Filed 6/26/18 Bagumyan v. Brandies CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HENRY BAGUMYAN, Plaintiff and Appellant, v. IRENE DOROTHY BRANDIES, Defendant and Respondent.	B282566 (Los Angeles County Super. Ct. No. BC591255)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen M. Moloney, Judge. Affirmed.

West Coast Trial Lawyers, H. Dean Aynechi and Houman Sayaghi for Plaintiff and Appellant.

Doherty & Catlow, Paul F. Sullivan and Susan Rousier for Defendant and Respondent.

Plaintiff and appellant Henry Bagumyan (Bagumyan) appeals a judgment in favor of defendant and respondent Irene Dorothy Brandies (Brandies) following a defense verdict.

Bagumyan contends the trial court erred in denying his *Batson/Wheeler*[1] motions regarding defense counsel's peremptory challenges which eliminated two prospective jurors of Armenian descent, and abused its discretion in certain evidentiary rulings with respect to the parties' respective experts.

As explained below, we perceive no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On August 12, 2015, Bagumyan filed a personal injury action against Brandies arising out of a motor vehicle accident that occurred in Burbank on August 14, 2014. The matter came on for a jury trial, commencing on February 21, 2017. The evidence showed:

Bagumyan, who was driving a Chrysler, turned left from Verdugo Avenue to go northbound onto North Brighton Street. After he made the turn, he began to accelerate. He observed Brandies's Ford automobile ahead of him, to his left, in an alley. Brandies was traveling eastbound. According to Brandies, she stopped to check for oncoming traffic, it was all clear, and then she proceeded. Bagumyan honked his horn at Brandies but continued moving northbound. Brandies struck the driver's side of Bagumyan's vehicle in a "T-bone" collision.

---

[1] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

Defense expert Kenneth Pearl, who has a degree in mechanical engineering and 27 years of experience in accident reconstruction, opined that assuming a typical acceleration rate after he completed his turn, Bagumyan's speed at impact was 37 miles per hour. Calculating Bagumyan's perception-reaction time at 1.5 seconds, even at a speed of 37 miles per hour he could have stopped in sufficient time to avoid the accident.

The jury returned a special verdict for the defense, finding that Brandies was not negligent.[2] Bagumyan filed a timely notice of appeal from the judgment.

CONTENTIONS

Bagumyan contends (1) the trial court erred in denying his *Batson/Wheeler* motions with respect to defense counsel's exercise of peremptory challenges which eliminated two prospective jurors of Armenian descent; (2) the trial court abused its discretion in ruling that Officer Lloyd was not qualified to testify for Bagumyan as an accident reconstruction expert; and (3) the trial court erred in denying his motion in limine to preclude portions of defense expert Pearl's testimony and in thereafter denying his motion to strike Pearl's testimony.

DISCUSSION

1. *No* Batson/Wheeler *error as to either of the excused jurors.*

a. *Legal standard governing claim of discriminatory bias in jury selection.*

In *People v. Gutierrez* (2017) 2 Cal.5th 1150 (*Gutierrez*), the California Supreme Court clarified the constitutionally required

---

[2] Bagumyan does not challenge the sufficiency of the evidence to support the verdict.

duties of California lawyers, trial judges, and appellate judges when a party has raised a claim of discriminatory bias in jury selection. (*Id*. at p. 1154, 1157–1159.)

"Peremptory challenges are a long-standing feature of civil and criminal adjudication. But the exercise of even a single peremptory challenge solely on the basis of race or ethnicity offends the guarantee of equal protection of the laws under the Fourteenth Amendment to the federal Constitution. (*Batson*, *supra*, 476 U.S. 79; *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 315.) Such conduct also violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. (*Wheeler*, *supra*, 22 Cal.3d 258, 276–277.)[3]

"At issue in a *Batson/Wheeler* motion is whether any specific prospective juror is challenged on account of bias against an identifiable group distinguished on racial, religious, ethnic, or similar grounds. [Citation.] Exclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal. [Citation.]

"When a party raises a claim that an opponent has improperly discriminated in the exercise of peremptory challenges, the court and counsel must follow a three-step process. First, the *Batson/Wheeler* movant must demonstrate a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. The moving party satisfies this first step by producing ' "evidence sufficient to

---

3 These principles also apply to the trial of civil cases. (*Di Donato v. Santini* (1991) 232 Cal.App.3d 721, 731–738.)

permit the trial judge to draw an inference that discrimination has occurred." ' [Citations.]

