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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMIAH MUHAMMAD,

Defendant and Appellant.

F062576

(Super. Ct. No. F10903279)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Mark Wood Snauffer, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Melissa Lipon, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Kane, Acting P.J., Detjen, J. and Franson, J.

Defendant and appellant, Jeremiah Muhammad, claims the trial court abused its discretion when it denied his motion for new trial based on newly discovered evidence. (Pen. Code, § 1181, subd. (8).) He also argues he is entitled to one more day of conduct credit. (Pen. Code, § 2933.1.) We find no abuse of discretion and affirm the trial court's order denying defendant's motion for new trial. We grant, however, defendant's request for one additional day of conduct credit.

### **FACTS AND PROCEDURAL HISTORY**

Mary Thompson testified that at approximately 11:40 p.m. on June 25, 2010, she was asleep on the sofa at her house. Mary recently had had surgery to remove one of her intestines and had taken a pain pill earlier in the evening.<sup>1</sup> Her husband had gone to the store. Because Mary had trouble getting up and down, her husband told her that he would not lock the front door. Mary testified her security door and wooden door were both closed and it was dark inside the house. Mary heard a knock on the door, which she did not respond to. She heard the security door open and then the wooden door being kicked open. Defendant entered the house and closed the door behind him. Mary asked him, "Why you kick my door open and come in? I didn't tell you to come in my house." Defendant told Mary she did not tell him what to do. Defendant told her to get off the sofa. When she did not, defendant moved toward her, grabbed her clothing in the area of her collar, pulled her up, and took her in the direction of the dining room. Mary was in pain and was scared. In the dining room, defendant told her, "I'm hungry. You fix me something to eat." She told him she did not have hot water. Defendant responded, "Well, I'm hungry. I don't know how you going to fix it.... [I]f you're moving ... I'll stab your bitch ass." Mary noticed a towel in defendant's left hand. She noticed the towel was covering a knife and testified that she felt her life was going to end. Defendant

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<sup>1</sup> For clarity, we will refer to Mary Thompson, and her son, Terrell Thompson, by their first names. We intend no disrespect by this informality. (*Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, 263, fn. 1.)

hit Mary. Defendant said he had some noodles in his pocket. She told him they could go across the street to her neighbor who could “fix it.” Mary testified that she made this statement because it was a way she could escape.

Mary recognized defendant. She testified that she knew him because his mother used to live on her block. He was not a child when she knew him, he was over 18. She testified that she did not know him “that well”; she never invited him over to her house, she never cooked food for him, and she had not “[sat] and talk[ed] or [had] coffee with him.” She did not invite him over on June 25, 2010, and did not give him permission to come into her home.

Once outside, defendant stood close behind Mary with the knife by his side. He again told her, “If you try anything ... I’m going to stab your bitch ass.” Mary testified that he told her this twice while they were inside the house and once outside. Mary saw Alex Ceballos, who lived across the street, and told defendant, “[M]y neighbor right here will fix the noodles for you.” Mary and defendant walked to Ceballos’s yard. Ceballos stood up on the porch and Mary told him that defendant had a knife in his hand. Ceballos told her to come up on his porch, which she did. Ceballos picked up a brick from the ground, exchanged words with defendant and defendant ran away. Mary then heard glass breaking. The sound came from the area of her back window.

Ceballos testified that he had known Mary for about 20 years and that she lived in the house across the street. He testified that, on June 25, around 11:45 p.m., he was sitting on his front porch. He heard glass breaking and some yelling coming from the back of Mary’s house across the street. Ceballos saw a man. The man said he was going to “stick that bitch.” Ceballos called the police. He reported that he saw a large, African-American male, who seemed drunk, breaking windows at his neighbor’s house. He did not go over to the yard because the man was large and appeared “yoked up.”

Ceballos testified he saw the man go in Mary’s front door. About five minutes later, he saw Mary cross the street to his house with an African-American man that he

described as “a big guy.” The man was walking behind Mary and she appeared to be scared. The man said he was going to “stick her.” Ceballos saw something shiny in defendant’s hands, but was uncertain if it was a pair of scissors or a knife. Ceballos picked up a brick. The man left, going toward the empty lot located by Mary’s house, and then went toward the Sahara Motel.

