Court of Appeal, Fourth Appellate District, Division Two - No. E065838

S248269

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

OSCAR KENNETH MORENO, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX C

Filed 3/9/18 P. v. Moreno CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. OSCAR KENNETH MORENO, Defendant and Appellant.	E065838 (Super.Ct.No. RIF1309561) OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Johnson, Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Theodore M. Cropley, Alana Cohen Butler and Teresa C. Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

APPENDIX A.

Defendant Oscar Kenneth Moreno was convicted of two counts of attempted robbery, two counts of assault with a firearm, and one count of being a felon in possession of a handgun. A jury also found true the allegation that defendant personally used a firearm during the commission of the attempted robberies and the assaults. The trial court sentenced defendant to state prison for 16 years eight months. Defendant appeals contending: (1) the trial court erred by instructing the jury that it could conclude defendant knew he was guilty because he fled when one of the victims tried to apprehend him, and (2) that admission of DNA evidence through a witness who did not personally perform the underlying tests and did not prepare the report of the test results violated his right to confront witnesses under the Sixth Amendment to the United States Constitution. Having found no prejudicial error, we affirm the judgment.

I.

FACTS AND PROCEDURAL BACKGROUND

In an amended information, the People charged defendant with two counts of attempted robbery by means of force or fear (Pen. Code,[1] §§ 664, 211, counts 1-2), two counts of assault with a firearm (§ 245, subd. (a)(2), counts 3-4), and one count of being a felon in possession of a firearm (§ 29800, subd. (a)(1), count 5). The People alleged defendant personally used a firearm during the commission of counts 1 through 4. (§§ 12022.53, subd. (b), 12022.5, subd. (a), 1192.7, subd. (c)(8).) Finally, the People

[1] All undesignated statutory references are to the Penal Code.

alleged defendant served a prior prison term within the meaning of section 667.5, subdivision (b).

Sometime between 2:00 and 2:20 a.m., on August 26, 2013, D.A. got off work at a restaurant in Mira Loma. D.A., a coworker, and a visitor walked out the back door of the restaurant to smoke a cigarette. As the men walked outside, D.A. heard voices and saw two men standing behind some trees and bushes. The two men approached and said, "Give us the fiera," meaning, give us the money. The two men were pointing guns, and D.A. heard the sound of two semiautomatic handguns being cocked. The lighting behind the restaurant was good. The two men had their faces covered with bandanas, and they were wearing dark clothing with hoodies over their heads. The men were shorter than D.A.

Just then, R.G. and J.G., the restaurant's security guards, and the owner's son were about to walk out the back door of the restaurant. R.G. walked out first. As he exited the door, R.G. saw D.A. and the two other men with their hands up, and he saw two robbers pointing guns at them. R.G. slammed the door behind him before his brother and the owner's son could exit, and he held it closed. The two robbers turned and pointed their guns at R.G., and in Spanish the closest of the two said, "Where's the fiera," "Give me the fiera," meaning, "Give me the money." R.G. put his hands up and told the robber there was no money, that it was gone. When the robbers turned their attention to R.G., D.A. and one of the other men jumped a fence and ran away.

R.G. did not see the robbers' faces because they were both wearing ski masks. The robber who demanded the money also wore a bandana over his face. The robbers

wore black shirts and black pants, and the robber who demanded the money wore tennis shoes with tape on them. Both robbers were between five feet seven inches and five feet eight inches tall. R.G. identified defendant as the robber who had demanded the money. Defendant repeated his demand for money two more times. After the third demand, defendant looked at the other robber, and R.G. heard a semiautomatic handgun click. Both robbers then ran off together northbound on Etiwanda Avenue.

