Filed 4/18/12 P. v. Elias CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. STEVE ROBERTO ELIAS, Defendant and Appellant.	2d Crim. No. B231565 (Super. Ct. No. GA069244-01) (Los Angeles County)

A jury found Steve Roberto Elias guilty of first degree murder (Pen. Code, §§ 187, subd. (a), 189) and found true the special allegation that he personally used a deadly weapon in the commission of the murder (*id.*, § 12022, subd. (b)(1)). We affirm.

FACTS

New Avenue in the city of Monterey Park has two northbound and two southbound lanes separated by a center median. On July 30, 2005, Juvenal Gomez left his apartment, taking his red bicycle, to buy cigarettes. He rode or walked his bicycle along New Avenue.

At about 11:00 p.m., Tuan Vuong was waiting at a stop sign at the bottom of a freeway off-ramp preparing to turn onto New Avenue. He was stopped behind a white Honda Accord. Vuong looked to his right and saw Gomez on his bicycle travelling southbound on New Avenue in the northbound lanes. Vuong looked to his

left and saw Elias holding a pack of beer in one hand and an unidentifiable object in the other.

Elias set the beer on the ground, and ran across New Avenue at a 45 degree angle. He crossed the two northbound lanes, the median and the two southbound lanes and stopped at the stop sign in front of Vuong.

Elias intercepted Gomez and knocked him off his bicycle. Vuong saw Elias hit Gomez on his body with a thrusting motion. The men were about 15 feet from Vuong. Vuong's view of the attack was partially obstructed by the car in front of him.

Elias went to the car in front of Vuong, banged his hand on the hood and told the driver to "get the hell out of there." Elias went to the front driver's side of Vuong's car and told him to do the same. Vuong avoided making eye contact with Elias, and drove away. When Vuong looked in his rearview mirror, he saw another man take Gomez's bicycle.

Vuong turned into a drug store parking lot to call 911. He tried twice, but the line was busy. He met a friend and drove back to the scene. There were people there assisting Gomez, so he drove on. He returned to the scene to talk to the police at about 5:00 a.m. the next morning.

Leandro Cabrera's father was a friend of Gomez. As Cabrera drove along New Avenue, he noticed three men grabbing at each other. Cabrera assumed the men were playing, so he kept driving. When he looked in his rearview mirror, he saw that one was holding Gomez while the other was hitting him with thrusting motions. Cabrera backed up to where the men were fighting. One of the men left, taking Gomez's bicycle. Elias walked up to Cabrera's car and asked if he "wanted some," showing Cabrera his fist. Elias then fled. Gomez fell down in the middle of the street in front of Cabrera's car. Cabrera tried to call 911, but the line was busy.

Kevin McCaffrey was driving on New Avenue at about 11:00 p.m., on July 30, 2005. He saw Elias riding a bicycle in the middle of the road. McCaffrey then saw Gomez lying on the median. He got out of his car to assist Gomez.

Amy Wong was driving on New Avenue. She saw Gomez sitting on the median bleeding. Elias and another man crossed the street toward her. Elias was carrying a case of Tecate beer. As the men passed, Wong heard a thud on the hood of her car. Elias yelled, "[G]o back to your Hina." The other man got on a bicycle and rode away. Wong stopped to help Gomez. After several attempts, Wong reached 911. Gomez died of his wounds.

Identification

Each of the witnesses spoke to the police on the night of the incident or in the early morning hours thereafter. Vuong described Elias as a 20-year-old male Hispanic, five feet seven inches to five feet eight inches tall, 180 pounds, with a shaved head. Cabrera described Elias as Latino, five feet nine inches tall, between 190 and 200 pounds, a heavy build, broad shoulders and shoulder length hair. McCaffrey said he could not identify anyone. Wong described Elias as a Hispanic, heavy set at about 200 pounds, shaved head, between five feet eight inches and five feet 10 inches tall, in his late teens or early 20's. Wong said the man she saw had an acne-marked face. At trial, Wong conceded Elias does not have an acne-scarred face.