The police arrived and Mary and Ceballos told Officer Escareno and Officer Marquez what happened. Escareno provided updates to assisting patrol units that a male, who was possibly armed, had gone to the Sahara Motel. After receiving an update from another officer, Escareno and Marquez told Ceballos and Mary they would be back and took off running to the Sahara Motel. At the Sahara Motel, they saw defendant handcuffed and face down on the floor. Approximately a foot away from defendant’s left shoulder, was a towel with a knife under it. When Escareno arrested defendant, he detected a strong odor of alcohol on him. Escareno then obtained statements from Mary and Ceballos, who were at their individual residences. Once back at her house, Mary noticed a glass window was broken, but did not provide the police with this information.

On July 26, 2010, the district attorney charged defendant in count 1, assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)); in count 2, kidnapping (Pen. Code, § 207, subd. (a)); in count 3, making a criminal threat (Pen. Code, § 422); in count 4, false imprisonment by violence (Pen. Code, § 236); and in count 5, first degree residential burglary while a person who was not an accomplice was present (Pen. Code, §§ 459, 460, subd. (a), 667.5, subd. (c)(21)). The information further alleged that as to counts 2 through 5, defendant personally used a deadly and dangerous weapon, a knife. (Pen. Code, § 12022, subd. (b)(1).) On August 5, 2010, defendant pled not guilty to all counts. On December 20, 2010, a jury found defendant guilty as charged in counts 1, 3, 4, and 5 and not guilty as charged in count 2. The jury found true that defendant was personally armed with a deadly and dangerous weapon as to the commission of the crimes as charged in counts 3, 4 and 5.

On April 22, 2011, defendant filed a motion for new trial based on newly discovered evidence. (Pen. Code, § 1181, subd. (8).) The evidence was of a declaration from Terrell Thompson, Mary's son, which stated, among other things, that defendant used to stay at the Thompson residence when he was younger and that, on June 25, 2010, the day the crimes were committed, defendant spent the morning and afternoon "hanging out" on the Thompsons' front porch. Terrell declared that defendant wanted to drink alcohol and had gone to the store to buy some, that no one wanted to stay at the house and drink with defendant, and that he (Terrell) left the house around sunset.

On May 20, 2011, defendant's motion for new trial was denied. The trial court found that a different result was not probable on retrial because Terrell did not witness the events that took place that evening and his testimony merely impeached Mary's testimony on the "narrow issue" as to whether defendant was an invited guest. Defendant was then sentenced to five years in prison. He received 378 days of custody credit; 330 for days actually served and 48 days of statutory credit pursuant to Penal Code section 2933.1.

## **DISCUSSION**

A motion for new trial may be granted pursuant to Penal Code section 1181, subdivision (8), "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (*Ibid.*) "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." [Citations.] "[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background." [Citation.] [¶] "In ruling on a motion for new trial based on newly discovered evidence, the 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.’” [Citations.]” (*People v. Howard* (2010) 51 Cal.4th 15, 42-43.)

“[W]hen a defendant makes a motion for a new trial based on newly discovered evidence, he has met his burden of establishing that a different result is probable on retrial of the case if he has established that it is probable that at least one juror would have voted to find him not guilty had the new evidence been presented.” (*People v. Soojian* (2010) 190 Cal.App.4th 491, 521.) “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.” (*People v. Martinez* (1984) 36 Cal.3d 816, 823.)

Defendant contends that the trial court abused its discretion in denying his motion for new trial on the grounds that a different result would not be probable on retrial. Defendant states that Terrell’s declaration contradicts the strongest evidence introduced against him, Mary’s testimony, particularly as to the burglary charge.

Mary testified that she knew defendant when his mother lived on her block. When she knew defendant, he was not a child but was over 18 years of age. She did not know defendant well. She had never invited him over to the house and she did not invite him over on June 25, or give him permission to come into her house. Terrell’s declaration states that defendant used to stay at the Thompson residence when he was younger and, on June 25, had spent the morning and afternoon on the Thompson porch. Defendant argues that from this evidence one or more jurors could have had a reasonable doubt as to whether defendant entered the home with the intent to commit a felony. (Pen. Code, § 459.)

First, the degree to which Terrell’s declaration contradicts Mary’s testimony is minimal at best. Second, the jury had other evidence to conclude that defendant entered the Thompson residence with the intent to assault Mary: Ceballos heard glass breaking and some yelling from the back of Mary’s house. He saw defendant and heard him say,

before he entered the house, that he was going to “stick that bitch.” Third, Terrell’s declaration states that he (Terrell) left the house around sunset that day. These events did not take place until about 11:45 p.m. Therefore, even if Terrell were to testify that defendant stayed at the Thompson residence when he was younger and was present earlier in the day on the front porch, Terrell was not present when the events took place and his declaration did not impeach his mother’s or Ceballos’s testimony as to defendant’s actions.