R.G. ran back inside the restaurant and told the owner's son to call the police. He also told J.G. that they needed to get in their car and go get the robbers. The two men ran back outside the restaurant, got in their vehicle, and drove off in pursuit. R.G. drove north on Etiwanda and passed 54th Street. Thinking the two robbers could not have gotten very far on foot, R.G. made a U-turn, drove west on Etiwanda, and turned left on 54th Street. As he drove west on 54th Street, R.G. saw a man walking by himself.[2] R.G. recognized the man as one of the robbers because he was dressed all in black and was wearing a ski mask. Defendant was taking the ski mask off of his head and about to throw it away in a trash can when R.G. yelled out, "Hey, stop." Defendant threw his ski mask and ran, so R.G. drove forward and maneuvered his vehicle in front of defendant. Defendant rolled over the hood of the vehicle, and J.G. got out of the vehicle and tried to grab him. R.G. also got out of the vehicle. J.G. was wrestling with defendant on the ground, but defendant got loose and ran away. R.G. ran after him, and J.G. got back in

[2] J.G. testified there were two men walking down 54th Street, and when R.G. yelled, "Stop," one of the men ran between some houses and the other ran straight down the street.

the vehicle and drove forward to block defendant's path. J.G. then got out of the vehicle and again tried to restrain defendant. Defendant managed to get on top of J.G., so R.G. struck defendant on his side with an expandable baton. When defendant reached for something in his pocket, R.G. shot defendant twice with a Taser gun.

After finally subduing defendant, R.G. saw that defendant was wearing tennis shoes with tape on them. Defendant did not have a gun. R.G. and J.G. handcuffed defendant and drove him back to the restaurant. Sheriff's deputies arrived soon thereafter. J.G. and a deputy both testified defendant had a bandana around his neck. The deputy also noticed tape on defendant's shoes, and he testified the tape might have been used to conceal the shoes' tread to prevent it from leaving an imprint. D.A. came back to the restaurant after the robbers had fled. He saw that the deputies had a man in handcuffs standing against a wall. D.A. recognized the man as one of the robbers and saw that he was wearing the same dark clothing as the robbers were wearing during the robbery. D.A. identified defendant as the man he had seen in handcuffs.

A resident of 54th Street found a handgun in her front yard later on the morning of the attempted robbery. She had not seen the gun the night before. The gun was loaded with one bullet in the chamber. Sheriff's deputies recovered a black ski mask and spent Taser cartridges from 54th Street.

A DNA sample was taken from defendant. That sample, as well as DNA samples taken from the handgun, the magazine, the ammunition, and the ski mask were sent to the Department of Justice for testing. A criminalist testified that he was assigned to conduct a routine technical review of DNA analyses of evidence in this case performed by a

senior criminalist who works in the same laboratory. He reviewed the testing procedures utilized by the other criminalist and, based on his training and experience, found no irregularities or problems that would call into question the results.

Defendant was found to be a match to the DNA extracted from a swab taken from the mouth area of the ski mask. DNA extracted from a swab taken from the eye area of the ski mask showed there was a mixture of DNA from two different people, with one person being the major contributor. Defendant was found to be a match to the majority of the DNA that was found on the eye area of the ski mask. A statistical frequency analysis performed on the DNA from the mouth area of the ski mask indicated that the chances it would match a person randomly taken from the population was approximately one in 27 sextillion for African-Americans, one in 300 quintillion for Caucasians, and one in 17 quintillion for Hispanics.[3]

Testing performed on a swab taken from the handgun showed there was DNA on the trigger from at least three people. The DNA mixture was too complex to single out one individual's DNA, and it could not be determined if defendant had touched the gun. The swabs taken from the ammunition found inside the magazine contained too little DNA for comparison to the reference sample taken from defendant. The report of the DNA testing was not introduced or admitted into evidence.

A jury found defendant guilty on all five counts, and rendered true findings on the special allegations that defendant personally used a firearm during the commission of

[3] The criminalist testified that a quintillion is a 10 followed by 18 zeros. A sextillion has 21 zeros. (*People v. Nelson* (2008) 43 Cal.4th 1242, 1249.)

counts 1 through 4. The trial court chose count 1 as the principle count and sentenced defendant to the middle term of two years, and imposed a 10-year enhancement for personal use of a firearm, for a term of 12 years in state prison. The court sentence defendant to one-third the middle term of two years on count two, for a term of eight months, and imposed one-third the 10-year personal use enhancement, for a term of three years four months, for a total term of four years in state prison to be served consecutively with count 1. The court imposed sentence on counts 3 through 4 and on the related use enhancements, but stayed execution pursuant to section 654. On count 5, the court sentenced defendant to one-third the middle term of two years, for a term of eight months to be served consecutively with count 1, for an aggregate prison term of 16 years eight months. Finally, the trial court exercised its discretion to dismiss the prior prison term allegation.

