification purposes, how much detail is required for a fingerprint to be sufficient for identification purposes, and--because of the subjectivity and lack of a standard--whether the print's quality or extent was "sufficient." His counsel also implied the peer review process could be biased because the verifying technician is aware of the results and analysis done by the primary

technician. He then asked if Shelton knew about various cases and studies in which fingerprint evidence was found unreliable and incorrect. She said she was familiar with them, but reaffirmed her belief that the fingerprint she analyzed was that of Saunders.

The jury was instructed with CALCRIM No. 332, without objection, as follows:

"A witness was allowed to testify as an expert and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. [¶] In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses in general. [¶] In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. [¶] You must decide whether information on which the expert relied was true and accurate. [¶] You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence."

The jury convicted Saunders on all counts. The court sentenced him to the upper term of six years in prison for burglary and stayed execution of sentence of the upper term for receiving stolen property under section 654.

DISCUSSION

I

Standard of Review

We review claims of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) " ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]" ' " (*People v. Martin* (2000) 78

Cal.App.4th 1107, 1111-1112.) We view jury instructions in the context of the overall charges, not in artificial isolation. (*People v. Mayfield* (1997) 14 Cal.4th 668, 777.) "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

II

Saunders Forfeited the Claim

"The long-standing general rule is that the failure to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given." (*People v. Rundle* (2008) 43 Cal.4th 76, 151, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Saunders acknowledges he did not object to the jury instructions at trial, but argues a substantial right was affected because his identity is a critical element of the offense, and this court may consider the issue. (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 6; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) We will address that this routine instruction did not affect his substantial rights and was proper.

Saunders cannot contend on appeal that a legally correct instruction was too general or incomplete unless he "has requested appropriate amplifying, clarifying, or limiting language." (*People v. Farley* (1996) 45 Cal.App.4th 1697, 1711.) Because Saunders did not give the trial court an opportunity to address his appellate claims of jury instruction error, he forfeited this claim. (See *People v. Dunkle* (2005) 36 Cal.4th 861,

895-897, disapproved on other grounds by *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) We nevertheless address his claims.

III

The Court Did Not Err

Saunders asserts the court should have instructed the jury sua sponte (1) the fingerprint analyst's testimony was opinion, (2) to consider the fingerprint evidence independently, and (3) to view the fingerprint evidence with cautious disregard for its overall lack of certainty. He also contends the fingerprint expert testimony fails the *Daubert*³ expert testimony test because there are no universal standards governing fingerprint analysis and no available known or potential rate of error.

A. The Jury Instructions Were Proper

In criminal proceedings, the court must instruct the jury regarding expert witness testimony in accordance with section 1127b. Section 1127b provides the jury may consider expert opinion testimony but is not bound to accept expert opinion testimony as conclusive. It also provides the jury should give expert testimony the weight it deems appropriate, and may disregard opinions it finds unreasonable. (*Ibid.*) It finally mandates, "No further instruction on the subject of opinion evidence need be given." (*Ibid.*) Here, the jury instructions were proper.

First, the court adequately advised the jury that expert testimony was an opinion by instructing with the first part of CALCRIM No. 332, "Expert Witness Testimony."

³ *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579.

CALCRIM No. 332 thoroughly explains that expert testimony is opinion and the jury has the responsibility of deciding whether and how to use the opinion testimony in reaching a verdict. Saunders contends CALCRIM No. 332's language stating the jury "*must* consider the opinions," instead of the language in section 1127b that the jury "*may* consider the opinion[s]," is improper because it "contributes to an impression of judicial support for such opinion testimony." However, CALCRIM No. 332 continues, "You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence." CALCRIM No. 332 has the same effective meaning as the "may consider" language in section 1127b because, although it requires the jury to consider the opinion testimony, it also permits jurors to disregard it. Because CALCRIM No. 332 is a correct statement of the law, the court had no duty to sua sponte give any modified version or additional instructions absent a request by the parties. (See *People v. Hart* (1999) 20 Cal.4th 546, 622; § 1127b ["[n]o further instruction on the subject of opinion evidence need be given"].)

