Filed 8/1/18 P. v. Morgan CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIE MORGAN, JR., Defendants and Appellants.	B283556 (Los Angeles County Super. Ct. No. VA142171)

APPEAL from a judgment of the Superior Court of Los Angeles County. Raul Sahagun, Judge. Affirmed.

Joshua Schraer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Willie Morgan, Jr. (defendant) appeals from his conviction for attempted carjacking. He contends that the judgment must be reversed because the trial court admitted irrelevant evidence which was more prejudicial than probative. Although the evidence was not relevant, we conclude that any error was harmless, and affirm the judgment.

BACKGROUND

Defendant was charged in an amended information with a single count of attempted carjacking in violation of Penal Code sections 215, subdivision (a), and 664, subdivision (a).[1] It was also alleged that defendant had suffered two prior serious or violent felony convictions, subjecting him to sentencing under sections 667, subdivisions (b) through (j), and 1170.12 (the "Three Strikes" law), and under section 667, subdivision (a)(1). A jury found defendant guilty as charged, and defendant admitted the prior convictions.

On June 29, 2017, the trial court sentenced defendant to eight years in prison, comprised of the low term of 18 months, doubled as a second strike, plus five years pursuant to section 667, subdivision (a). The court imposed mandatory fines and fees and awarded custody credits. Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Zachery London (London) was a used car salesman at "Cash or Finance Auto" on June 11, 2016, at about 7:00 p.m., when he saw defendant on the lot looking at a Honda. London approached and asked defendant whether he was car shopping. As he had the key in his pocket for a nearby Acura, London suggested they look at the Acura.

---

[1] All further statutory references are to the Penal Code unless otherwise specified.

London described the arrangement of the lot and identified photographs showing the location of the Acura in relation to other cars and a nearby wall. The lot held 80 to 100 cars "packed in," in long rows. There were a number of rows of cars parked in front of the Acura with a wall behind it. London could not recall whether the Acura was obstructed by other cars that evening or whether it would have been easy to drive the car out.

After defendant agreed to look at the Acura, London got into the passenger seat and defendant into the driver's seat -- the usual arrangement when London showed a car. London handed the key to defendant who then started the car. Defendant asked London whether he was the owner or a salesman, and when London replied he was a salesman, defendant told him he was going to steal the car. Defendant told London that if he would participate, defendant would give him a Jaguar. Defendant proposed that they go for a test drive, and suggested that London later tell the owner that he was elbowed, hit, or something by defendant, which made London jump out of the car, and defendant then drove away.

Pretending to go along with the plan, London told defendant he would get his business card from the office, and reached over to take the key from the ignition. Defendant then pulled London back into the car and struck him with defendant's right hand. London was unable to remove the key. London managed to get out of the car and alerted coworkers in the office. Defendant also got out, ran around the front of the car toward London, who was now cornered between the wall and another car, and said something like, "You fucked up. I'm going to hurt you." London responded by punching defendant in the nose or upper mouth. As London tried to hold defendant in place, defendant punched London several times, hard in the upper arms and body and back.

London's coworker, Faoud Hamida, testified that he saw London jump out of a car, heard him call for help, and saw defendant attack London, prompting Hamida to go to London's aid. When Hamida reached London, he was kneeling on the ground trying to protect his face from defendant, who was standing over London, looking like he was ready to throw a punch. Hamida got defendant to the ground, where he and London held him until police arrived.

The 911 call was played for the jury. In the call London described defendant, repeated several times that a man had tried to steal a car, and that he was being held there.

Defense evidence

Defendant's girlfriend Elizabeth Lockett (Lockett) testified that in June 2016, defendant owned a 2001 or 2002 Jaguar, which was not functioning, so they had been looking at cars at various dealerships during the first week or so of June. On June 3 or 4, defendant injured his right hand. She identified a photograph of defendant's swollen hand taken soon afterward.

Deputy Sheriff Christopher Avila initially testified that Hamida told him that defendant punched London with his closed right fist while he was on the ground, but on cross-examination, Deputy Avila testified that Hamida did not tell him anything about a right-handed fist.

Radiologist Michael Douek testified that he reviewed an x-ray of defendant's hand on June 4, 2016, the date it was taken, and found a fracture of the fifth metacarpal bone, that runs from the base of the little finger to the wrist. There was soft tissue swelling around the fracture and some bruising.