"Second, if the court finds the movant meets the threshold for demonstrating a prima facie case, the burden shifts to the opponent of the motion to give an adequate nondiscriminatory explanation for the challenges. To meet the second step's requirement, the opponent of the motion must provide 'a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' [Citation.] In evaluating a trial court's finding that a party has offered a neutral basis—one not based on race, ethnicity, or similar grounds—for subjecting particular prospective jurors to peremptory challenge, we are mindful that ' "[u]nless a discriminatory intent is inherent in the prosecutor's explanation," ' the reason will be deemed neutral. [Citation.]

"Third, if the opponent indeed tenders a neutral explanation, the trial court must decide whether the movant has proven purposeful discrimination. [Citation.] In order to prevail, the movant must show it was ' "more likely than not that the challenge was improperly motivated." ' [Citation.] This portion of the *Batson/Wheeler* inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness. [Citation.] At this third step, the credibility of the explanation becomes pertinent. To assess credibility, the court may consider, ' "among other factors, the prosecutor's demeanor; . . . how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy." ' [Citations.] To satisfy herself that an explanation is genuine, the presiding judge must make 'a sincere and reasoned attempt' to evaluate the prosecutor's justification,

with consideration of the circumstances of the case known at that time, her knowledge of trial techniques, and her observations of the prosecutor's examination of panelists and exercise of for-cause and peremptory challenges. [Citation.] Justifications that are 'implausible or fantastic . . . may (and probably will) be found to be pretexts for purposeful discrimination.' [Citation.] We recognize that the trial court enjoys a relative advantage vis-à-vis reviewing courts, for it draws on its contemporaneous observations when assessing a prosecutor's credibility. [Citation.]

"We review a trial court's determination regarding the sufficiency of tendered justifications with ' "great restraint." ' [Citation.] We presume an advocate's use of peremptory challenges occurs in a constitutional manner. [Citation.] When a reviewing court addresses the trial court's ruling on a *Batson/Wheeler* motion, it ordinarily reviews the issue for substantial evidence. [Citation.] A trial court's conclusions are entitled to deference only when the court made a 'sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.' [Citation.] What courts should not do is substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual. '[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. . . . If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.' [Citation.]" (*Gutierrez*, *supra*, 2 Cal.5th at pp. 1157–1159.)

b. *No* Batson/Wheeler *error as to prospective juror A.*

(1) *Bagumyan's* Batson/Wheeler *motion as to A.*

After defense counsel exercised a peremptory challenge to Mr. A., a prospective juror, Bagumyan's attorney, Neama Rahmani, asserted "I believe this is a racially motivated strike. Mr. [A.] has an Armenian surname. I believe he may be Armenian. The plaintiff is obviously Armenian. Many of the plaintiff's medical providers are also Armenian or [of] Middle Eastern [descent]. Specifically to not ask Mr. [A.] any questions during voir dire,[4] there's nothing that he indicated that could show any sort of bias, and I believe the burden has shifted to the defense to show a non-racially motivated reason for exercising this peremptory strike."

(2) *Defense counsel's stated reasons for excusing A.*

The trial court asked defense counsel to explain his reasons for excusing A., "to make sure that it's not racially motivated or based on his national origin." Paul Sullivan, Brandies's attorney, stated his reasons as follows: "I have a jury consultant here . . . . He [A.] has been nodding to plaintiff's counsel, and he did it several times coming in and out of the courtroom. I've had my juror consultant watch the jurors to see the jurors' interaction with both sides, and he's had eye contact and is nodding his head at counsel. In fact, he did it yesterday at the end of the day, and he nodded his head two or three times to counsel as he was walking by attempting to make eye contact with them.

---

4 Contrary to Rahmani's argument, the reporter's transcript reflects that defense counsel did question A. during voir dire.

"Number two, I believe -- and I was trying to establish in voir dire -- that he has some language barrier. I'm very concerned about his ability to understand the case in terms of the experts. He answered questions from you, your honor, that were contradictory. You asked him a question. Is that yes? He would answer no, and it was clear he had some difficulty understanding what was going on with simple questions.

"Some of the issues in the case are complicated in terms of the experts, and I'm very concerned that he will not understand what's going on in the case, and I'm also concerned that he has some bias towards the plaintiff because he -- potentially he could be -- have some bias towards the plaintiff, and I don't understand why he'd be nodding at counsel also. When I look at him, he looks away. [¶] So there's a lot of other issues that I'm concerned about. Those are just two of them, and I think I've met my burden to establish that I have some valid reasons here to excuse him, and it doesn't have anything to do with him being Armenian. It has to do with him . . . possibly favoring the plaintiff for whatever reasons. . . . [A]nd also that I don't believe that he has the capability, and I'm concerned about jurors that don't have the capability to understand the case."

(3) *Bagumyan's response*.

Rahmani disputed the legitimacy of Sullivan's reasons. Rahmani stated "[A.] has not nodded to me or made any facial expressions to me." Rahmani also asserted that A. was able to answer all of Sullivan's questions "proficiently. So language is not an issue."

(4) *Trial court's ruling*.

After hearing the arguments of counsel, the trial court stated: "This is an important issue [in] any case. I take these

challenges seriously. I listened to Mr. Rahmani. He felt it was racially motivated. I believe he meant it's based on [A.'s] ethnic background in terms of being Armenian. I accept it on that basis." Thus, after reiterating that Rahmani had made out a prima facie case, the trial court proceeded to examine the reasons given by Sullivan to determine whether Sullivan had legitimate nondiscriminatory reasons for exercising the peremptory challenge.

The trial court explained, "the burden shifted to Mr. Sullivan. The reason doesn't have to be one that is accepted by the other side, in this case, the plaintiff. The reason has to be sufficient because cause does not have to be established to use a peremptory. However, it can't be based upon race. . . . I don't find that here. [¶] . . . [¶] I think Mr. Sullivan has met his burden in terms of the two grounds, one indicating that he saw facial expressions that concerned him and concerned his jury consultant, and two, the language issue. I think that's sufficient to allow him to exercise a peremptory, and so based on the record, I'll deny the *Batson/Wheeler* challenge."

The trial court added, "I'm not making a finding that I saw eye contact. Mr. Sullivan indicated he saw eye contact. He indicated his jury consultant saw eye contact and that combined with the language issue, I think, is sufficient to overcome the *Batson-Wheeler* challenge."

(5) *Substantial evidence supports trial court's determination with respect to both of the stated reasons*.

Here, the trial court found that Bagumyan, the movant, had satisfied the initial step by making a prima facie showing of group bias, and it then "evaluated [the stated] reasons for the challenges. When this occurs, the adequacy of the prima facie

showing becomes moot [citations], and the reviewing court skips to the third stage to determine whether the trial court properly credited the [stated] reasons for challenging the prospective juror[] in question [citations]." (*People v. Smith* (May 21, 2018, S065233) __Cal.5th __ [p. 9].)

Thus, with respect to the assertion of eye contact between A. and plaintiff's counsel, " ' "the issue [came] down to whether the trial court f[ound] the [stated] race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." [Citation.] " 'As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." ' " [Citation.] Thus, in reviewing a trial court's reasoned determination that a prosecutor's reasons for striking a juror are sincere, we typically defer to the trial court and consider only "whether substantial evidence supports the trial court's conclusions." [Citation.]' [Citation.]" (*People v. Smith*, *supra*, __Cal.5th __ [p. 9].)

Here, the trial court made a finding that Sullivan and his jury consultant observed inappropriate eye contact by A. The determination of Sullivan's credibility was within the purview of the trial court, which had the opportunity to observe Sullivan's demeanor. (*People v. Smith*, *supra*, __Cal.5th __ [p. 9].) Further, Sullivan's stated reason of eye contact by A., evidencing favoritism toward the plaintiff, was not improbable (*ibid.*), and case law recognizes that "[h]ostile looks from a prospective juror can themselves support a peremptory challenge." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125.) Moreover, Sullivan's

proffered rationale, based on A.'s perceived favoritism, was grounded in accepted trial strategy (*People v. Smith*, *supra*, __Cal.5th __ [p. 9]), i.e., to ensure that biased jurors are eliminated.

Sullivan's second stated reason for excusing A., which the trial court also credited, was based on language and lack of comprehension. This reason likewise is supported by the record.