Second, the court had no duty to instruct the jury to consider the fingerprint testimony independently of other evidence. Saunders cites a concurring opinion footnote from a Utah case to support his contention. (*State v. Quintana* (Utah Ct.App. 2004) 103 P.3d 168, 171, fn. 3.) Although we agree with the concurrence in that case that fingerprint evidence is not infallible, we disagree that trial courts should be required to sua sponte instruct juries that fingerprint evidence is unreliable. (*Id.* at p. 170.) We find no precedent for imposing a duty on the trial court to instruct a jury to independently

consider fingerprint evidence apart from other evidence. The court properly instructed the jury it could examine the exhibits, which included both the latent fingerprint found on the can of degreaser and Saunders's "known" prints from the database.

Third, the court did not violate Saunders' Fifth and Fourteenth Amendment rights to due process and Sixth Amendment right to have the jury properly evaluate the evidence when it did not instruct the jury "to view [the fingerprint expert's testimony] with cautious disregard for its overall lack of certainty." Saunders argues that by not giving the instruction, the prosecution was not required to prove an element of the crime; here, the identity of the burglar. However, Saunders cites no case establishing a court's duty to characterize fingerprint expert testimony as uncertain. Any causal link between the jury instructions here and the jury's findings is too attenuated to be considered a constitutional violation. The jury was sufficiently advised that the testimony was opinion and not fact.

B. Admissibility of Fingerprint Evidence

Lastly, fingerprint evidence is not subject to the *Daubert* test in California. Saunders argues fingerprint evidence fails the five factor *Daubert* test because there is no known or potential rate of error or standard for application of fingerprint evidence. The California Supreme Court has held the *Kelly*,⁴ rather than *Daubert*, test applies in California. (*People v. Leahy* (1994) 8 Cal.4th 587, 593-594.) We are bound by the

⁴ *People v. Kelly* (1976) 17 Cal.3d 24.

decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Under *Kelly*, new scientific evidence or technology must be sufficiently established to have gained general acceptance in the relevant scientific field. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 843; *People v. Kelly, supra*, 17 Cal.3d at pp. 30, 32.) Fingerprint evidence is not novel or foreign. Nevertheless, in accordance with *Kelly*, fingerprint evidence has prolonged and widespread acceptance in the forensic field. (See *People v. Adamson* (1946) 27 Cal.2d 478, 495.) Moreover, the California Supreme Court continues to recognize the legitimacy of fingerprint evidence. (*People v. Farnam* (2002) 28 Cal.4th 107, 160 [noting "the prosecution relied on a long-established technique — fingerprint comparison performed by fingerprint experts"].)

C. Any Error Was Harmless

Even if the court had a duty to give additional instructions to the jury under section 1127b, courts have continually held section 1127b errors require reversal only when, after examination of the entire record, a different result might have occurred. (*People v. Haynes* (1984) 160 Cal.App.3d 1122, 1137.) Reviewing the record as a whole, Saunders's counsel cross-examined and thoroughly challenged the expert's opinion, and the court properly advised the jury that the expert's testimony was opinion. The jury as the sole trier of fact chose to convict Saunders based on the fingerprint and the corroborating evidence of the victim's watches found in his bedroom. Under these

circumstances, there was no risk the jury gave undue weight to the expert's testimony and would have reached a different result with additional instructions.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.

McDonald, J., Concurring.

I add the following comments because it should be acknowledged that fingerprint evidence is not perfect. Latent partial fingerprints alone should not be the sole basis of a conviction. Although there are only a few reported instances, false convictions based on erroneous fingerprint identifications are unacceptable. (See Cole, Comment, *The Prevalence and Potential Causes of Wrongful Conviction by Fingerprint Evidence* (2006) 37 Golden Gate U.L.Rev. 39.) Additionally, the peer review process has the potential to be unconsciously biased, and the fingerprint evidence should be "independently verified" by a second examiner. (See generally Reese, *Techniques for Mitigating Cognitive Biases in Fingerprint Identification* (2012) 59 UCLA L.Rev. 1252.) "[T]he verifying examiner should not know what conclusion the first examiner reached." (Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* (2001) p. 269.)

However, when--as here--there is a fingerprint and corroborating evidence of the crime, juries may take the fingerprint evidence as proof of identity. "It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight." (*People v. Rice* (1938) 29 Cal.App.2d 614, 619; accord, *People v. Miller* (2000) 81 Cal.App.4th 1427, 1442.)

McDONALD, J.