Emergency room physician Cary Gallardo testified to having treated defendant on June 4, 2016, after defendant came in with swelling and pain in the right hand. Dr. Gallardo ordered an x-ray and diagnosed him with a fracture. On cross-

examination, Dr. Gallardo testified that he did not remember asking defendant how he injured his hand, but it was his usual and customary practice to do so as part of taking a medical history. Dr. Gallardo observed in the triage notes that the patient reported the injury occurred because of an altercation two days earlier. When asked whether this was a "boxer's fracture," Dr. Gallardo explained that it was sometimes called that, but in this case the fracture was lower than the typical boxer's fracture. Dr. Gallardo tested defendant's range of motion and found a mild decrease due to pain, but defendant was still able to swing his arm, left to right, parallel to ground, and he could wiggle his fingers and close his hand into a fist. Dr. Gallardo could not give an opinion on what defendant's condition or capabilities would have been on June 11. Defendant's hand was placed in a splint removable by the patient, and he was given medication for inflammation and pain.

Emergency room physician Chun Joey Chang saw defendant on June 11, 2016, when defendant was brought there by deputies. Defendant had what looked like a facial contusion, a shoulder contusion, and a fracture of a right fifth metacarpal, which runs from wrist toward small finger. Dr. Chang gave him a splint and instructions for rest. Defendant was not in much pain, and refused Tylenol. Dr. Chang wrote in his report that this was a boxer's fracture, but that was incorrect, as the fracture was not in the precise area to be a typical boxer's fracture. The patient did not tell Dr. Chang that he had injured his hand before June 11.

Defense investigator Tamara Gayden, interviewed London by telephone in August 2016. London told her that defendant was in the Acura's driver's seat and he was in the passenger seat when he grabbed the key out of the ignition as he exited the car through the passenger door. He added that defendant assaulted

London by hitting his shoulder, neck, and chest areas after saying to him, "You fucked up." Gayden made an unsuccessful attempt to obtain surveillance video from a nearby gas station.

The court read from the preliminary hearing transcript in which the judge stated: "'Right now he's in custody. He not only has the last two fingers of his right hand bandaged, they are in a visible cast or splinted so that it's rigid, and the Ace bandage extends well up his wrist.'"

Defendant did not testify.

Rebuttal

Deputy Avila testified that on June 11, 2016, he saw no sling, brace, or other medical device on defendant's right hand, and defendant did not tell him that he had injured his hand prior to that date.

DISCUSSION

I. Evidence Code section 352 objection

Defendant contends that the trial court erred in admitting Dr. Gallardo's testimony that defendant's hand fracture occurred during an altercation.

Prior to cross-examining Dr. Gallardo, the prosecutor asked for a ruling on the admissibility of defendant's statement that he had injured his right hand in a fight with police, found in his medical records. The prosecutor argued that the statement was admissible because it was not hearsay, it was a party admission, and Dr. Gallardo "presumably" relied on the statement in forming his diagnosis. Defense counsel argued that the statement was irrelevant and highly prejudicial. The court found the evidence relevant, but citing Evidence Code section 352, excluded the part of the statement that defendant's altercation was with the police.

Dr. Gallardo then testified that he did not remember asking defendant how he had injured his hand, but it was his

customary practice to hear the patient's complaints, and to ask how the injury occurred, the location and quality of the pain, whether it radiates, and what makes it better or worse. The doctor said he customarily noted the answers under the heading, "History of Present Illness." Dr. Gallardo explained that the manner in which the injury occurred was important "to help us make a diagnosis." Dr. Gallardo was not asked, and did not testify whether he had in fact relied on defendant's statement to form a diagnosis.

Later, while discussing jury instructions, the trial court observed that it found defendant's statement relevant because the doctor relied on it to form his diagnosis, and that is was also admissible as a party-admission exception to the hearsay rule.[2] The court refused defendant's request for CALCRIM No. 360, which would have instructed the jury that defendant's statement found in Dr. Gallardo's notes was admitted only for a limited purpose, to be considered only to evaluate the expert's opinion, not as proof that the information contained in the statement was true.

Defendant contends that the statement should have been excluded as irrelevant and more prejudicial than probative, and the trial court erred in refusing his proposed limiting instruction on the issue.

Relevant evidence is evidence "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 court in its discretion may exclude evidence, including relevant evidence, if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice. (*People v. Scott* (2011) 52

---

[2] See Evidence Code section 1220.

Cal.4th 452, 490; § 352.) The party challenging the trial court's discretion must demonstrate that it was exercised in an irrational or arbitrary manner, or that it was not "'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

Defendant also argues that the statement amounted to inadmissible character evidence under Evidence Code section 1101, which eroded his credibility. However, defendant's relevance and Evidence Code section 352 objections failed to preserve his claim that the trial court admitted the evidence in violation of Evidence Code section 1101. (*People v. Doolin* (2009) 45 Cal.4th 390, 437.)

Defendant reasons that the statement was irrelevant because the prosecution did not dispute that defendant fractured his hand the week before the charged incident, and the fact that the fracture occurred in a fight was not otherwise relevant to any disputed fact at trial. Respondent contends that the evidence was relevant because Dr. Gallardo relied on the statement in forming his diagnosis.