On voir dire, the trial court asked A. the following: "Have you or any of your relatives or any of your close friends ever been involved in any court matter as a witness, as a plaintiff, as a defendant, or any other way as an officer, as an expert witness? Ladies and gentlemen, this basically refers to have you been involved in a small claims case? Have you been involved in a marital dispute case in family court? Have you had a lawsuit that you've gone to court over?" In response, A. stated: "So far I don't know anybody like -- like courtroom, any relationship, people face I see or any. So I don't know anybody around here." Thus, rather than responding to the question, which asked whether he had ever been involved in a legal proceeding, A. stated that he was not familiar with anyone in the courtroom. A. then was asked a follow-up question, "Have you ever gone to court on any case?" This time, A. responded "No."

Next, when A. was asked "You have not made up your mind in this case?," which called for him to respond either "yes" or "no," A. gave a one word response, "Fair." The trial court then asked "You can be fair?," which elicited a "Yes" from A.

Thereafter, when A. was asked, "Do you agree to base your verdict on the evidence that you hear and the law I read to you?," A. stated "No." The trial court rephrased the question, at which time A. changed his answer to "Yes."

For these reasons, we conclude both of the grounds stated by Sullivan, eye contact by A. as well as his lack of comprehension, support the trial court's determination that A. was excused for valid nondiscriminatory reasons.

c. *No* Batson/Wheeler *error as to prospective juror M.*

(1) *Bagumyan's* Batson/Wheeler *motion as to M.*

After the defense thanked and excused prospective juror Mr. M., Rahmani made another *Batson/Wheeler* motion, contending there was nothing in M.'s responses that suggested he could not be fair to the defense, and that the exercise of the peremptory challenge showed "a clear bias . . . against Armenian jurors in this case."

(2) *The defense's stated reasons for excusing M.*

In response to the trial court's inquiry as to "the basis for the strike," Sullivan explained "I struck him . . . because he's unhappy with the result of his case, and he had back surgery that he's attributing [to] something that occurred previously. We had an issue in this case with Mr. Bagumyan having surgery more than a year after the accident, and we think it's unrelated, and this juror has a bad taste in his mouth about what happened to him, and we're very concerned that Ms. Brandies may be the fallout from his bias about what happened to him, and so this has nothing to do with his . . . ethnicity. [¶] . . . [¶] So for our valid, justifiable reason which is more than trivial to thank and excuse Mr. [M.] is that he has a similar back injury and had surgery, and we think that there's a potential that [Ms.] Brandies may be a fallout of [M.'s] prejudice that he has regarding not recovering other than $1,500 for his case."

(3) *Trial court's ruling with respect to M.*

The trial court denied Bagumyan's motion, stating: "I have Mr. [M.] who is Armenian, and the question is is Mr. Sullivan seeking to strike him because he's Armenian. If you have a case involving a plaintiff who claims a low back injury and you have a plaintiff who had surgery for a low back injury and you have a prospective juror who has the same ethnic background as the plaintiff, in this case Armenian, who has had back surgery and felt he was not compensated for what happened to him, the question is is that a sufficient race neutral reason or ethnic background neutral reason, or is it a pretext and he simply doesn't want him here because he would be sympathetic because plaintiff is Armenian and he's Armenian. . . . [I]t really comes down to do I believe that Mr. Sullivan is making up this reason because he simply wants a non-Armenian on the jury . . . or is it a genuine reason? [¶] I'm satisfied that, if someone is trying a case involving a similar injury and a juror has a similar injury and a similar surgery, that would be a basis to allow for a peremptory. I'm well aware of the fact that [Mr. M.] said he speaks Armenian and spoke to his daughter in Armenian, and if I felt that he was being removed because of his ethnic background, I would grant your *Wheeler/Batson* challenge. I don't find under the circumstances that the reason Mr. Sullivan gave is trivial[,] and so the *Wheeler/Batson* motion is denied, and I'll allow for the peremptory as to Mr. [M.]."

(4*) Substantial evidence supports trial court's ruling.*

On voir dire, M. stated that he worked as a gas station cashier, and that he had been injured in an accident at work when a car backed up into him while he was seated in a chair. He brought suit, received $1,500 in a settlement, and the case

was dismissed. Five or six years later, he had to undergo back surgery for the injury he sustained in the accident, and he still needs to undergo neck surgery. M. explained, "My L4-L5 disc was kind of popped out, and back then they said it's not a big deal, but during the years [it] start[ed] getting worse and worse and worse, and finally, I end[ed] up doing surgery."

When asked whether he could be fair to both sides, M. was somewhat equivocal, stating "I cannot say yes, but again, I can try to be fair." Asked by the trial court to explain his hesitation, M. elaborated, "the hesitation is because of that injury. I didn't get fair kind of treatment through my lawyers. That makes me kind of uncomfortable, but like I said, I can try my best to be fair."

