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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. CHRISTOPHER CONRAD JOHNSON, Defendant and Appellant.	B270872 (Los Angeles County Super. Ct. No. SA089358)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark T. Zuckman, Judge. Affirmed.

Cindy Brines, 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, Shawn McGahey Webb and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Following a jury trial, defendant Christopher Johnson was convicted of one count of robbery, and the jury found that defendant personally used a knife in the commission of the crime. Evidence at trial included surveillance video showing three suspects committing a robbery at a Travelodge hotel, and a police officer's lay opinion testimony that one suspect in the video looked similar to defendant. Defendant contends the officer's testimony should have been excluded.

We affirm. The officer's lay opinion testimony met the standards for admissibility, and even if it were erroneously admitted, any error was harmless.

FACTUAL AND PROCEDURAL BACKGROUND

A. Information

The Los Angeles County District Attorney (the People) filed an information charging defendant with a single count of second degree robbery (Pen. Code, § 211).[1] The information also alleged that defendant personally used a deadly and dangerous weapon, a knife, in the commission of the offense. (§ 12022, subd. (b)(1).)

B. Trial

John Keefer testified that he was working as the night auditor at a Travelodge hotel in El Segundo when the robbery occurred on September 11, 2014. At about 4:00 a.m., a woman was talking to Keefer at the front desk. A group of three men walked in and came to the front desk. When he was shown still photos from the security video system in the hotel, Keefer identified himself, the woman, and the three men who entered the building.

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

One of the men, who was wearing a sweatshirt with a large lightning bolt design, walked behind the counter and brandished a foot-long knife. The man grabbed Keefer's arm and demanded money. The man led Keefer to the manager's office and asked questions about the safe. While holding the knife near Keefer's neck, the man said something bad would happen if Keefer could not help him open the safe, but Keefer did not have the keys. Keefer showed the man where the safe was located, and Keefer believed one of the other men came in and removed the entire safe. The men also demanded Keefer's wallet, which Keefer gave to them. When Keefer returned to the front desk, he found that there were no bills left in the cash register.

After the robbers left the building, Keefer contacted police. El Segundo police officers arrived, and Keefer reported what happened. He said the suspect with the lightning bolt sweatshirt had a knife. Keefer also wrote a report for Travelodge a couple of days after the robbery. On cross-examination, Keefer admitted that his report said there were four perpetrators, not three. Keefer spoke with El Segundo Police officer Luke Muir a day or two after the robbery. With Muir, Keefer reviewed still photos from security camera video footage recorded during the robbery.

Keefer testified that the perpetrators' faces were partially obscured by their clothing, but "they weren't covered up completely. You could see parts of their face." In court, Keefer identified defendant as one of the robbers, but said, "I don't believe [he] was the one holding the knife though." On cross-examination, Keefer said he thought defendant was one of the perpetrators who went behind the counter during the robbery.

Sanjay Patel testified that he was the owner of the Travelodge in El Segundo. Patel said that there was a cash

register at the front desk, and at each shift change employees would empty the cash drawer of all cash except $300, put the cash in an envelope, and drop it into the safe. On September 11, 2014, when Patel arrived at the hotel, the safe was gone. There had been approximately $4,200 in the safe when it was stolen. Other items that were taken in the robbery included the $300 from the hotel cash register, a cell phone the hotel shuttle driver would use when picking people up from nearby LAX airport, and Keefer's wallet.

Detective Luke Muir testified that he investigates crimes reported in El Segundo. He was assigned to investigate the Travelodge robbery. Muir interviewed Keefer three times. Muir showed Keefer two six-pack photographic lineups; although defendant was in at least one of them, Keefer did not identify him.[2]

Muir also met with Patel and Mike Ahir, the general manager of the Travelodge. Muir reviewed security video footage from the incident with Ahir and Patel; Keefer also was there briefly while they reviewed the video. Muir testified that he verified that the time and date stamp on the video was accurate.

Muir ultimately reviewed three hours of Travelodge security video recorded on September 11 from 2:00 a.m. to 5:00 a.m. The suspects came into the Travelodge building at about 4:00 or 4:01, and they fled by 4:09. The video first showed a woman in a blue shirt, whom Muir said he later identified in the course of his investigation. The video later showed three people walking through the parking lot and entering the building.

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[2] The record does not make clear whether defendant's photograph was in both six-packs Keefer reviewed.

One person in the video was wearing light colored shorts, a dark hoodie sweatshirt with a lightning bolt, and neon green shoes. When Muir interviewed defendant two weeks after the robbery, he noticed that the shoes defendant was wearing matched the shoes in the video. Muir testified that the shoes "appeared to be the same style, same brand, same color of shoe that the suspect is wearing" in the video. Muir took photos of defendant's shoes, and those photos were shown to the jury along with still shots from the video. Using the pictures, Muir pointed out different areas of green and black, and a white Nike swoosh that matched in both pictures. Muir testified that the video showed that the suspect with the lightning bolt hoodie was armed with a knife, because one still shot showed a straight object held in that suspect's closed hand.

The video also showed that one suspect wore a shirt with the word "security" written across the back. This is the suspect who carried the safe out of the building. This suspect was Edward Gilmore, whom Muir identified as a part of his investigation.[3]

In his interview with Muir, defendant said he had been at the Travelodge at about 2:00 in the morning and he knew who committed the robbery, but he was not there when the robbery occurred. Defendant's phone was collected and Muir secured a search warrant for the phone. Muir took the phone to Los Angeles Sheriff's Department detective Jarry Saba, who testified that he regularly engages in cellular phone forensics.

Saba examined defendant's Android smart phone, and testified that the time and date on the phone were accurate. The

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[3] Gilmore was tried separately. (See *People v. Gilmore* (Mar. 28, 2017, B270304) [nonpub. opn.]).

time and date were captured in the photographs taken by the phone. Saba testified that one photo on defendant's phone was an image of black polo shirts that had the word "security" on them. The photo of the shirts was taken on September 10, 2014 at 7:24 p.m., about nine hours before the robbery. Muir testified that the shirt Gilmore was wearing in the surveillance video was consistent with these shirts.

A second photo, taken September 11, 2014 at 5:25 a.m., showed a gray safe. Muir pointed out that a shoe is visible in this photo, and the markings on the shoe matched the neon green Nike shoes in the surveillance video and the shoes defendant was wearing when he was interviewed. Patel testified that the safe in the photo was the hotel safe.

A third photo, taken September 11, 2014 at 5:32 a.m., showed cash in various denominations. A fourth photo, taken the same date at 5:33 a.m., showed "a person sitting with currency in their mouth and on their body." Muir testified that "you can't really tell who it is based on the shadowing, but it had a similar build to Mr. Johnson, a similar appearance." A fifth photo, taken the same date at 6:01 a.m., showed a person holding a stack of currency with a $100 note facing the camera. This photo had been posted on Instagram the same morning, September 11, 2014.

On cross-examination, defense counsel challenged whether Saba could be sure that the date and time on the phone had not been manually changed. Saba said he could not be sure, but the dates and times of photos and text messages on the phone appeared to be sequential, indicating that the date and time had not been manually changed.

Los Angeles County Sheriff's Department detective Mike Davis testified that he was working at the courthouse on November 24, 2015. He observed defendant talking to another person, and overheard the conversation. Defendant told the other person that he had robbed someone, and he had also been booked on kidnapping. He also said that he did not kidnap anyone, but he certainly had a lot of money. Davis put the statements into a report, which he gave to the prosecution.

The prosecution rested, and the defense did not present any additional evidence. The court granted defendant's motion to add a second felony count for receiving stolen property (count 2).

C. Verdict and sentencing

The jury found defendant guilty of second degree robbery, and found true the allegation that defendant personally used a knife in the commission of the crime. The court dismissed count 2. The court sentenced defendant to the high term of five years for the robbery, with an additional year for the weapon enhancement, for a total of six years. The court also imposed various fines and fees.

DISCUSSION

Defendant asserts a single argument on appeal. He contends that the court erred when it "permitted Detective Luke Muir to testify that one of the people who appeared on the surveillance tape of the robbery at the Travel Lodge [*sic*] looked similar to appellant." We review for abuse of discretion a court's admission of testimony identifying a person shown on a surveillance video. (*People v. Leon* (2015) 61 Cal.4th 569, 600 (*Leon*).)

A. Relevant proceedings

Before trial, defense counsel sought to exclude testimony by Detective Muir that the suspect in the lightning bolt hoodie was defendant. Defense counsel also sought to exclude any testimony from Muir that the shoes in the video and the shoes defendant was wearing at his interview were the same shoes. Defense counsel said that the actual shoes were not in evidence, and "[i]f he wants to say they look similar, they do look similar, and I would object to anything more than that." The court said it was not concerned about Muir stating that the shoes were the same, but "[w]ith regard to his conclusion that the defendant is the person on the video or in the stills, that's more problematic for me." The court and counsel discussed Muir's bases for concluding that the suspect and defendant looked similar, such as facial characteristics and build. The court did not make a ruling at the time.

Later, during a break in Muir's testimony, the court said, "The court's tentative ruling is that the witness can say that the defendant appears to be similar to the person depicted in the video. You can ask the – a witness why he believes that. I'm inclined to restrict the witness to saying what objective facts in the video lead him to believe that it depicts the defendant, and he can say things like height, weight, facial characteristics, facial similarity, body type if he wants. . . . Essentially, this would be lay witness testimony rather than expert witness testimony, and counsel can cross-examine him on the underpinnings of his opinion. I do not want the officer to conclusively say he believes it's the defendant, because I believe that ultimately is the ultimate question for the jury." The court then asked, "Are both

sides comfortable with that ruling?" Both counsel answered "yes."

During Muir's testimony, he said he watched the video about 20 times, and many more times paused the video, took still shots, and viewed it frame-by-frame. One portion of the video offered the best view of the face of the suspect in the lightning bolt hoodie. The jury was shown still shots from this portion of the video. Muir testified that while he interviewed defendant, "based on looking at booking photos . . . that I took of Mr. Johnson while in custody with the still frames, though I couldn't see a full face in this still frame, I believed the nose, mouth, and portion of the eyes that I could see on the photo looked similar to Mr. Johnson." Muir also testified that "based on a number of factors, including the shoes that the person was wearing, including his appearance on the surveillance video, that would be build, like, body structure, height, from what I can see in the surveillance video, the nose, eye, and mouth that we just talked about, I believe that person looked similar to the defendant." On cross-examination, Muir clarified that the suspect in the lightning bolt hoodie looked somewhat shorter than the other suspects, his shoulder width was visible in the videos, and the bagginess of his sweatshirt indicated that he was slim.

As the video was played and paused during Muir's testimony, Muir testified about what was visible on the video: "You can see one point in the where it appears that the defendant in the lightning bolt or the suspect in the lightning bolt with the hooded sweatshirt is looking back. . . ." Defense counsel did not object. Shortly thereafter, the prosecutor asked, "Stopping at 4:09:22, can you tell the jury what you believe you see there?" Muir began to answer, "Mr. Johnson appears to be --." Defense

counsel objected, and the objection was sustained. Muir then went on to testify what the "suspect" was doing in the video.

Later at sidebar, the court noted defense counsel's objection to Muir's testimony referencing defendant specifically, and said, "If you would like, I will instruct the jury that the jury ultimately needs to draw their own conclusion, or I can leave it alone if you would care not to highlight that testimony." Defense counsel requested a mistrial and asked for the instruction. The court denied the mistrial. The court then instructed the jury, "On two occasions, I believe I sustained an objection and struck an answer on the part of the witness as to his opinion as to who is depicted in the video. Ultimately, it is up to the jury to determine if the person depicted in the video is the defendant or not or whether you have reasonable doubt as to whether or not the person depicted in the video is the defendant. That, ultimately, is your call, not the call of any witness." Defense counsel then cross-examined Muir.

When instructing the jury at the end of trial, the court included CALCRIM No. 333: Opinion Testimony of Lay Witness: "A witness who was not testifying as an expert gave his opinion during the trial. You may but are not required to accept those opinions as true and correct. You may give the opinions whatever weight you think appropriate. Consider the extent of the witness's opportunity to perceive the matters on which his or her opinion is based, the reasons the witness gave for an opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence."

In closing arguments, defense counsel told the jury that Muir's opinion about whether defendant was in the video was not binding on them: "If Detective Muir says, Oh, yeah, that is him, I can tell because of the build. I can tell because of the facial features and everything, so what? You have to decide that. You can weigh the pictures, you can weigh the independent evidence that's been presented to determine whether or not Mr. Johnson was the one in the lightning bolt jacket."

B. Forfeiture

The Attorney General argues that defendant has forfeited any objection to testimony that defendant looked "similar to" the suspect, because counsel expressly indicated that he was "comfortable" with this testimony. Defense counsel objected to Muir's testimony at the beginning of trial. Although it is not entirely clear whether counsel intended to object to any definitive statement that the suspect in the video *was* defendant, or any statement that the suspect in the video simply looked "similar to" defendant, we find that the objection was sufficiently preserved. (Evid. Code, § 353.)

C. Analysis

"Court of Appeal decisions have long upheld admission of testimony identifying defendants in surveillance footage or photographs." (*Leon*, *supra*, 61 Cal.4th at p. 601; see also Evid. Code, § 800 [A lay witness may testify to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding of his testimony].) Defendant argues that Muir's testimony should have been excluded nonetheless because "the testimony was not necessary for the jury to determine the crucial identity issue." In support of this argument, defendant cites *People v. Mixon* (1982) 129 Cal.App.3d 118 (*Mixon*), which

relied on an earlier case, *People v. Perry* (1976) 60 Cal.App.3d 608 (*Perry*), to state that two predicates were required "for the admissibility of lay opinion testimony as to the identity of persons depicted in surveillance photographs: (1) that the witness testify from personal knowledge of the defendant's appearance at or before the time the photo was taken; and (2) that the testimony aid the trier of fact in determining the crucial identity issue." (*Mixon, supra*, 129 Cal.App.3d at p. 128.) Defendant focuses on the second factor, arguing that "Muir was in no better position to make an identification of the person depicted in the surveillance video than the jurors themselves."

In *Mixon,* the defendant/appellant's "primary contention is that the trial court erred in allowing Officers Brown and Burks to identify appellant as a subject partially depicted in one of the surveillance photos." (*Id*. at p. 127.) The court noted that "[i]dentity is a proper subject of nonexpert opinion . . . but cases have recognized certain prerequisites to the admissibility of photographic identification testimony, particularly when such testimony comes from law enforcement officers." (*Ibid*.) The court discussed the requirements from *Perry*, above, and held that the testimony at issue was admissible. The testimony met the first *Perry* factor because "[b]oth officers had had ample prior contact with appellant. Both identified him unequivocally and without hesitation. '[T]he question of the degree of knowledge goes to the weight rather than to the admissibility of the opinion.' (*Perry, supra*, 60 Cal.App.3d 608, 613, [131 Cal.Rptr. 629.]) We thus reject appellant's argument that insufficient foundation was laid for the testimony." (*Mixon, supra*, 129 Cal.App.3d at p. 131.) The second *Perry* factor was also met because "the surveillance photograph was not a clear depiction of the subject, and appellant

had changed his appearance before trial." (*Ibid*.) In addition, the officers' testimony helped the jury identify a second robber in the surveillance photo. (*Ibid*.)