The witnesses described the assailant as wearing a white T-shirt.

In March 2007, one year eight months after the incident, Detective Mitchell Robison created a six-pack photographic lineup. Elias's photograph was in the No. 2 position. Vuong said the perpetrator was either photograph No. 1 or No. 2, but he could not tell which one. Cabrera selected photograph No. 2. He said he could not be certain because the attacker had long hair.

McCaffrey told Detective Robison that he did not know if he could identify anyone, but he was willing to try. McCaffrey identified photograph No. 2. He testified, "[H]e jumped right off the page." Wong also chose photograph No. 2. Detective Robison directed officers to arrest Elias.

DNA Evidence

Officers found open Tecate beer cans at the crime scene. Criminalist Ken Howard analyzed DNA evidence taken from the cans. A DNA swab was taken from Elias at the time he was arrested. Howard testified he is confident that the DNA profile taken from one of the cans matched that of Elias. Howard estimated that there was a one-in-422-quadrillion chance the DNA on the can was from someone other than Elias.

Defense Case

Jonathan Reyes and his brother, Louis, testified for Elias. Jonathan has known Elias since Jonathan was 12 years old. Louis has known Elias since 1997.

For most of the time Jonathan has known Elias, Elias has had a shaved head. Elias has never had acne scars. Neither Jonathan nor Louis has known Elias to go out in a white T-shirt or tank top. Neither Jonathan nor Louis has ever seen Elias drink Tecate beer.

Psychologist Kathy Pezdek testified as an expert on the difficulties of making an accurate eyewitness identification.

Jonathan Reyes testified Elias was with him at his home on the night of the murder.

DISCUSSION

I

Elias contends the trial court erred in denying his *Batson/Wheeler* motion. (*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.)

Juror 0114 was the only Hispanic prospective juror in the jury box. The prosecution used a peremptory challenge to excuse him. Elias made a *Batson/Wheeler* motion. Elias argued the prospective juror's answers were fair and did not indicate any biases.

The trial court found Elias failed to make a prima facie showing of an inference of discriminatory purpose. In finding no prima facie showing, the court

stated, "I found that [Juror 0114] was very -- somewhat hesitant in his answers, and I thought he was somewhat -- just hesitant."

Even though the trial court found no prima facie showing, it allowed the prosecutor to state for the record his reason for rejecting the juror. The prosecutor stated: "Juror No. [0114], watching his facial expressions, he was a little confused. His voice was a little soft spoken. I had trouble hearing him at times. I just want jurors who can be strong and be able to make their decisions. I have some doubts about him being indecisive. That was my main concern."

The trial court stated, "I found that too." The court denied the motion.

The California and United States Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias, including race. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 89; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) The defendant must make a prima facie showing that the totality of the facts gives rise to an inference of discriminatory purpose. (*People v. Cornwell* (2005) 37 Cal.4th 50, 66, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) If the defendant makes a prima facie showing, the burden shifts to the prosecution to explain the racial exclusion by offering permissible race-neutral justifications. (*Cornwell*, at pp. 66-67.)

Here Elias failed to make even a prima facie showing. The trial court on its own found the prospective juror was "hesitant" when he answered the prosecutor's questions. Morever, the court agreed with the prosecutor that the prospective juror seemed confused and indecisive. Elias presents no basis for overturning the court's findings.

II

Elias contends the trial court's exclusion of an entire class of evidence deprived him of his constitutional right to present a complete defense.

A DNA profile taken from a beer can found at the crime scene was compared with DNA profiles contained in a database maintained by the California

Department of Justice. The database search produced a match for Elias. This was confirmed by DNA taken from a swab of Elias's mouth at the time of his arrest.

Elias offered the testimony of Lawrence Mueller, Professor of Ecology and Evolutionary Biology at the University of California, Irvine. The prosecution objected to the evidence under Evidence Code section 352. The trial court held a hearing under Evidence Code section 402.

Mueller testified at the hearing. He contrasted a "probable cause" DNA case with a "cold hit" case. In a probable cause case, the suspect comes under suspicion for reasons unrelated to his DNA. DNA taken from the suspect is compared with DNA obtained at the crime scene to confirm the suspicion. In a cold hit case, DNA found at the crime scene is compared with a DNA profile contained in a database. If a match is made, the person becomes a suspect. Mueller testified that in cold hit cases there is a greater change of coincidental matches.

Mueller relied on an Arizona study of a database consisting of DNA profiles for 65,000 people. The study found 122 pairs of people in the database matched at nine loci and 20 pairs matched at 10 loci. It was Mueller's conclusion that random match statistics have no relevance in a cold hit case. Mueller admitted the Arizona study did not involve cold hit cases. It only studied matches between DNA profiles of persons within the database.

Ken Howard was a supervising criminalist with the Los Angeles Sheriff's Department Crime Laboratory. He testified he performed the DNA analysis on samples obtained from the crime scene. He said the DNA taken from the crime scene and directly from Elias matched in all 15 loci with the DNA match found in the database.

Howard said he was familiar with the Arizona study. He said it is statistically consistent with what one would expect to find when looking for matches in a database of 65,000 people. The study does not affect his calculation of probabilities. He would not expect to see another match at all 15 loci.

Mueller was called again to testify. He admitted that in a database of 65,000, he would not expect to see a match in all 15 loci.

The trial court found that the Arizona study had nothing to do with the case. The court ruled it would not allow the Arizona study to come into evidence. Based on that ruling, Elias stated he would not introduce evidence concerning database match probabilities.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Here the trial court excluded evidence of the Arizona study. The study involved the number of matches found at nine or 10 loci within a database of 65,000 DNA profiles. It did not involve the question presented here: the probability of a "cold case" match at all 15 loci. The court could reasonably conclude the probative value of the study is substantially outweighed by the probability of confusing the issues or misleading the jury. The court did not abuse its discretion in barring reference to the study. Nor did the court deprive Elias of his right to present a proper defense.

III

Elias contends the trial court erred in restricting the testimony of a defense expert on eyewitness identification.

Elias offered Pezdek, a cognitive psychologist, as an expert on eyewitness identification. Prior to her testimony, the trial court ruled Pezdek cannot: testify that "[she] looked at the scene of the crime and [she] could see this and that"; answer hypotheticals; or "look at the six-pack and say, well, if [she were] going to rule, this looks to me suggestive." The court allowed Pezdek to testify about the contents of other expert studies she relied on. The court stated, however, Pezdek could not quote hearsay from the studies. The court gave an example of the forbidden hearsay: "Mr. Jones is an

expert. He interviewed three people that were in a case and the three people said this and this and that." Elias's counsel replied, "I understand the court, and I'm fine with that."

Pezdek testified the largest cause of erroneous convictions is eyewitness evidence, even where there are multiple eyewitnesses. To remember the specific details of a person, witnesses need to see the person in good light, close up and for a reasonable amount of time. Witnesses need to be motivated to remember the person and have their memories tested a short time after seeing the person.

Pezdek testified the longer the duration between the time the witness saw the perpetrator and the time the witness identified the perpetrator, the less reliable the identification. If witnesses spoke to each other about what they saw, the conversation could render the identification less reliable. Cross-race identification is less reliable than same-race identification. A stressful situation, particularly where a weapon is involved, makes identification less reliable.

Pezdek testified that in a photographic lineup, all of the individuals in the lineup should match the descriptions provided by the witnesses. That the police officer administering the lineup knows who the subject is would be a major source of potential bias. Where the time between the incident and the lineup is long, witnesses believe the police must have a suspect and that they are expected to identify someone.