However, Dr. Gallardo did not testify that he relied on defendant's statement in making a diagnosis. When the prosecutor asked why it was important to know how an injury occurred, Dr. Gallardo explained: "It's to help us make a diagnosis." He did not indicate it was important in defendant's case. He did not remember asking defendant how the injury occurred. All he remembered was the swelling and pain in defendant' right hand, reviewing an x-ray, and diagnosing him with a fracture. The statement was in the triage notes because it was Dr. Gallardo's usual and customary practice to take a medical history, which included the manner in which any injury occurred.

Respondent contends that the statement was relevant for its truth, but does not suggest how defendant's altercation a week earlier was of consequence to the determination of any disputed issue in the case. The doctor's diagnosis was not disputed. We thus do not agree that the manner of the previous injury was relevant or probative of any issue of consequence in this case. However, we agree with respondent that the error was harmless.

Error in the admission of evidence is generally reviewed for prejudice under the test of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Hernandez* (2011) 51 Cal.4th 733, 746.) Under that test, we examine the entire cause, including the evidence, to determine whether the reasonable probability that defendant would have obtained a more favorable result had the evidence been excluded. (*Watson*, *supra*, at p. 836; Evid. Code, § 353, subd. (b); Cal. Const., art. VI, § 13.) It is the defendant's burden to demonstrate the reasonable probability of a different result. (See *Hernandez*, at p. 746.)

At the outset, we reject defendant's contention that this is a close case due to a note from the jury that it was "hung" after just one hour of deliberations, and the jury's request for a readback of London's testimony. Whatever the jury's confusion or disagreement, it was easily resolved, as the jury reached a verdict just six minutes after the readback.

We also reject defendant's claim that London did not recall "crucial details any ordinary person would vividly recall." The incident took place a year before trial, the events transpired quickly, and there was no expert witness testimony regarding memory retention of traumatic events by the "ordinary person." In addition, defendant's assertion that London could not remember who sat in the driver's seat is unsupported by the record. London did not forget that he was in the passenger seat, and appeared to be certain, in that it was his usual arrangement

when showing a car. Deputy Avila testified that London told him that he (London) was in the driver's seat and defendant was in the passenger seat. This testimony merely created a minor inconsistency, as London was certain, and his testimony was supported by Hamida, who saw defendant emerge from the driver's seat and run around to the passenger side, where he attacked London. It was also supported by investigator Gayden's testimony that when she interviewed London by telephone in August 2016, London told her he had been in the passenger seat and defendant had been in the driver's seat.

We also reject defendant's contention that London could not remember whether he removed the keys from the ignition. In fact, London recalled that he was unable to remove the key. Investigator Gayden testified that London told her that he grabbed the key out of the ignition as he exited the car. This created another conflict in the testimony, but did not demonstrate a lack of recall on London's part.

Finally, despite defendant's assertion otherwise, we find no comment, let alone "several comments" by the trial judge suggesting that the prosecution's case was weak, that there were flaws in London's testimony, or that London's testimony was "very unusual" and "close to bizarre." On the contrary, it was the *fact pattern* that the court found "bizarre." As respondent notes, the judge stated: "[T]his is an unusual fact pattern, . . . very unusual. This thing just spiraled out of control, Mr. Morgan, but I do think the conduct does match the charge. I think the jury was well within their right to convict you of this charge."

Moreover, we agree with respondent's point that if the jury construed the cause of defendant's injury as suggesting that he was prone to fight, such an inference would assist, not hurt the defense theory. If there had been no evidence of the manner in which defendant had fractured his hand, it would remain

undisputed that there was a physical altercation between London and defendant. Defense counsel argued that London made up the conversation about stealing the car, and that the discussion in the Acura instead involved insulting words and aggressive behavior by London, making defendant angry and causing him to react and continue the fight. Counsel argued that such a scenario indicated that defendant intended to fight, not steal the car. As defendant points out here, London testified that the keys remained in the ignition, indicating that defendant could have stolen the car without London's help. This argument also suggests that defendant was prone to fight, and thus theft was not his motivation. Instructing the jury not to consider defendant's statement for the truth could have undermined rather than assisted defendant's theory.

Furthermore, the prosecution case was strong. Although the incident was indeed unusual, the testimony of London, corroborated by Hamida, presented a compelling eyewitness account. Adding to that, London's excited, contemporaneous statements to the 911 operator in which he repeatedly said that defendant had tried to steal a car, amply supported London's credibility and his version of the events. The jury believed London, and as we discern no reasonable probability of a different result if the trial court had excluded defendant's statement, we conclude that defendant has not met his burden of demonstrating that the trial court's error requires reversal. (See *People v. Hernandez*, *supra*, 51 Cal.4th at p. 746.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST