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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SHAWN CHRISTOPHER THOMAS, Defendant and Appellant.	G046074 (Super. Ct. No. 11WF1102) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Shawn Christopher Thomas was convicted of one count of robbery following an automobile burglary in Huntington Beach. At trial, he relied on the defense that another man detained in the neighborhood that night was the burglar, not him. The court permitted rebuttal testimony from a neighbor who stated he had seen two men committing another auto burglary some 90 minutes earlier. Defendant argues this testimony was irrelevant and any probative value was outweighed by the possibility of prejudice. We disagree and conclude the trial court did not abuse its discretion.

I

FACTS

In February 2011, Mark and Molly Kiefer were living in Huntington Beach. They owned a Jeep Grand Cherokee, which was used mostly by Molly.[1] At about 4:30 a.m. on February 25, Mark was leaving to go to work, and he heard one of the Jeep's doors close. He saw a man getting out of the car, whom he later described as Caucasian, in his early 30's, and about five feet 10 inches tall. He wore a black hooded sweatshirt over a black hat, and had a small tattoo on his face. Mark approached the man, later identified as defendant, and asked what he was doing, and if he had been in the Jeep.

Defendant started crossing the street, and Mark followed. Defendant was carrying what appeared to be Molly's reusable grocery bags. When they reached a corner, Mark tried to stop defendant. Defendant pulled out a semiautomatic handgun, pointed it at Mark and told him to back up. Mark complied, and defendant left. Mark went home and called 911. After the police arrived, Molly checked the Jeep. She reported she was missing an MP3 cord, some cookies, Safeway-brand bottled water, a sweatshirt, and reusable grocery bags.

While Huntington Beach Police Officer John Elser, the first officer to arrive at the scene was interviewing Mark, he saw a suspicious subject, later determined to be a

[1] We refer to the Kiefers by their first names to avoid confusion.

man named Christopher Fischer, across the street. Fischer was wearing dark clothes and generally fit the description. When Fischer saw the patrol car, he ducked and hid between two parked cars. Elser tried to pursue, and when he could not find Fischer, he called other police units to establish a perimeter.

Officer Rafael Mena, who responded to Elser's call, saw Fischer nearby and detained him. He had a mark on his face similar to the one Mark described, but was not in possession of a weapon or grocery bags. Fischer was cooperative, and Mena noticed grass or debris on his back. Elser searched the general area, and found some Safeway-brand water bottles behind a nearby home.

Noah Riemenschneider, who lived in a nearby building, was on his balcony between 3:00 and 3:30 a.m. on the morning of the incident, about an hour to 90 minutes before Mark saw the man in the Jeep. Riemenschneider saw two men "fiddling around" in a silver Toyota parked nearby, with one in the driver's seat and the other outside. One of the men was wearing a black hooded sweatshirt and a beanie, and the other was wearing a gray hooded sweatshirt. Riemenschneider believed that the man outside saw him light a cigarette and signaled his companion. The car, which was started, was then turned off and the men walked across the street and opened the back of a blue Pathfinder. They took a few items from the back of the Pathfinder, closed the trunk, and then left. The next morning, Riemenschneider talked to the neighbor who owned the Toyota, and the neighbor contacted the police.

Investigating the Kiefer incident, a Huntington Beach Police Department crime scene investigator lifted two partial prints off a passenger door, one on the inside and one on the outside. The interior print was reported as unworkable by the latent print examiner, but the palm print was later matched to defendant. The examiner was unable to opine as to how long the print had been on the door, but both Mark and Molly later testified that they had never met defendant before and did not give him permission to be

inside the Jeep. There were no other prints on top of the palm print, meaning it had not been disturbed since the print had been placed there.

A police detective showed Mark a photo lineup containing defendant's picture, but he was unable to identify anyone. He was focused on the gun and did not get a good look at the perpetrator's face.

A few months later, a Huntington Beach patrol officer stopped a car for Vehicle Code violations. Defendant was in the passenger's seat, wearing black hat. There was a locked safe behind the passenger seat. The key was on defendant's key ring, and he gave the key to the officer. The safe contained papers belonging to defendant and a black replica handgun, which appeared to be real. The gun was actually a pellet gun and was supposed to have an orange tip, but it had been covered over or concealed.

The Orange County District Attorney filed an information charging defendant with one count of robbery. (Pen. Code, § 211.) At trial, defendant's defense was premised on mistaken identity, and he elicited the testimony about Fischer from the relevant witnesses. In rebuttal, over defense counsel's relevance objection, the prosecution introduced Riemenschneider's testimony regarding the presence of two men in the neighborhood that night.

Defendant was found guilty as charged. He was sentenced to prison for the low term of two years. Defendant now appeals.

II

DISCUSSION

Defendant's only argument on appeal is that admitting Riemenschneider's testimony was improper. A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197.) The trial court's "discretion is only abused where there is a clear showing [it] exceeded the bounds of reason" (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 32) or where discretion was exercised "in an arbitrary, capricious, or patently absurd manner."

(*People v. Coddington* (2000) 23 Cal.4th 529, 587-588, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Even where evidence has been erroneously excluded or admitted, the judgment or decision shall not be reversed unless the reviewing court believes the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, §§ 353, 354; *People v. Earp* (1999) 20 Cal.4th 826, 878.)