The trial court then inquired: "Let me ask it this way. You feel that your lawyers or the system didn't treat you fairly in that case?" M. replied, "It wasn't the system. No. Whatever it was, it was my lawyers what they did[,] to be honest. Later on I heard they've been bought."

Thus, M. expressed some uncertainty that he could be fair to both sides. M. believed that he had been treated unfairly by his attorneys, and felt that he had received inadequate compensation for his injury, in that years after his case settled for a modest sum, his back injury deteriorated to the point that he required surgery. On this record, substantial evidence supports the trial court's determination that Sullivan did not excuse M. on account of his ethnicity.

2. *No abuse of discretion in trial court's determination that Officer Lloyd did not qualify as an accident reconstruction expert.*

a. *Proceedings.*

On February 7, 2017, Brandies brought a motion in limine to preclude Officer Lloyd from rendering opinions as to the cause of the accident, as such opinions and testimony "are within the knowledge and expertise of accident reconstruction and/or traffic engineering expert[s]," and Officer Lloyd lacked such expertise.

In opposition to the motion in limine, Bagumyan argued that Officer Lloyd was duly qualified to render an opinion as to the cause of the accident. Bagumyan asserted, inter alia, Officer Lloyd had about 168 hours of formal training in investigating collisions, he had been a police officer for 20 years and responds to six or more collisions a day, and he had authored between 500 and 1,000 traffic collision reports which included his opinions and conclusions with respect to accident reconstruction and fault.

The trial court deferred ruling on the motion in limine, and ordered a 402 hearing (Evid. Code, § 402) to determine Officer Lloyd's qualification to testify as an accident reconstruction expert.

At the 402 hearing on February 28, 2017, Officer Lloyd testified on direct examination as follows: Over a 20-year period, he had investigated 10,000 to 15,000 accidents, had prepared about 6,000 police reports, and had about 170 hours of formalized accident investigation training.

On cross-examination, Officer Lloyd stated that although he had testified in trial and in depositions, he had never been qualified as an accident reconstruction expert. In this case, in investigating the accident, he tried to determine the area of impact based on the statements of the parties and a witness, as

he found no physical evidence in the street. He admittedly did not "do any analysis . . . to try to verify what the speeds were of the parties by any calculations." Also, he did not do "any evaluation as to the depth of the damage patterns to the vehicles." He concluded, "you talk to [the] parties. You look at damage. Your look at the scene. So that would cover it."

b. *Trial court's ruling with respect to Officer Lloyd's qualifications*.

The trial court ruled as follows: Pursuant to Evidence Code section 720, an expert "must have the knowledge, skill, training, experience, and expertise . . . in that area to testify. The testimony based on direct examination by Mr. Rahmani was as follows: He's been with the Burbank Police Department for 20 years. He does traffic collision[] [investigations] of about five a day three times a week. He does about 15 a week. Reports are prepared in a third of them. He's investigated 10 [to] 15,000 accidents and has prepared 6,000 reports. So he has the background in that area. [¶] In terms of his training, there was not a lot that was provided other than the fact that he had training in the academy and outside of the academy of 170 hours traffic collision investigation basically primary, medium, and advanced. He was trained in how to investigate accidents and how to determine fault. [¶] *On cross-examination . . . he testified that he's never qualified as an accident reconstruction expert before. He was not asked if he's qualified to give his opinion on fault in the past, the only issue I have before me. He's not qualified as an accident reconstruction expert before*. He indicated that there was no physical evidence on the street that would determine the area of impact but an area of impact was set forth. He set forth the location indicating it was in the

northbound lane. He indicated that he did not calculate the speeds and the effect of the physical damage was not analyzed. [¶] I don't think there's enough here for the witness to testify as an expert. He doesn't qualify based upon the record that's before me to testify." (Italics added.)

c. *Standard of appellate review.*

"We review the trial court's ruling on the admissibility of expert testimony for abuse of discretion, except to the extent that the ruling is based on the court's conclusion of law, which we review de novo. (*Sargon* [*Enterprises, Inc. v. University of Southern California* (2012)] 55 Cal.4th [747,] 773 [(*Sargon*)].) A court abuses its discretion if its ruling is ' "so irrational or arbitrary that no reasonable person could agree with it." ' (*Ibid.*) A court's discretion also is limited by the applicable principles of law. (*Ibid.*)" (*Garrett v Howmedica Osteonics Corp*. (2013) 214 Cal.App.4th 173, 187.)

d. *No abuse of discretion in trial court's ruling.*

Bagumyan contends the trial court abused its discretion in finding Officer Lloyd did not qualify as an expert given his training and many years of experience in investigating thousands of traffic collisions. Bagumyan relies on *Kastner v. Los Angeles Metropolitan Transit Authority* (1965) 63 Cal.2d 52 (*Kastner*), which states in relevant part: "It is equally clear that cases may occur where the opinions of trained experts in the field on this subject [as to where a collision between two vehicles occurred] will be of great assistance to the members of the jury in arriving at their conclusions. In such cases, a traffic officer who has spent years investigating accidents in which he has been required to render official reports not only as to the facts of the accidents but also as to his opinion of their causes, including his opinion, where

necessary, as to the point of impact, is an expert. Necessarily, in this field much must be left to the common sense and discretion of the trial court. [Citation.]" (*Id.* at p. 57.)

However, *Kastner* does not stand for the proposition that traffic officers are qualified as accident experts for all purposes. There, the issue was whether the officer was qualified to render an expert opinion with respect to the *point of impact* in a bus-pedestrian accident. (*Kastner*, *supra*, 63 Cal.2d at pp. 56–58.)

Unlike *Kastner*, the issue here was whether Bagumyan had sufficient perception-reaction time, from the time he saw Brandies's vehicle, to brake and avoid the collision. Officer Lloyd could not speak to that issue, as he admittedly did not do any analysis to determine "what the speeds were of the parties by any calculations." Thus, the record supports the trial court's finding that Officer Lloyd "did not calculate the speeds and the effect of the physical damage was not analyzed." Accordingly, the trial court acted within the bounds of its discretion in concluding Officer Lloyd was not qualified to testify as an accident reconstruction expert in the instant case.

3. *No showing the trial court abused its discretion in denying Bagumyan's motion in limine to exclude parts of defense expert Pearl's testimony*.

a. *Procedural history*.

The deposition of Pearl, Brandies's accident reconstruction expert, was taken on February 22, 2017, the day after trial commenced. In substance, Pearl opined that Bagumyan was traveling at about 20 miles per hour when he made the left turn onto North Brighton Street, he then accelerated to 37 miles per hour; he had 1.9 seconds prior to impact to avoid the collision,

and had he braked, he could have stopped in 65 feet and the accident would have been avoided.

On March 1, 2017, Pearl emailed defense counsel, stating: "As I reviewed my deposition for corrections, I noticed that one of my opinions was not clearly stated. [¶] The portion of my analysis wherein I determined that if Bagumyan turned onto Brighton at 20 miles per hour and accelerated to approximately 37 miles per hour at impact was done to confirm Ms. Brandies' testimony that Bagumyan's car was not on Brighton when she began to cross the alley. [¶] At the bottom of page 2 of my analysis sheets, copy attached, which are also attached to my deposition, I did note that: 'Ford [Brandies's vehicle] starts to move before Chrysler [Bagumyan's vehicle] on Brighton.' [¶] Mr. Aynechi's [plaintiff's counsel's] questioning did not clearly elicit the opinion and at the time of the deposition I did not realize that the opinion was not clearly stated. [¶] It is my opinion that Brandies'[s] testimony that she looked before she started to cross and that Bagumyan's car was not on that portion of Brighton between her location and Verdugo is reasonable. My analysis described above and on Page 2 of my analysis sheets shows how that could have occurred."

A few minutes after receiving Pearl's email, defense counsel forwarded it to plaintiff's counsel and stated, "Let me know if you want to depose him." Plaintiff's counsel declined to do so.

On March 7, 2017, Bagumyan filed a motion in limine (motion in limine No. 12) to exclude parts of Pearl's testimony. Bagumyan sought, inter alia, to preclude Pearl from testifying to the following: (1) Bagumyan's speed of 20 miles per hour when he completed his left turn onto Brighton Street; (2) Bagumyan's acceleration rate once he turned onto Brighton; (3) Bagumyan's

speed of 37 miles per hour at the point of impact; and
(4) Bagumyan's ability to avoid the collision by braking timely.

