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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUDEL MARQUEZ,

Defendant and Appellant.

B281593

(Los Angeles County
Super. Ct. No. VA140757)

APPEAL from a Judgment of the Superior Court of Los Angeles County. Michael A. Cowell, Judge. Affirmed.

Elizabeth K. Horowitz, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Robert L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Raudel Martinez appeals his conviction of two counts of false imprisonment (Pen. Code,¹ § 237, subd. (b)) and one count of second-degree robbery (§ 212.5, subd. (c).) Appellant entered a hair and nail salon at closing time, tied up the owner and another worker at the salon with zip ties and tape, and took money from one of the victims. The victims were not able to conclusively identify defendant from photographs and a photographic array, but one victim identified him from a surveillance video. DNA evidence connected defendant to the zip ties and tape used to subdue the victims. On appeal, defendant contends that the trial court erred in denying his motion, in response to a jury inquiry during deliberations, to reopen the evidence to establish that unlike the person in the surveillance video, he did not walk with a limp. We conclude the trial court did not abuse its discretion, and affirm the judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Darina Morn owned a nail and hair salon on Telegraph Road in Pico Rivera. Sopearath Horn was her co-worker.

On Sunday, March 1, 2015, at approximately 6:00 p.m., both women were in the salon working late. They were closing up when they realized they didn't have Horn's car keys. The door to the salon was open, and while they were looking for the keys, defendant walked in.

¹ All statutory references herein are to the Penal Code unless otherwise noted.

Defendant opened his jacket to reveal what Morn believed was a gun tucked into his pants. Morn and defendant stared at each other. Defendant ordered them into the back room of the salon, where they sat on a couch. He asked for their hands and they looked down to avoid seeing him because they were afraid he might hurt them. Defendant tied Morn's hands with tape, and tied Horn's hands with a zip tie.

Defendant said, "Stay still. Open your purse and give me your money." Morn opened her purse and gave defendant about \$650. After taking Morn's money, defendant said, "stay there." He spoke in English.

They waited until it became quiet, and then looked up to see that defendant had gone. After defendant left, they called 911. The women untied each other's hands. Morn put the tape on the receptionist's desk. She did not remember what she did with the zip tie.

Morn described the robber to the police when they arrived. She stated that defendant was husky, tall, and was wearing dark clothing, blue jeans, and a brown jacket. The robber was over five feet five inches, but less than six feet two inches. Dorn described the robber as Hispanic, over six feet tall, and about 40 to 50 years old.

Although she was confident she would be able to identify the man who robbed her, Morn was unable to identify defendant from photographs shown to her after the robbery. Morn could not identify defendant from a six pack photographic array. She did not identify him at trial, although at trial she testified that she could see that defendant was one of the persons in the same photographic array. However, she was not be sure defendant was the robber.

Vicente Ortiz, the owner of the El Pescador restaurant next door to the salon, had surveillance cameras that pointed towards the nail salon. The day of the robbery, he gave the police the surveillance videos from the cameras. Ortiz had never seen the man in the video before. Morn identified defendant as the person in the surveillance tape by his build and his clothing.

Deputy Sheriff Hector Rosas responded to the call at the nail salon. Deputy Rosas found and collected the zip tie and tape used to bind the women. He used Latex gloves and secured them in a bag. He put the case file number on the bag, signed it, and placed it in an evidence locker.

Deputy Sheriff Yvonne Gudino knew defendant as a transient who frequented the area near the nail salon. Defendant slept behind a 7-Eleven at 9311 Slauson, about a mile and a half away from the nail salon.

Deputy Sheriff Alejandro Diaz arrested defendant on December 10, 2015 near the dumpster area of the 7-Eleven. At the time, defendant was 48 years old. During the arrest, defendant spoke Spanish. He did not have any tape or zip ties on him, and did not have a weapon.

Stephanie Sandoval, criminalist with the Sheriff's Department analyzed the DNA on the tape and zip ties. She analyzed DNA samples from the victims as well as from defendant. Sandoval's analysis established that with a probability of 42 trillion to one, defendant's DNA was on the tape. With respect to the zip tie, the probability was 2400 to one.

After defendant's first trial ended in a mistrial, an amended information charged him with two counts of kidnapping (§ 207, subd. (a); counts 1 and 2) and one count of robbery in the second degree (§ 212.5, subd. (c); count 3) (Darina M.) The second jury convicted defendant on counts 1 and 2 of the lesser included offense of false imprisonment (§ 237, subd. (b)), and convicted him on count 3 of robbery as charged (§ 212.5, subd. (c).)

The trial court sentenced defendant to the upper term of five years on count 3, and stayed the sentences on counts 1 and 2 pursuant to section 654.

DISCUSSION

Defendant argues that the trial court abused its discretion when it denied defense counsel's request, in response to a jury inquiry during deliberations, to reopen the evidence to show the jury that unlike the person in the video, defendant did not walk with a limp. We disagree.

A. *Factual Background*

During deliberations, the jury sent out a note asking: "The video appears to show [defendant] walking with a limp. May we visually see [defendant] walk and can it be used in deliberation?" Defense counsel asked that the court allow him to reopen the evidence, but the court stated it was inclined to deny the request: "It's too late for testimony. You could have had him walk and—stand up and walk. First of all, this happened so long ago, he could have had a broken leg at that time, for all I know. It's completely irrelevant at this stage of the proceedings.

He may have had a pebble in his shoe, if it was him. I'm not going to allow it. I'll say no."

In the presence of the jury, the court told the jury that "certainly you can use your observations of the video in deliberation, but this court has ruled that since both sides had rested the evidence has been concluded. This would constitute additional evidence at this stage and I'm not going to permit it."

B. *Discussion*

A motion to reopen the evidence is addressed to the trial court's discretion. (§ 1094; *People v. Homick* (2012) 55 Cal.4th 816, 881.) In determining whether an abuse of discretion occurred, the reviewing court considers four factors: (1) the stage of the proceedings when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence. (*People v. Masters* (2016) 62 Cal.4th 1019, 1069.) "There is no abuse of discretion in refusing to reopen where 'the evidence the defense sought to offer at reopening was indisputably available *during* the trial.'" (*People v. Jones* (2012) 54 Cal.4th 1, 66.)

This case is remarkably similar to *People v. Funes* (1994) 23 Cal.App.4th 1506 (*Funes*). In *Funes*, the defendant was charged with murder of a rival gang member, whose head was crushed on the left side with a blunt object (a bat). (*Id.* at p. 1510.) During deliberations, the jury asked whether the defendant was left- or right-handed. The

trial court informed the jury it was bound by the evidence in the record and refused to answer the jury's question. (*Id.* at p. 1519.) Defendant moved to reopen the case to present evidence he was right-handed and thus could not have administered the fatal blow. (*Ibid.*) The prosecution argued that the evidence would raise additional issues, including whether the victim turned his head, whether the defendant held the bat with one hand or both hands, and whether the defendant swung the bat or threw it. (*Id.* at pp. 1519–1520.)

The trial court observed that it would have reopened the case, even after arguments, if the omission had been an inadvertent oversight. “But now that the jury has sent out a note on the issue, both sides know that this is something apparently that may interest the jury. I don’t know to the degree that it may interest them, but to do this now it puts, I think, the opponent, the District Attorney at a distinct disadvantage. [¶] If there is an issue or he would have good cause to believe that there is an issue that the jury is interested in I would have to grant him leave to call all of the percipient witnesses back to see what hand it was. . . . He might want to cross-examine on the issue of whether or not he is left handed or right handed; he might want to change all of his arguments in the case . . . and when I weigh all of that against the time consumed and all of the possible delays . . . I am going to exercise my discretion and the motion is going to be denied.” (*Funes, supra*, 23 Cal.App.4th at p. 1520.)

The appellate court in *Funes* affirmed, finding that the evidence came at an extremely late stage in the proceedings, and the evidence easily could have been introduced earlier as the medical records

concerning the decedent's injuries were available to the defense. Second, "the evidence was not even 'new;' it was merely overlooked." (*Funes*, *supra*, 23 Cal.App.4th at p. 1521.) Third, because "a jury may accord undue weight to evidence which is admitted close to the time deliberations begin," such danger was acute because the jury had asked for the evidence. Finally, the evidence was not critical, and depended upon numerous other factors, such as whether the defendant used one or two hands or whether the victim turned his head. (*Id.* at p. 1521.)

Funes guides our analysis. That the person depicted in the surveillance video appeared to limp was obviously known to the defense prior to trial. Had it been important to the defense, defense counsel could have asked the court to have defendant demonstrate his walking pace before the close of evidence. Defendant's lack of diligence in pursuing this evidence militates against its admission at the late stage in the proceedings.

Further, as in *Funes*, it was likely that the jury here would accord the late evidence undue emphasis, given that the jurors raised the issue themselves. Finally, the evidence was not particularly probative. Assuming defendant did not walk with a limp at trial, that fact would have little relevance to prove he was not the robber. The crime occurred on March 1, 2015. The trial occurred two years later, in March 2017. That defendant may not have walked with a limp at trial would not reasonably suggest that he did not walk with a limp on the date of the robbery two years earlier, caused by some temporary condition or injury. Moreover, the evidence would not have undercut the victims' testimony (there was no testimony concerning whether the robber

limped) or the DNA evidence connecting defendant to the zip ties and tape used in the robbery. We find no abuse of discretion in the trial court's refusal to reopen the case.²

DISPOSITION

The judgment of the superior court is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.

² Lastly, to the extent that defendant argues the court had a duty to assist the jury, such argument misses the mark. The question here was whether the case should be reopened for additional evidence, not whether the court had a duty to answer a jury question.