Defendant also cites *Leon, supra*, 61 Cal.4th 569. In *Leon*, the Supreme Court cited *Perry* and *Mixon*, and held that an officer is not required to be familiar with the defendant *before* the crime in order to testify about the identity of a suspect in a surveillance video. (*Id* at p. 601-602.) The defendant in *Leon* argued that "the trial court erred when it allowed a detective to identify him as the person shown on the surveillance videos of two robberies." (*Id*. at p. 600.) As the video played before the jury, the prosecutor asked the detective whether he recognized the jacket of the person entering the store. Defense counsel objected that the detective's testimony would be inadmissible lay opinion. (*Ibid*.) The court allowed the testimony subject to the detective laying foundation that he had contact with the defendant. (*Ibid*.) The detective testified that he was familiar with the defendant because he saw the defendant nearly 10 times, spent about two hours with him, and was familiar with the jacket defendant had on when he was arrested. (*Ibid*.)

The Supreme Court held that the testimony was properly admitted. "It is undisputed [that the detective] was familiar with defendant's appearance around the time of the crimes. Their contact began when defendant was arrested, one day after the Valley Market robbery. Questions about the extent of [the detective's] familiarity with defendant's appearance went to the weight, not the admissibility, of his testimony." (*Leon, supra*, 61 Cal.4th at p. 601.) The Court noted that the identification was helpful to the jury because "[w]itnesses who identified defendant in lineups held many months after the crimes noted that

defendant was heavier, had shorter hair, and no longer wore a mustache." (*Ibid*.) In addition, "because the surveillance video was played for the jury, jurors could make up their own minds about whether the person shown was defendant." (*Ibid*.) The court concluded, "Because [the detective's] testimony was based on his relevant personal knowledge and aided the jury, the court did not abuse its discretion by admitting it." (*Ibid*.)

The same is true here. Muir testified that he interviewed defendant in person, he watched the video about 20 times, and he repeatedly paused the video to capture still shots. The suspect's full face was not visible in any part of the video, and therefore Muir's testimony could aid the jury in determining whether the suspect in the video was defendant. (See, e.g., *People v. Ingle* (1986) 178 Cal.App.3d 505, 514 [it is "entirely appropriate" for a witness to opine that the defendant is the person seen in a surveillance video when "the quality of the videotape was not sufficient to establish his identity conclusively"].) Moreover, Muir provided ample reasoning for his opinion that the suspect in the video appeared similar to defendant, saying that the portions of the suspect's face and the suspect's build were similar to defendant's. Any suggestion that Muir's identification of defendant was not sufficiently supported goes to the weight of the evidence, not its admissibility. (*Perry, supra*, 60 Cal.App.3d at p. 613.)

We therefore find that the trial court did not abuse its discretion in admitting Muir's lay opinion testimony identifying defendant as the suspect in the video. Even if the court had erred, the error would be harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Harris* (2005) 37 Cal.4th 310, 336 [*Watson* standard applies to evidentiary errors].)

Defendant argues that admission of Muir's testimony was prejudicial because "[w]ithout Muir's testimony it is reasonably likely the jury would have found [defendant] not guilty, or at the least, found the knife enhancement not true." We disagree. Although Muir's testimony likely assisted the jury because the video did not clearly show the suspect's face, the jury nonetheless had sufficient evidence to determine defendant's guilt without the assistance of Muir's testimony. The jury was shown the video and the still photos, was able to observe defendant in court, and therefore could consider whether defendant's face and body matched that of the suspect on the video. Moreover, Keefer identified defendant as one of the suspects, even though he did not think he was the one with the knife. However, the video showed the suspect in the lightning bolt hoodie with something straight in his hand that appeared to be a knife. That suspect was also wearing shoes that matched the shoes defendant was wearing when he was interviewed. A similar shoe was visible in the photo on defendant's phone showing the safe after the robbery. Defendant's phone contained additional photos, taken shortly after the robbery, of the safe and the robbery proceeds.

The jury therefore had ample evidence upon which to base its own conclusions about defendant's guilt. In addition, the jury was instructed not to rely on Muir's testimony, and instead to make its own determination as to whether defendant was the suspect in the video. We presume the jury understood and followed the instruction. (*People v. Edwards* (2013) 57 Cal.4th 658, 746.) Any purported error was harmless.

DISPOSITION

Affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.