Defendant argues that the information in Terrell’s declaration could establish how much he had to drink, which is relevant to whether defendant formed the specific intent necessary for burglary and for making a criminal threat. (Pen. Code, § 22.)

At trial, Escareno testified that he smelled a strong odor of alcohol on defendant and Ceballos told the 911 operator that defendant seemed to be drunk. The jury was instructed they could consider defendant’s voluntary intoxication in determining whether he intended the statement he made to be understood as a criminal threat and in determining whether he entered the house with the intent to commit a felony assault or theft. Terrell’s declaration does not add anything to the issue of defendant’s intoxication that was not already presented at trial: “That afternoon, [defendant] wanted to drink alcohol and chill with me and my brother. [Defendant] even went to the store and bought some alcohol. [Defendant] was excited to hang out, but no one wanted to stay and drink with him.” Contrary to what defendant argues, the declaration is “cumulative merely” on the issue of defendant’s intoxication, which was established by Escareno’s testimony and by the information Ceballos provided to the 911 operator, and which was considered by the jury. (*People v. Howard, supra*, 51 Cal.4th at p. 43.)

Defendant argues that Terrell’s declaration impeaches Mary’s testimony concerning her knowledge of defendant and whether she had invited him to her home earlier that day. Again, the actual discrepancy between the information in the declaration and Mary’s testimony is less than persuasive. Additionally, “[a] new trial on the ground of newly discovered evidence is not granted where the only value of the newly discovered testimony is as impeaching evidence’ or to contradict a witness of the

opposing party.” (*People v. Hall* (2010) 187 Cal.App.4th 282, 299, quoting *Hanton v. Pacific Electric Ry. Co.* (1918) 178 Cal. 616, 623.) Defendant cites *People v. Martinez*, *supra*, 36 Cal.3d 816, arguing that “impeachment of the main prosecution witness has been considered sufficient to warrant a new trial.” In *Martinez*, the defendant was convicted of second degree burglary. The only evidence the prosecution had connecting the defendant to the theft of a drill press was the maintenance man’s testimony that the drill press was painted just hours before the burglary and the defendant’s palm print was found on it afterwards. (*Id.* at pp. 819-820, 822.) Prior to the burglary, the defendant had been a frequent visitor to the location of the drill press and had several opportunities to handle it. The newly discovered evidence consisted of the foreman’s statement that the drill press had actually been painted sometime within the two weeks preceding the burglary. (*Id.* at p. 820.) In reversing the denial of a motion for new trial, the Supreme Court stated, “A plausible, innocent explanation for defendant’s palm print on the drill press would expose a serious gap in the prosecution’s proof.” (*Id.* at p. 822.)

In this case, even if Terrell’s declaration impeached Mary’s testimony about the degree to which she knew defendant and about whether he had been at her house earlier that day, such impeachment does not create a “serious gap in the prosecution’s proof” as to whether defendant entered Mary’s home and threatened to stab her: Mary’s testimony in this regard was fully corroborated by Ceballos, and the new evidence does not purport to impeach Ceballos in any way.

Defendant also cites *People v. Williams* (1962) 57 Cal.2d 263 and states it is similar to the present case because “one witness provided the sole evidence of defendant’s guilt.” In *Williams*, the newly discovered evidence refuted the main witness’s “story in its entirety.” (*Id.* at p. 271.) However, Terrell’s declaration does not refute Mary’s “story in its entirety,” but on the “narrow issue” of whether defendant was an invited guest, as the trial judge found. Further, Mary’s testimony was not the “sole evidence of defendant’s guilt,” as her testimony was corroborated by Ceballos.

On these facts, we cannot say the court abused its broad discretion when it denied defendant’s motion for new trial.

Defendant also contends that he is entitled to one more day of conduct credit and the People agree. Defendant received 378 days of custody credit; 330 for days actually served and 48 days of statutory credit pursuant to Penal Code section 2933.1. Under Penal Code section 2933.1, any person convicted of a violent felony is not permitted to accrue more than 15 percent of worktime credit. Defendant was convicted of a violent felony, first degree burglary. (§§ 459, 460, subd. (a), 667.5, subd. (c)(21).) Defendant states that because 15 percent of 330 is 49.5, he should have been entitled to 49 days of conduct credit, not 48. We agree and grant defendant one more day of conduct credit.

### **DISPOSITION**

The trial court is ordered to correct the abstract of judgment to reflect an additional day of custody credit. The court is further ordered to forward the amended abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.