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

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMIE JAMIL MAHMOOD,

Defendant and Appellant.

F066162

(Super. Ct. No. MCR037373B)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Joseph A. Soldani, Judge.

John L. Staley, 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 Max Feinstat, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Following his conviction for theft, defendant Samie Jamil Mahmood challenges a number of the trial court's rulings concerning evidence he wished to present, contending those rulings violated his constitutional right to due process. More specifically, defendant maintains he wished to introduce certain videotape evidence that purported to show his niece—the prosecution's key witness—engaging in similar theft-resulting transactions with other individuals. He argues that evidence supported the defense theory of the case: that defendant's niece was behind the thefts and he was merely an unwitting participant, having been told by his niece that the items he removed from the store had already been paid for. Second, defendant wished to introduce conflicting testimony of his other niece regarding another item of merchandise returned to Lowe's for store credit and an issue related to an arranged marriage; he contends this testimony would have significantly affected the key witness's credibility. Lastly, defendant asserts the trial court erred by refusing to allow him to testify that his house did not require horse fencing (one of the items stolen) because the fact he did not need the horse fencing demonstrated his lack of a motive to steal.

Following a review of the record, we discern no error. The trial court's rulings regarding the relevancy and, hence, admissibility of the proffered testimony or evidence did not amount to an abuse of the court's discretion. We further hold defendant's constitutional rights to due process and an opportunity to cross-examine witnesses were not violated by those same rulings. Therefore, we will affirm.

FACTUAL BACKGROUND

The Prosecution's Case

In September 2009, 19-year-old Sabah Ali was hired to work as a cashier by home improvement store Lowe's. When defendant—her uncle—learned she would be working at Lowe's, he indicated she could enjoy the benefits of his family's approval by helping him obtain merchandise without paying for it. Sabah wished for that approval because following her marriage to Gilbert Pimentel, defendant and others frowned upon the

relationship as Sabah had married outside of her race and Muslim religion.¹ Sabah felt she and her children were excluded and treated differently as a result. When defendant indicated she and her children would be treated like family again, Sabah felt pressured to help defendant steal.

During the 10 or so days of her employment, Sabah helped defendant, or other members of his family, steal Lowe's merchandise. Defendant would approach the cash register where she worked as a cashier. He would place a few of the items from the cart on the counter to be scanned. Only those items scanned were paid for; the remaining items on the cart were never paid for.

Lowe's began an investigation after certain "low dollar sales" were reviewed. Low dollar sales can signal theft perpetrated by employees. Several transactions involving employee Sabah were investigated as a result. Store surveillance videotape was compared to the store's "journal tape" or store receipts for the transactions involving defendant.

At least three transactions involved defendant. Videotape from October 3, 2009, showed Sabah scanning or ringing up a few items from defendant's cart. Other items on the flat cart included windows and "some type of water softener." The corresponding receipt established the sale was processed and a merchandise or "merch" card was used as payment. Nevertheless, neither the windows nor the water softener was paid for. The estimated value of the unpaid water softener was between \$300 and \$400.

Next, video footage from a transaction of October 9, 2009, showed Sabah scanning or ringing up rags, an extension cord, and a third product. Two windows and louvered closet doors remained on defendant's cart. Another view of the same transaction showed a second cart carrying a DeWalt multipiece combination tool kit, a

¹In the Muslim religion, according to Sabah's testimony, it is common for the father or father figure to arrange a marriage for a female family member to another Muslim. It is not considered as egregious for a Muslim man to marry outside his race or religion; the same does not apply to women raised in the Muslim faith.

range or stove appliance in a cardboard box, and two rolls of horse fencing.² Sabah only scanned a few items from the first cart; she did not scan the box, the tool kit, the appliance, or the fencing. The corresponding receipt showed only red shop towels were purchased. None of the other products on the two carts appeared on the corresponding receipt. The estimated values of the unpaid-for items is as follows: horse fencing—\$150 to \$178 per roll; DeWalt tool kit—\$300 to \$600; appliance—\$300 to \$3,000; windows—\$40 to \$120; louvered doors—\$36 to \$92.