Defendant timely appealed.

II.

DISCUSSION

A. *The Trial Court Correctly Gave the Jury a Flight Instruction.*

Defendant argues the trial court erred prejudicially by instructing the jury that it could consider defendant's flight as evidence of guilt. According to defendant, a flight instruction is not appropriate where, as here, the only issue at trial was the identity of the perpetrator. The People contend defendant did not object to the flight instruction on any basis, so he may not challenge it on appeal. True, defendant did not timely interpose an objection to the instruction, which normally would result in forfeiture of the right to

challenge it on appeal. However, "[c]hallenges to the flight instruction given pursuant to section 1127c are cognizable on appeal even in the absence of a contemporaneous objection. [Citations.]" (*People v. Rogers* (2013) 57 Cal.4th 296, 332, fn. 5; see § 1259.) Although we disagree with the People's forfeiture argument, we agree the trial court properly instructed the jury.

The trial court instructed the jury with a modified CALCRIM No. 372 as follows: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it's up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself." "A flight instruction is proper where the evidence shows a defendant departed the crime scene under circumstances suggesting his movement was motivated by a consciousness of guilt. [Citations.]" (*People v. McWhorter* (2009) 47 Cal.4th 318, 376.) "The evidentiary basis for [a] flight instruction requires sufficient, not uncontradicted, evidence. [Citation.] Moreover, section 1127c[4] 'makes mandatory the giving of an instruction on flight where evidence of a defendant's flight is relied upon as tending to show guilt, and the giving of such an instruction in

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[4] Section 1127c reads: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine. [¶] No further instruction on the subject of flight need be given."

appropriate cases repeatedly has been approved.' [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1020.)

Relying on *People v. Anjell* (1979) 100 Cal.App.3d 189 (*Anjell*), defendant argues the trial court erred by giving a flight instruction because the identity of the robbers was the sole issue during his trial. *Anjell* stated: "The fact that the perpetrators fled the scene of the crime cannot warrant an instruction on flight where identity is a contested issue. Flight is relevant because it is a factor 'tending to connect an accused with the commission of an offense.' [Citation.] The fact that a robber fled the scene is of no assistance to a jury where the defendant does not dispute that all elements of the crime were present but denies that he was the robber. This is true because the instruction becomes relevant only if the sole contested issue in the case—the defendant's identity as the robber—is assumed. Even if the robber's flight tends to show his (the robber's) guilt, this is immaterial unless the jury believes that the defendant is the robber. If such is the case, there is no need to 'connect' him with the crime any further." (*Id.* at pp. 199-200.)

A number of courts have read *Anjell*, *supra*, 100 Cal.App.3d 189, to stand for the proposition that a flight instruction is never appropriate when identity is the sole or major issue in the case, and those courts have rejected that rule as overbroad and unpersuasive dictum. (See, e.g., *People v. Batey* (1989) 213 Cal.App.3d 582, 586; *People v. Simon* (1989) 208 Cal.App.3d 841, 851.) To the extent *Anjell* stands for such a broad bar to use of a flight instruction, our Supreme Court disapproved of it. (*People v. Mason* (1991) 52 Cal.3d 909, 943, fn. 13; see *People v. Turner* (1994) 8 Cal.4th 137, 201; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1245.) But the actual holding from *Anjell* is "that a

flight instruction should not be given when identity *of the person fleeing* is in dispute." (*People v. Kelley* (1990) 220 Cal.App.3d 1358, 1376 (*Kelley*), italics added.) "If there is evidence identifying the person who fled as the defendant, and if such evidence 'is relied upon as tending to show guilt,' then it is proper to instruct on flight. (§ 1127c.)" (*Mason*, at p. 943; see *People v. Boyd* (1990) 222 Cal.App.3d 541, 575; *Kelley*, at pp. 1376-1377; *Batey*, at p. 587.)