Bagumyan argued: Pearl's testimony regarding speed and acceleration rate should be excluded because it was not supported by sufficient case-specific admissible evidence and lacked foundation; Pearl's testimony as to Bagumyan's reaction time lacked foundation and was beyond the scope of Pearl's expertise; and Pearl should be precluded from testifying that Bagumyan had not started to make his turn onto Brighton when Brandies began to enter Brighton from the alley because Pearl did not disclose that opinion at his deposition. In support, Bagumyan relied on *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 919 [expert's obligation to disclose in deposition the substance of the facts and opinions which the expert will testify to at trial] (*Kennemur*).

In opposition, the defense asserted that Pearl's testimony would be based on hypotheticals. Further, Pearl had reviewed the trial transcripts of Bagumyan, Brandies, and Kenneth Kurland, a percipient witness, "so he has a foundation for all of his opinions." Sullivan contended that Bagumyan's objections went to the weight of the evidence, rather than its admissibility, and could be dealt with on cross-examination. As for Pearl's supplemental opinion which was not stated in deposition, Sullivan argued that Pearl did not cover that point in deposition "because he forgot about the portion of his analysis where he said that, if Mr. Bagumyan turned onto Brighton at 20 miles an hour and accelerated to 37 at impact, then Mrs. Brandies would not have seen Mr. Bagumyan's car when she . . . started to move out from the alley into the street. So when we checked that, I went ahead and forwarded that information . . . to [plaintiff's counsel]

by e-mail . . . . It was just an oversight. [¶] So I then [offered] to submit Mr. Pearl for his deposition, and there has been no response to that."

In ruling on the motion in limine, the trial court stated: "An expert may not discuss case-specific facts unless there is testimony from a witness on the subject or issue. According to *Kennemur* and *Jones* [*v. Moore* (2000) 80 Cal.App.4th 557, 564–565 (*Jones*)[5]], Mr. Pearl is restricted to those opinions he gave at his deposition and any additional opinions he offered[,] provided they were given to plaintiff's counsel, and they were by the e-mail of March [1], 2017 and provided. He was offered for deposition, which he was per the e-mail of March [1], 2017. [¶] During his testimony today on direct, Mr. Pearl must explain how he arrived at the plaintiff's speed of 20 miles an hour and what evidence he relied upon. During his testimony on direct, Mr. Pearl must explain how he arrived at the acceleration rate of .25 GS, and I want evidence he relied [on] during direct. Mr. Pearl must explain how he arrived at an impact speed for the plaintiff of 37 miles an hour and on what evidence he relied. He must explain how he arrived at a perception reaction time of 1.5 seconds."

The trial court then denied the motion in limine to exclude portions of Pearl's testimony, stating "[t]he opinions at deposition

---

[5] *Jones* upheld the exclusion at trial of expert testimony which went beyond the opinions the expert expressed in deposition. (*Jones*, *supra*, 80 Cal.App.4th at pp. 564–565.)

may be given and those were the nine opinions[6] that were referred to in the motion[,] provided[] there is evidence to support [the] opinions. So I'm going to allow his testimony. *I think there's sufficient evidence to allow it, but it's subject to an objection, and I'll just rule on the objections as we go forward on an individual basis.* (Italics added.)

b. *No showing of an abuse of discretion in the trial court's denial of Bagumyan's motion in limine.*

Having set forth the relevant procedural history at some length, we now turn to Bagumyan's arguments on appeal with respect to Pearl's testimony.

---

6 Those nine opinions expressed by Pearl in his deposition were enumerated in the motion in limine as follows: "1. 'It is my opinion that the Delta-v for the Ford, the Brandies Ford, as far as a frontal collision, would be in the range of 3 to 5 miles an hour.' [Citation.] [¶] 2. 'It is my opinion that the lateral Delta-v, the sideways Delta-v for Mr. Bagumyan's Chrysler would be in the range of 2 or 3 miles per hour.' [Citation.] [¶] 3. 'Then I've got the travel speed of Ms. Brandies's Ford at 5 to 8 miles an hour.' [Citation.] [¶] 4. 'It is my opinion that it took Ms. Brandies between 3.4 and 5.6 seconds to travel from a stop at the west curb line.' [Citation.] [¶] 5. 'The Chrysler speed of impact happens about 37 miles an hour.' [Citation.] [¶] 6. 'It took him about 3.1 seconds to travel from the north curbline of Verdugo to the point of impact, and when we include turning from the centerline of Verdugo, it would be about 4 and a half seconds total.' [Citation.] [¶] 7. 'The rest position or the parked position of the Chrysler was about 115 feet north of the point of impact.' [Citation.] [¶] 8. 'I allowed [Mr. Bagumyan] a perception-reaction time of l and a half seconds.' [Citation.] [¶] 9. '[Mr. Bagumyan] would have had 1.9 seconds prior to impact to try to avoid.' [Citation.]"