In *People v. Page* (1991) 2 Cal.App.4th 161, the defendant confessed during a police interrogation and later recanted his confession. At trial, the defendant called an expert witness on the reliability of confessions. The trial court ruled the expert could testify as to the general psychological factors that might lead to an unreliable confession, along with descriptions of the supporting experiments. (*Id.* at p. 183.) The court precluded the expert from testifying about the particular evidence in the defendant's statements that indicated those psychological factors were present in the case and the reliability of the defendant's confession. (*Ibid.*) The Court of Appeal upheld the trial court's ruling. The court cited *People v. McDonald* (1984) 37 Cal.3d

351, 370-371, disapproved on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, for the proposition that usually an expert would be limited to discussing general factors bearing on the accuracy of eyewitness identification in a typical case. (*Page*, at p. 188.) The expert does not take over the jury's task of judging credibility by telling the jury that any particular witness is not truthful or accurate. (*Ibid.*)

Here, as in *Page*, the trial court properly limited Pezdek's testimony to a discussion of the general psychological factors that might lead to an unreliable identification in the typical case. Pezdek testified to those factors that could lead to an unreliable identification in a photographic lineup. In fact, the court allowed more latitude than was required. Ordinarily, an expert witness may not on direct examination reveal the contents of reports prepared or opinions expressed by nontestifying experts. (*People v. Campos* (1995) 32 Cal.App.4th 304, 308.) Here the trial court allowed Pezdek to testify about the contents of the studies on which she relied. The only limitation was that she could not quote double-hearsay statements from the studies.

Elias complains that Pezdek was not allowed to respond to hypothetical questions. But no such hypotheticals were needed. The jury could easily relate Pezdek's testimony to the particular facts of the case without the aid of hypothetical questions.

The trial court did not err in limiting Pezdek's testimony.

IV

Elias contends the trial court erred by admitting tainted pretrial identifications and in-court identifications that were not purged of the taint.

Elias's objection to the six-pack photographic lineup shown to the witnesses is based on the testimony of his eyewitness identification expert, Dr. Pezdek. Pezdek testified all individuals depicted in the photographs should match the descriptions given by the eyewitnesses. Further, the officer administering the lineup should not know who the suspect is. Elias argues the photographic lineup procedure employed here violated those principles.

But Elias cites no authority requiring the trial court to accept his expert's opinion on what constitutes a fair procedure for a photographic lineup.

The question is whether the identification procedure was so impermissibly suggestive that it creates a very substantial likelihood of misidentification under the totality of the circumstances. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) The defendant bears the burden of showing the identification procedure was unreliable. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 942.)

In Elias's motion to suppress in-court identification, he claimed the photographic lineup was unduly suggestive in that he was the only one wearing a checkered shirt, the persons in photographs Nos. 4 and 6 were too young and not husky enough, and the person in photograph No. 3 did not appear to be Mexican-American. The trial court found that all persons in the lineup appeared to be Hispanic. The court concluded the lineup was not unduly suggestive. The court allowed Elias to raise his objections to the lineup before the jury.

Elias simply failed to carry his burden of proving the photographic lineup was unduly suggestive. There is no requirement that a defendant in a lineup be surrounded by persons who look like him. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) Nor is the lineup unduly suggestive simply because one person's photograph is much more distinguishable from the others. (*Ibid.*)

Elias points to McCaffrey's testimony that when McCaffrey saw the photographic lineup, Elias's photograph "jumped right off the page at [him]." But that does not prove the lineup was unduly suggestive. Elias's photograph may well have "jumped right off the page" because it is the photograph of the person McCaffrey saw at the scene of the crime.

V

Elias contends the trial court erred when it rejected his request for a manslaughter instruction.