Arguably there were two acts of flight in this case: when the robbers ran off from the back of the restaurant and when defendant (and possibly a second man) ran away from R.G. and J.G. down 54th Street after R.G. yelled, "Hey, stop." The trial court seemed to believe a flight instruction was appropriate for either act. "I think this is flight maybe when he took off running. . . . If he fled immediately after the crime or after he was accused of committing the crime." Assuming the narrower rule from *Anjell*, *supra*, 100 Cal.App.3d 189 (as stated in *Kelley*, *supra*, 220 Cal.App.3d at p. 1376), is a correct statement of the law, the trial court could not have given a flight instruction if the only evidence of flight in this case was the robbers running away from the restaurant, because the identity of the robbers was at issue. However, the People introduced substantial evidence that, within minutes of the attempted robbery, defendant was seen walking or running down 54th Street, which is close to the restaurant. Defendant was wearing dark clothing and a bandana around his neck, and he was taking something off his head and about to throw it away when R.G. yelled, "Hey, stop." Defendant ran away and, when J.G. caught him, defendant resisted and again tried to run away. Defendant did not dispute that it was he who ran away from R.G. and J.G. Therefore, acting under the

assumption that the prosecutor would argue flight, the trial court properly instructed the jury on how it could consider that evidence.

Even if we were to conclude the trial court erred by giving the flight instruction, the error is reversible only if we conclude it resulted in a miscarriage of justice, meaning it is reasonably probable defendant would have fared better absent the error. (Cal. Const., art VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Moye* (2009) 47 Cal.4th 537, 555-556.) We find any error was harmless for three reasons.

First, the prosecutor did not, ultimately, rely on defendant's flight as evidence of guilt during closing arguments. Defense counsel argued defendant ran from R.G. and J.G. because he reasonably feared for his safety, not because he had anything to do with the attempted robbery. Neither counsel addressed the flight instruction during their arguments. In other words, no particular emphasis was placed on the flight evidence.

Second, the instruction permissively informed the jury that "if" it concluded defendant fled after committing the attempted robbery, (1) evidence of flight "may" be considered evidence of guilt, (2) the jury was to decide for itself "the meaning and importance" of defendant's flight, and (3) "by itself" flight was not enough to prove guilt. Such a "cautionary instruction . . . benefitted the defense by 'admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory.' [Citation.]" (*People v. Streeter* (2012) 54 Cal.4th 205, 254.)

Finally, the trial court properly instructed the jury with CALCRIM No. 200, which provided in relevant part: "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular

instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." We must presume the jury understood and properly applied that instruction. (*People v. Chism* (2014) 58 Cal.4th 1266, 1299 [jury presumed to have followed CALJIC No. 17.31 and disregarded inapplicable instruction]; *People v. Scott* (1988) 200 Cal.App.3d 1090, 1095 [same].) If the jury concluded defendant did not flee, "they would have disregarded the flight instruction as they were . . . instructed. [Citations.]" (*People v. Richardson*, *supra*, 43 Cal.4th at p. 1020.) And the fact the jury was instructed to disregard inapplicable instructions mitigated against any prejudice that might have arisen from the trial court incorrectly giving a flight instruction. (*People v. Saddler* (1979) 24 Cal.3d 671, 684; *People v. Vega* (2015) 236 Cal.App.4th 484, 503; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1472.)

Viewing the record in its entirety, we conclude it is not reasonably probable defendant would have obtained a better result at trial had the trial court not instructed the jury on flight.

B. *Defendant Was Not Prejudiced by Expert Testimony About DNA Tests Performed by a Criminalist Who Did Testify.*

Defendant argues his right to confront witness under the Sixth Amendment was violated because the criminalist who testified about DNA testing did not perform the tests himself, but instead relayed the results of tests performed by another criminalist who was not subject to cross-examination. Defendant did not object to the criminalist's testimony on confrontation clause grounds, so the challenge is forfeited. (*Melendez-Diaz v.*

Massachusetts (2009) 557 U.S. 305, 313-314, fn. 3; *People v. Redd* (2010) 48 Cal.4th 691, 730.) In any event, any error in admitting the criminalist's testimony was harmless beyond a reasonable doubt.[5]