Bagumyan's argument is as follows: Pearl's entire testimony was layer upon layer of guesses and conjecture in that (1) Pearl guessed that Bagumyan stopped in a typical position and made a smooth turn; (2) Pearl assumed that Bagumyan had a typical acceleration rate; (3) Pearl assumed that Bagumyan accelerated at .25 GS; and (4) Pearl assumed the photograph of Bagumyan's vehicle parked after the collision depicted the exact spot his vehicle came to rest after the collision. Combining these assumptions, Pearl was able to reach his objective of testifying that Bagumyan was travelling 37 miles per hour at the time of the incident. Further, Pearl was allowed to offer his brand new opinion with respect to the location of Bagumyan's vehicle at the time Brandies entered Brighton Street from the alley.

These arguments by Bagumyan are meritless because they do not address the relevant issue. Instead of addressing the arguments made in support of, and in opposition to, the motion in limine, and the trial court's resolution of the motion—which was to admit the testimony subject to objection if adequate foundation were not established—Bagumyan only discusses the testimony at trial which came in *after* the trial court ruled on the motion in limine. However, the testimony that was admitted after the trial court ruled on the motion in limine, testimony that *could have been* objected to, has no bearing on whether the trial court acted within its discretion in conditionally denying the motion to preclude portions of Pearl's testimony. Bagumyan simply has not identified any abuse of discretion in the trial court's ruling on the motion in limine, that is to say, he has not demonstrated that the trial court's ruling was " 'so irrational or arbitrary that no reasonable person could agree with it.' " (*Sargon*, *supra*, 55 Cal.4th at p. 773.)

Bagumyan merely argues that after its ruling on the motion in limine, the trial court erred in allowing Pearl to present expert testimony that was based on speculation and conjecture. However, Bagumyan does not point to any specific objections that he made at trial to Pearl's testimony, which was presented immediately after the trial court invited Bagumyan's counsel to make "objections as we go forward on an individual basis."[7] Nor does Bagumyan contend the trial court erred in overruling any such evidentiary objections to Pearl's testimony.

Thus, Bagumyan has failed to show any abuse of discretion in the trial court's conditional denial of his motion in limine to exclude portions of Pearl's testimony, or in the trial court's subsequent admission of Pearl's testimony at trial.

4. *Bagumyan has forfeited his contention that the trial court erred in denying his motion to strike Pearl's testimony*.

Bagumyan's remaining argument, consisting of a single sentence, is as follows: After the trial court allowed Pearl to testify to an opinion that he had not disclosed in deposition, the trial court committed reversible error in denying Bagumyan's motion to strike Pearl's testimony. This contention requires no

---

[7] Evidence Code section 353 states: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) *There appears of record an objection* to or a motion to exclude or to strike the evidence *that was timely made and so stated as to make clear the specific ground of the objection or motion*; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that *the admitted evidence should have been excluded on the ground stated* and that the error or errors complained of resulted in a miscarriage of justice." (Italics added.)

discussion, both because Bagumyan has failed to provide an adequate record for review and because he has not properly briefed the issue.

An appellant has the burden of providing an adequate record for review, and the failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. (*Rhue v. Superior Court* (2017) 17 Cal.App.5th 892, 897.) With respect to the proceedings on the motion to strike, the record is inadequate. Bagumyan has merely provided this court with a copy of the motion to strike he filed on March 9, 2017. He has not provided us with Brandies's opposing arguments nor has he shown that the motion to strike was unopposed. Further, Bagumyan has not provided this court with the trial court's ruling on the motion to strike; his brief merely indicates that the trial court denied the motion. Without a record on the motion to strike, this court cannot perform its reviewing function.

In addition to failing to provide an adequate record concerning the motion to strike, Bagumyan has not properly briefed the issue. An appellate argument is forfeited by failing to make anything more than a passing argument, unsupported by citation to authority and to the record. (*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 918.) Therefore, Bagumyan's cursory contention that the trial court erred in denying his motion to strike is forfeited.

DISPOSITION

The judgment is affirmed. Brandies shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

KALRA, J.*

---

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