Murder is a killing with malice aforethought. (Pen. Code, § 187, subd. (a).) Manslaughter is an unlawful killing of a human being without malice. (Pen. Code, § 192.) Manslaughter is a lesser-included offense of murder. (See *People v. Moore* (2011) 51 Cal.4th 386, 409.) Instructions on a lesser-included offense are required whenever there is substantial evidence the defendant is guilty only of the lesser offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Elias apparently relies on the theory that his attack on Gomez was the product of a sudden quarrel or heat of passion. But the sudden quarrel or heat of passion must be aroused by a provocation sufficient to cause an ordinary person of average disposition to act rashly and without deliberation. (*People v. Breverman, supra,* 19 Cal.4th at p. 163.) Here there was no evidence of such a provocation. The evidence was simply that Elias ran across four lanes of traffic and began stabbing Gomez. There is no evidence that Gomez or anyone else did anything to provoke the attack.

VI

Elias contends the trial court deprived him of his right to a trial by jury when it removed a holdout juror.

Juror 12 complained that Juror 7 was intimidating her. Juror 12 explained that all the jurors would agree on a particular point. But Juror 7 would threaten that if the jurors did not vote her way on another point, she would change her vote on the agreed point.

The foreman, Juror 11, told the court: "We have one juror who -- how do I put this? She doesn't seem to be able to comprehend. She's very -- I don't know how to -- she's incoherent about how to put facts together. So she can't focus on any particular thing that we're talking about without going to a different point. She changes her opinion and mind from day-to-day. So once we get past one point, we get to the next day, then she goes back to the day before and reverses what she thought about. We can't seem to make progress with her."

The trial court decided to interview the jurors individually. They all agreed Juror 7 threatened to change her vote on a settled matter if the jurors did not agree with her on another matter. Various jurors commented that Juror 7 is an "indecisive scatter brained juror"; is "not really stable minded"; and "all of a sudden . . . starts changing her mind and coming off with off-the-wall things in her head." One juror said, "[W]e'll be talking about one subject, and then she'll spin off into another subject. . . . I really think it's a mental instability"; and "sometimes she seems very confused." The jurors agreed that Juror 7 was holding back their deliberations. They also agreed that the problem was not that she had a different view of the facts.

Finally, the court interviewed Juror 7. She told the court: "I want to withdraw, but yet I'm afraid that justice will not be done if I do not continue. Okay. But I'm at any time happy to be thrown off, okay, the jury." She said the person who accused her is the problem

The trial court may at any time discharge a juror who is found unable to perform her duty. (Pen. Code, § 1089.) A juror's inability to perform her duty must be shown as a demonstrable reality. (*People v. Wilson* (2008) 44 Cal.4th 758, 821.) The demonstrable reality standard of review requires a stronger showing than mere substantial evidence. (*Ibid.*)

Here no juror thought Juror 7 was deliberating in a rational manner. Other jurors described Juror 7 as scatter brained, not stable minded, mentally unstable and confused. The record shows as a demonstrable reality Juror 7's inability to perform her duty. The trial court had no choice but to discharge her.

VII

Elias contends the jury's finding of first degree murder is not supported by the evidence.

Murder in the first degree is murder that is deliberate and premeditated (Pen. Code, § 189). Deliberation and premeditation do not require any extended period

of time. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) Cold and calculated judgment may be arrived at quickly. (*Ibid.*)

In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We discard evidence that does not support the judgment as having been rejected by the trier of fact for lack of sufficient verity. (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1316.) We have no power on appeal to reweigh the evidence or judge the credibility of witnesses. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) We must affirm if we determine that any rational trier of fact could find the elements of the crime or enhancement beyond a reasonable doubt. (*Johnson*, at p. 578.)

Here Elias had to cross four lanes of traffic before reaching Gomez. That is sufficient to show deliberation and premeditation. Moreover, Elias stabbed Gomez twice in the chest, an area of the body where vital organs were likely to be hit. Stab wounds to a vital area are indicative of a reasoned decision to kill. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1293 [slashing of victim's throat is indicative of a reasoned decision to kill].) A rational finder of fact could find beyond a reasonable doubt that the murder was deliberate and premeditated.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Janice C. Croft, Judge

Superior Court County of Los Angeles

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.