On a third occasion, for which there is no videotape footage or corresponding journal tape, Sabah and defendant engage in similar conduct.³

Sabah was arrested by loss prevention personnel at Lowe's. She testified she told the truth when speaking with them and giving her statement. Sabah also spoke to an officer with the Madera Police Department and was transported to the Madera County jail. During the course of the police investigation, Sabah participated in a pretext phone call to defendant. The conversation between defendant and Sabah was played for the jury.⁴

Sabah denied receiving any money or financial benefit from the thefts she helped facilitate. She does not know what happened to the items defendant took from Lowe's, but she heard the items were at his mother's home. She was never found to be in possession of any of the items taken from Lowe's.

In April 2011, Sabah pled guilty to felony theft. She was placed on probation and ordered to pay fines and restitution.

²According to the store's electronic records, no horse fencing was scanned or sold in the Madera store on that date.

³Particulars were developed about this transaction during the defense case, and more specifically, during cross-examination of the Lowe's loss prevention manager who witnessed the transaction live. Sabah was approached by defendant. Defendant's cart held several large pieces of product, two water softeners, and a red box containing a Troy-Built lawnmower.

⁴Later, during rebuttal, audio of the entire call was played, including the portion previously redacted: a conversation between Sabah and defendant's wife.

The Defense Case

Defendant testified that on October 3, 2009, his niece Sabah Ali called and asked him to go by Lowe's to pick up and then drop off some items for her. He agreed to do so and Sabah provided him with a gift card. Later, at Lowe's, defendant added several other items Sabah had asked for and he went through the checkout line. He purchased some red shop towels for himself. He did not load the cart with the items from Lowe's; the cart was already loaded and he believed those items had already been paid for. Defendant did not look at the receipt following the transaction. He loaded the items in his vehicle and drove them to Sabah's house as requested. Sabah's husband met him at the gate and took the items.⁵ Defendant returned the gift card to Sabah's husband.

On October 9, 2009, Sabah called defendant several times and then came by his workplace and asked for help picking up and dropping off additional items from Lowe's. Later, defendant's son drove him to Lowe's. Once again, he did not load the cart with items and neither did his son. The cart was already loaded and Sabah told defendant the majority of the items had already been paid for. As before, she had given defendant a gift card to use to pay for any additional items he might add. After checking out, the items were loaded up and driven to Sabah's home. Defendant again returned the gift card to Sabah's husband.

Defendant denied involvement in a third transaction with Sabah. He testified he was only involved in the transactions of October 3 and 9 as shown in the videotape. When Sabah called him on October 10 about picking up additional items, he refused because he was suspicious.

All of the items taken from Lowe's were delivered to the residence Sabah shared with her husband. Further, defendant knew the home was being remodeled and some of

⁵Defendant testified Sabah's statement to investigators that she was on her own was not accurate, nor was her claim her husband had been deported. Sabah testified otherwise.

the stolen items appear to have been installed in Sabah's home, including the windows⁶ seen in the video footage.

Defendant testified Sabah's statements that his wife, his son, and his sister-in-law were also involved in fraudulent transactions at Lowe's were false.

While defendant did not initially approve of Sabah's relationship with Gilbert Pimentel, it was not because Pimentel is Hispanic. Rather, defendant disapproved because Pimentel was 20 years older than Sabah. Defendant denied disowning Sabah as a result of her marriage and had had no plans to arrange a marriage for her.

Rebuttal

Sabah was not surprised to learn defendant had testified the thefts were her idea. She indicated defendant was in denial and lying. Sabah denied calling defendant and asking him to pick items up from Lowe's, and also denied giving him any gift card or merchandise card. Sabah never loaded items on a cart so that defendant could pick them up, nor did she ever tell defendant the items on the carts were already paid for. Further, defendant never delivered any of the stolen items to Sabah's home, nor has she ever had possession of those items.

DISCUSSION

Legal Standards

An accused has a constitutional right to confront and cross-examine adverse witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Davis v. Alaska* (1974) 415 U.S. 308, 315; *People v. Cromer* (2001) 24 Cal.4th 889, 896–897; *People v. Ardoin* (2011) 196 Cal.App.4th 102, 118.) Denial of this right deprives the accused of an opportunity to test the credibility of the prosecution's witnesses, calling into question the integrity of the jury's verdict. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295;

⁶Sabah testified her mother purchased the windows pictured in the defense exhibit, and her mother had the receipts for those windows. During an Evidence Code section 402 hearing, Sabah's mother Ribihia Berjes testified the windows in defense exhibit I were purchased, not stolen, and she had the receipts for them with her.