The issue of Riemenschneider's testimony was discussed several times outside the presence of the jury. The prosecutor explained that there had been several car burglaries around the area that night, Riemenschneider had apparently witnessed one of them. Defense counsel stated that he did not see the relevance of these entirely separate incidents, and defendant had not been charged in the incident Riemenschneider witnessed. He asked to exclude the testimony as irrelevant. The prosecutor stated that she did not intend to call Riemenschneider unless defendant put on evidence that Fischer was the sole perpetrator of the Kiefer robbery.

The court stated that if defendant relied on an identification defense, it would seem probative that a few hours earlier, two individuals were witnessed burglarizing cars. The court added that under Evidence Code section 352, the probative value of the proffered testimony was not substantially outweighed by its prejudicial effect. Although defendant had not been identified in the other instance, he might also have been there. Further, if the defense asserted just one person committed the Kiefer robbery, the fact that a witness, two hours earlier, saw the same type of crime being committed by two people supported a theory of two perpetrators. Defendant was also free to cross-examine. At defense counsel's request, the court agreed to revisit the issue once each side concluded its case-in-chief.

After the prosecution rested, the court discussed the issue again, noting that it was clear the defense was relying on an identity defense, and thus, Riemenschneider's testimony appeared probative and relevant. The prosecutor said that calling him would

depend on the defense evidence. Defense counsel indicated he had received a report about the testimony, which, the prosecutor explained, was that Riemenschneider had seen two men a couple of blocks from the offense in the Kiefer case. One of them, like defendant, was wearing a black hooded sweatshirt, although he could not identify either man. The court postponed a final ruling.

Counsel and the court discussed the issue again toward the end of the defense case. Defense counsel again objected that Riemenschneider's testimony was irrelevant. The prosecutor's offer of proof was that Riemenschneider would testify that between 3:00 and 3:30 a.m. the morning of the robbery, he was at home, directly across from the Kiefers' home. While looking over his balcony, he saw two men go into a car, start it, leave it, go to another car across the street and start taking items from that car.

Defense counsel again objected on the issue of relevance.[2] The court rejected this argument, finding that it was "highly relevant and probative," particularly in light of the defense's argument that Fischer had committed the Kiefer robbery alone.

A. Relevance

No evidence is admissible but relevant evidence. (Evid. Code, § 350; (*People v. Scheid* (1997) 16 Cal.4th 1, 13.) Relevant evidence is that "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "'The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.' [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 337.)

This is not a close call. Defendant relied on a theory that someone else had committed the crime, specifically, Fischer, who had been detained in the area shortly after the Kiefer robbery. Given the defense's theory, the prosecution was entitled to

[2] Defense counsel also complained that the timing was inaccurate; according to the police report, the earlier incident happened at 1:00 a.m.

introduce evidence to show that there was another person who might have been committing automobile burglaries in the same area on the same night. Riemenschneider's testimony allowed the jury to infer that although Mark only saw one person, Fischer's presence did not necessarily exclude defendant as a suspect, either acting with Fischer or alone. Riemenschneider's testimony was clearly relevant, and the trial court did not abuse its discretion by permitting it.

B. Evidence Code section 352

Defendant next argues the trial court should not have permitted Riemenschneider's testimony because its probative value was outweighed by the potential for prejudice.

Defendant did not object on this ground at trial, and therefore the issue is not preserved for appellate review. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1124.) While the Attorney General pointed this out in its brief, defendant offered no response to this argument. Our own review of the record shows that defendant's counsel raised only relevance as an objection on the numerous occasions that Riemenschneider's testimony was discussed.[3] Where defense counsel neither mentions Evidence Code section 352 or argues that the evidence's probative value is outweighed by the risk of undue prejudice, the issue is not preserved for review. (*People v. Kipp*, *supra*, 26 Cal.4th at p. 1124.)

Further, even if the issue had been preserved, we would reject it on its merits. For purposes of analysis, "'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues. [Citations.]" (*People v. Kipp*, *supra*, 26 Cal.4th at p. 1121.) As discussed above, Riemenschneider's testimony was relevant. Although defendant contends "the record shows that the trial court and

[3] The court did mention, and reject, Evidence Code section 352 as grounds for denying defendant's motion. Defense counsel, however, never raised or argued it.

counsel were confused by how this evidence should be used, and thus it is reasonable to conclude that a jury would be confused as well," this amounts to pure speculation.

The court took care in deciding to admit Riemenschneider's testimony, discussing it with counsel three separate times and hearing argument. In addition to noting why it believed the testimony was relevant (see discussion *ante*), the court also stated the defense was free to impeach Riemenschneider, or call the officer who interviewed him to testify. We simply cannot conclude, even if the issue had been preserved for review, that the court exercised its discretion in an "arbitrary, capricious, or patently absurd manner." (*People v. Coddington*, *supra*, 23 Cal.4th at pp. 587-588) or "exceeded the bounds of reason" (*People v. DeJesus*, *supra*, 38 Cal.App.4th at p. 32).

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.