"[G]enerally the Sixth Amendment's confrontation right bars the admission at trial of a testimonial out-of-court statement against a criminal defendant unless the maker of the statement is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination." (*People v. Lopez* (2012) 55 Cal.4th 569, 580-581.) Both our Supreme Court and the United States Supreme Court have recently wrestled with the application of this principle to the context of scientific testing and expert testimony. (See *Williams v. Illinois* (2012) 567 U.S. 50; *Bullcoming v. New Mexico* (2011) 564 U.S. 647; *Melendez-Diaz, supra*, 557 U.S. 305; *People v. Dungo* (2012) 55 Cal.4th 608; *People v. Rutterschmidt* (2012) 55 Cal.4th 650; *People v. Lopez*, *supra*, 55 Cal.4th 569.)

The question here is whether the criminalist relayed testimonial statements from his fellow crime lab worker in violation of the confrontation clause. "To be considered testimonial, the out-of-court statement (1) must have been made with some degree of formality or solemnity and (2) must have a primary purpose that pertains in some fashion to a criminal prosecution." (*People v. Barba* (2013) 215 Cal.App.4th 712, 720-721

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[5] Because we ultimately address the merits of defendant's confrontation clause claim and conclude any error was harmless beyond a reasonable doubt, we need not address defendant's additional claim that his trial attorney rendered ineffective assistance of counsel by not objecting on confrontation clause grounds to the introduction of DNA evidence.

(*Barba*); see *People v. Holmes* (2012) 212 Cal.App.4th 431, 438 (*Holmes*) ["It is now settled in California that a statement is not testimonial unless both criteria are met."].)

Applying this framework, it does not necessarily violate the confrontation clause for expert witnesses who have supervised but not performed the underlying laboratory work to testify about the results of DNA testing. (*Holmes*, *supra*, 212 Cal.App.4th at pp. 433-434.) The testifying witnesses in *Holmes* "referred to notes, DNA profiles, tables of results, typed summary sheets, and laboratory results that were prepared by nontestifying analysts." (*Id.* at p. 434.) "None of these documents was executed under oath. None was admitted into evidence. Each was marked for identification and most were displayed during testimony. Each of the experts reached his or her own conclusions based, at least in part, upon the data and profiles generated by other analysts." (*Ibid.*) The *Holmes* court concluded the test data and reports were not sufficiently solemn or formal to qualify as testimonial because they consisted of "unsworn, uncertified records of objective fact." (*Id.* at p. 438.) Though the court noted the data and reports were generated for the primary purpose of a criminal prosecution, this alone was not enough to render the DNA test data testimonial. (*Ibid.*)

As the court in *Barba* concluded, "[s]o long as a qualified expert who is subject to cross-examination conveys an independent opinion about the test results, then evidence about the DNA tests themselves is admissible." (*Barba*, *supra*, 215 Cal.App.4th at p. 742.)

Unlike in *Barba*, the criminalist in this case did not testify that he personally supervised the DNA testing in this case, and he was not asked for and did not offer his

own opinion whether the DNA found on the ski mask matched the profile taken from defendant. Instead, the criminalist testified about the results of the tests and statistical analysis performed by a nontestifying criminalist. But even assuming the test results are testimonial hearsay, their admission was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Rutterschmidt*, *supra*, 55 Cal.4th at p. 661.) The DNA evidence did not directly tie defendant to the attempted robbery.[6] The test results merely confirmed that defendant and at least one other person had worn the ski mask that was found on 54th Street. Even if the DNA evidence had not been admitted, the record contained strong evidence that the ski mask was, in fact, defendant's. When R.G. and J.G. turned down 54th Street, they saw defendant walking or running down the street. Defendant was in the process of taking something off his head and about to throw it away when R.G. yelled out, "Hey, stop." Defendant threw something, then ran away. The ski mask was found nearby. Because the evidence independently established that the ski mask was defendant's, he was not prejudiced by the expert testimony.

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[6] The DNA testing performed on the handgun and ammunition was inconclusive and did not establish that defendant had ever handled them.

III.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.

Additional material from this filing is available in the Clerk's Office.