People v. Cromer, supra, at p. 897.) Exposing a witness’s credibility, including that witness’s motive for testifying, is a proper function of the constitutional right of cross-examination. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678–679; *People v. Ardoin, supra*, at p. 118.)

That said, the right of confrontation is not absolute. In the exercise of this right, the accused and the state must each comply with rules of procedure and evidence intended to assure that the jury’s ultimate determination is fair and reliable. (*People v. Ardoin, supra*, 196 Cal.App.4th at p. 118.) A proper application of rules of evidence does not impermissibly infringe on a defendant’s due process rights. (*Id.* at pp. 119, 122.)

Additional Videotape Evidence

Prior to trial, the court considered defense counsel’s desire to play all video clips contained on the DVD or CD created as a part of Lowe’s investigation into the thefts involving its employee. The court asked defense counsel what the relevance of the remaining video clips was given the fact that only two or three of those clips pertained to transactions involving Sabah and defendant. Defense counsel stated the clips were relevant because they were part of an “ongoing theft involving Sabah Ali. And they go towards the interest, motive, and bias for Sabah Ali’s testimony fingering” defendant. Asked to explain how they were relevant to show Sabah’s bias and motive, counsel argued the clips involved “her family,” and that her motive and bias involved deflecting attention away from her family and toward defendant instead. The trial court held that “admitting videos of [Sabah] providing property to other folks other than the defendant” was not relevant, but that it “may come in as a matter of impeachment.” Defense counsel complained later in the same proceeding about the limitation of transactions involving only defendant; the court allowed him another opportunity to explain the relevance of the other transactions involving other individuals. The court did not change its previous ruling and specifically stated the issue would be revisited if, after Sabah’s testimony, the information was necessary for impeachment purposes.

Once Sabah had testified and the People rested their case, defense counsel again sought to introduce all 17 video clips:

“THE COURT: ... So you want to introduce all of the videos that are on the—that were on the DV[D]. I think there was like 17 or something. Is that what you want to do?”

“[DEFENSE COUNSEL]: I think there were nine of them, actually, I think there’s 17 clips but nine transactions. Um, well, yeah, I’d like to but I wasn’t going to ask to at this time. I was going to try to make them relevant...”

A short time later, the trial court stated it was “not allowing any other videos” to come into evidence and asked whether it was being asked to reconsider that ruling. Defense counsel responded he was not asking for reconsideration at that time.

Later, defense counsel moved to “renew” his motion to admit certain additional video clips into evidence. The single video clip discussed purported to show Sabah and her husband Pimentel involved in a suspect transaction on October 9, 2009, about 7:45 in the evening. Counsel argued the clip was relevant to impeach Sabah’s testimony regarding her husband’s deportation, and it corroborated defendant’s testimony to the contrary. Further, counsel asserted the clip impeached Sabah’s testimony that her own family was not involved in the thefts. Ultimately, that video clip was played for the jury.

Defendant argues the trial court erred by denying his attempt to admit evidence of thefts by other individuals in which Sabah participated. Defendant’s argument lacks merit. First, the jury learned there were other persons depicted on the video clips rather than just Sabah and defendant. More particularly, Officer Shawn Bushey testified other persons appeared in video clips, although he was not able to identify them. Additionally, defense exhibit L—a video clip depicting a transaction between Sabah and an individual other than defendant—was shown to the jury on at least two occasions: once during the testimony of Ralph Dominguez, a Lowe’s loss prevention manager at the time of the incident, and again during Sabah’s testimony in the defense case. On the latter occasion, Sabah denied the individual depicted on the video clip was her husband, as alleged by

defendant. She identified the individual as her brother-in-law Leonel. Also, defense counsel only argued for this specific clip's admission, and he was successful.

Moreover, from Dominguez's testimony, the jury could have readily inferred there was evidence of individuals other than defendant or his family who were involved in the thefts. While Sabah testified she only assisted defendant or his family members in the thefts from Lowe's, defense exhibit L depicts Sabah and a man eventually identified as her brother-in-law Leonel. Dominguez testified that in the transaction Sabah is seen scanning one or two pieces of sheetrock or gypsum. Although Dominguez refused to estimate the number or pieces of sheetrock depicted in the video clip, other testimony offered regarding the stolen sheetrock placed the number between 30 or 40 pieces. For example, Sabah testified to a transaction involving about 30 pieces of sheetrock that did not involve defendant. Suffice to say, even though Sabah testified she gave her own family members a discount, any transaction that involved payment for one or two pieces of sheetrock wherein 30 or 40 pieces were actually obtained far exceeds a discount.

Defendant was provided an opportunity for effective cross-examination. He is not entitled to "cross-examination that is effective in whatever way, and to whatever extent," he wishes. (*People v. King* (2010) 183 Cal.App.4th 1281, 1314.) We find no reason to overturn the trial court's decision to exclude the remainder of the video clips. Its discretion is broad in that regard. (*People v. Clark* (2011) 52 Cal.4th 856, 932.) In any event, the jury was made aware that other video footage depicted transactions involving Sabah and persons other than defendant. One of those clips was played for the jury. In sum, the jury received and considered evidence relevant to defendant's theory of the case and affecting Sabah's credibility. The jury simply chose to believe the prosecution's theory, as is its prerogative.

Dawla's Expected Testimony

Sabah also testified as a defense witness. Specifically, she testified that her sister Dawla Ali helped defendant's wife by returning a Roman tub to Lowe's. The return resulted in store credit, which defendant's wife subsequently used. On cross-

examination, Sabah testified Dawla did not know the Roman tub was stolen or possibly stolen. Rather, Dawla believed she was simply doing her aunt a favor. Sabah herself did not know whether the tub was stolen. On redirect, Sabah testified she was not aware of any arrangements for Dawla's marriage.

At the conclusion of Sabah's testimony, defense counsel sought to call Dawla as his next witness. A discussion was held off the record. Once proceedings resumed on the record, counsel called another witness to the stand. Later, the trial court explained what occurred earlier:

“THE COURT: All right. Some things that counsel would like to put on the record at this time? I believe I did indicate a side-bar conversation that [Dawla]'s testimony was not relevant or it was cumulative in this matter.

“[Defense counsel], I believe you indicated her testimony, your offer of proof at side-bar was that she was going to testify that she didn't return the tub. And that she did not—she was not involved in an arranged marriage.

“[DEFENSE COUNSEL]: Yes. Or that she did not give a gift card to [defendant's wife]. I don't know if that came out in the side-bar but that was.

“THE COURT: No, that didn't. Additionally, you were going to ask her something about the house but you hadn't asked her yet; didn't know what the answer was going to be. So the Court ruled that testimony was irrelevant. What else would you like to put on the record?

“[DEFENSE COUNSEL]: With regards to [Dawla], that was about it.”

Relying upon Evidence Code section 780,⁷ defendant complains the proffered evidence was admissible to impeach Sabah's credibility because Dawla's testimony was

⁷Evidence Code section 780 states, in relevant part, as follows:

“Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] ... [¶]

“(b) The character of his testimony. [¶] ... [¶]

contradictory regarding the returned tub. He claims it was also admissible to impeach Sabah's testimony that she was ostracized for refusing to consent to an arranged marriage, because Dawla had also not consented to an arranged marriage. Defendant claims the trial court's exclusion of this evidence was prejudicial because "Dawla's testimony would have squarely contradicted Sabah's testimony and further demonstrated the latter's lack of credibility."

As noted in *People v. Thornton* (2007) 41 Cal.4th 391, 428:

"Evidence Code section 780 ... does not 'say that all evidence of a collateral nature offered to attack the credibility of a witness would be admissible. Under Section 352 [of the Evidence Code], the court has substantial discretion to exclude collateral evidence. The effect of [Evidence Code] Section 780, therefore, is to change the present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge.' [Citations.] We review the court's ruling under the deferential standard of abuse of discretion."

As plaintiff points out, Sabah testified she did not know whether the tub returned by Dawla was stolen. Therefore, had Dawla testified that she did not return any tub to Lowe's for defendant's wife, it would have had little probative value for purposes of impeachment. Notably too, Sabah had already testified that when she met with a law enforcement officer on October 14, 2009, she was shown a video clip that depicted her sister Dawla returning an item at Lowe's. This evidence was plainly collateral, and the trial court did not abuse its discretion in excluding it as not relevant and cumulative. (*People v. Thornton, supra*, 41 Cal.4th at p. 428; *People v. Price* (1991) 1 Cal.4th 324, 412.)

Similarly, Sabah testified she was not aware of any attempts to arrange a marriage for Dawla. Thus, whether Dawla's marriage was arranged would not affect Sabah's credibility. It is irrelevant and the trial court's ruling in that regard is not an abuse of discretion. Moreover, the jury did hear evidence that Sabah's other sister, Fatima, had

“(i) The existence or nonexistence of any fact testified to by him....”

married a Hispanic man and that her marriage was not arranged. Hence, Sabah's testimony regarding the issue of arranged marriage was contradicted by the testimony concerning Fatima's—rather than Dawla's—marriage.

The trial court has broad discretion to exclude evidence offered for impeachment that is collateral and has no relevance to the action. The confrontation clause and other constitutional guarantees do not limit the trial court's discretion unless the excluded evidence would have produced a significantly different impression of the witness's credibility. (*People v. Contreras* (2013) 58 Cal.4th 123, 152.) As we have explained, the excluded evidence was not relevant, or was collateral, and certainly would not have produced a “significantly different impression” of Sabah's testimony.

Testimony Concerning Horse Fencing

Defendant testified at trial. On redirect examination, defendant testified he lived in northwest Fresno, within the city limits. The following questions were also asked of defendant:

“[DEFENSE COUNSEL:] Q Okay. Um, do you live in an area of town where the residences, the houses such as yours have horses?”

“[DEFENDANT:] A No.

“[PROSECUTOR:] Objection. Relevance.

“THE COURT: Sustained.

“[PROSECUTOR:] Motion to strike.

“THE COURT: Granted.

“BY [DEFENSE COUNSEL]:

“Q Do you live in an area a part of town where you have a need for horse fencing?”

“A No.

“[PROSECUTOR:] Objection. Relevance.

“THE COURT: Sustained.

“[PROSECUTOR]: Motion to strike.

“THE COURT: Granted.

“BY [DEFENSE COUNSEL]:

“Q Okay. This residence, is it just a common city residence?

“A Yeah, it’s a Trend Home.”

Defendant contends the trial court erred in sustaining the People’s objection to the evidence because the “fact that horse fencing was not needed where [he] lived demonstrated that he did not have a motive to steal that particular item.” As pointed out by plaintiff, however, the People did not “attempt to demonstrate that [defendant]’s motive to steal was to obtain items for use on his property.”

CALCRIM No. 370 does provide that “[n]ot having a motive may be a factor tending to show the defendant is not guilty.” But it is only one factor. Here, defendant does not explain how being able to present evidence that he had no motive to steal horse fencing would corroborate his theory that “he was an unwitting victim of Sabah’s criminal scheme.” That alleged scheme clearly involved more than just the theft of horse fencing. Horse fencing was just one of many items taken from the Lowe’s store.

The horse fencing was taken on October 9. On that same date, and in that same transaction, windows, louvered closet doors, a DeWalt tool kit, and a large appliance were removed from the store by defendant. Those items could all be used at defendant’s residence, regardless of whether the community in which his residence was located allowed for horses. Thus, the trial court did not abuse its wide discretion in excluding the proffered evidence. Put another way, whether defendant lived in a community that allowed for the use of horse fencing did not have any tendency in reason to prove or disprove whether defendant was an unwitting participant in his niece’s plan. Hence, it was simply not relevant and the trial court did not err by excluding this evidence when it sustained the People’s objections on the basis of relevance. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.)

Conclusion

As discussed above, we do not “discern any fundamental unfairness or denial of due process” in the operation here of the various rules of evidence applied by the trial court. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 58.) Accordingly, defendant has failed to demonstrate cause for reversal, based on either state or federal constitutional principles.

DISPOSITION

The judgment is affirmed.

PEÑA, J.

WE CONCUR:

FRANSON, Acting P.J.

CHITTICK, J.*

*Judge of the Fresno Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.