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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.

DEL LAMONT SMITH,

Defendant and Appellant.

B263450

(Los Angeles County
Super. Ct. No. VA121955)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Thomas I. McKnew, Judge. Affirmed.

Jeffrey J. Douglas, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Lance E. Winters, Assistant Attorney General, Steven D.
Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and
Respondent.

This is the second appeal, following the third trial in this case. Appellant Del Lamont Smith initially was charged with first degree residential burglary (Pen. Code, § 459)¹ and making criminal threats (§ 422). He has been self-represented in all three trials. The first trial ended in a mistrial after the jury deadlocked on the burglary count and acquitted appellant on the criminal threats count.

Prior to his retrial on the burglary count, appellant requested a copy of the transcript of the first trial. The trial court denied that request and the second trial proceeded. A jury convicted appellant of the lesser included offense of attempted first degree residential burglary (§§ 664/459), and found true four prior strikes (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), one prior serious felony conviction (§ 667, subd. (a)(1)), and one prior prison term (§ 667.5, subd. (b)). Appellant was sentenced to a prison term of 30 years to life. He appealed, arguing that the trial court erred in denying his request for a transcript of the first trial, under *People v. Hosner* (1975) 15 Cal.3d 60 (*Hosner*). We agreed, reversed the judgment and remanded the matter for a third trial from which the instant appeal was brought.

Here, appellant was charged with attempted first degree residential burglary (§§ 664/459).² Appellant argues that, during his cross examination of two of the prosecution's principal witnesses, the court made three erroneous evidentiary rulings, the effect of which was to prevent him from attacking the credibility of those witnesses. Finding no prejudicial error, we affirm.

¹ All further undesignated statutory references are to the Penal Code.

² There is no dispute about the charged crime. Nevertheless, appellant attempted to augment the record with the amended information, but the clerk's office was unable to locate that document.

FACTUAL BACKGROUND

Our factual recitation is drawn from our opinion in the prior appeal, *People v. Smith* (Aug. 26, 2014, B249351) [nonpub. opn.] (*Smith I*)), and evidence from the third trial, which are substantially the same.

On October 5, 2011, Damon Jones, a sergeant with the Los Angeles County Sheriff's Department (LASD), had his home in Cerritos fumigated. On the evening the fumigation was performed, the fumigation company left several windows in the back of the house open a few inches for ventilation before tenting Jones's house. Concerned that his home was vulnerable to a burglary during fumigation, Jones remained on the property. He stayed in his car in the driveway, and performed hourly patrols around the house, carrying a flashlight, cell phone and his off-duty weapon.

On one patrol just before 11:00 p.m., as Jones approached his backyard, he heard men's voices, rustling sounds, and what sounded like an aluminum ladder. When Jones entered the backyard, he saw that the tent had been cut; the slit had not been there during his previous patrol. Jones backed into some bushes on the side of his house and called the Cerritos LASD station to report a crime.³

While he was still on the phone Jones saw three men emerge from the slit in the tent, one of whom was appellant, and start walking away from the house. Jones made eye contact with the men, who ran off. Two of the men, including appellant, ran toward a wall at the rear of Jones's property. Jones ran after them, yelling at them to "get down," or "stop." Appellant looked back at Jones and

³ The parties refer to this call as a "911" call, although Jones's call was made to the Cerritos station directly. For the sake of clarity and continuity we adopt the same terminology.

yelled, “I’ll shoot you” as he ran to the wall. Afraid he would be shot, Jones fired his weapon at appellant two or three times.

Jones grabbed the other man (Cooper) off the wall and he and Cooper struggled for control of Jones’s gun. Jones shot Cooper twice, then chased after appellant who had run off in another direction. Jones grabbed appellant as he tried to climb over another wall. Appellant “elbowed” Jones, tried to “break” his finger and struggled with Jones for control of Jones’s gun. Jones was able to get appellant off balance, and shot him. Jones ran away and called the LASD.

During an LASD walk-through inspection the next day, Jones noticed several changes in the condition of his home from the time he left the premises with the fumigators: a dining room window that had been left open two to three inches, was now wide open; clothes left neatly stacked on a bed or in dresser drawers were in disarray; drawers and cabinets that had been left closed were open; the screen from a second story window was missing and later found in the backyard; and there was a footprint on a newly cracked tray of a doll’s highchair in Jones’s daughter’s room. On the walk-through, in addition to the window screen, Jones found a pair of scissors, a screwdriver, a box cutter, and some gloves near the fumigation tent; none of these tools or items belongs to Jones.

PROCEDURAL BACKGROUND

As noted above, in the first trial, appellant was charged with first degree residential burglary (§ 459) and making criminal threats (§ 422). The jury deadlocked on the burglary count and acquitted appellant as to the charge of criminal threats. On retrial of the first degree residential burglary, appellant was found guilty of the lesser included offense of attempted first degree residential burglary, and the jury found true four prior strikes (§§ 667, subds. (b)-(i), 1170.12,

subds. (a)-(d)), one prior serious felony (§ 667, subd. (a)(1)), and one prior prison term (§ 667.5, subd. (b)). In *Smith I*, we reversed that judgment because the trial court erred in denying appellant's request for a transcript of the first trial. (*Smith I*, *supra*, at pp. 6-8.)

At the third trial (second retrial) appellant was (again) charged with attempted first degree residential burglary. It also was alleged that appellant suffered four prior strikes (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), one prior serious felony conviction (§ 667, subd. (a)(1)), and one prior prison term (§ 667.5, subd. (b)).

A jury found appellant guilty of attempted residential burglary and, in a bifurcated proceeding, found true the prior conviction allegations. Upon appellant's subsequent motion, the trial court struck three of the prior convictions, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Appellant was sentenced to 12 years in state prison, computed as follows: the upper term of three years doubled to six years (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), plus five years (§ 667, subd. (a)(1)), plus one year (§ 667.5, subd. (b)). The court awarded presentence credits, and imposed various fees and fines.

DISCUSSION

Appellant maintains that the trial court made three erroneous evidentiary rulings during his cross-examination of prosecution witnesses that violated his constitutional right to confront witnesses, to due process, and to present a complete defense. The argument lacks merit.

I. *Controlling Legal Principles and the Standard of Review*

A. *Constitutional Argument Forfeited*

Appellant contends that his constitutional right to present a defense and effectively cross-examine two of the prosecution's three witnesses was violated by the trial court's rulings. He did not, however, specify the precise ground for this objection at trial, and therefore has forfeited the claim on appeal. (*People v. Carter* (2003) 30 Cal.4th 1166, 1196, fn. 6 (*Carter*).)

B. *Appellant's Argument Fails on the Merits*

Even if appellant's constitutional claims had been raised, they would fail on the merits. Our Supreme Court has repeatedly stated that the application of ordinary evidentiary rules, as was the case here, does “not impermissibly infringe on [a defendant's] right to present a defense.” (*People v. Cudjo* (1993) 6 Cal.4th 585, 611 (*Cudjo*); *People v. Rodriguez* (1999) 20 Cal.4th 1, 10, fn. 2 (*Rodriguez*).) As discussed below, appellant's constitutional right to present a defense was not violated by the exclusion of evidence of marginal probative value.

Appellant relies, in part, on *Delaware v. Van Arsdall* (1986) 475 U.S. 673 (*Van Arsdall*), to argue he was precluded from exposing Jones' lack of credibility and exploring the partiality of a prosecution witness on cross-examination. In *Van Arsdall*, the Supreme Court held that “a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby ‘to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.’ [Citation.]” (*Id.* at p. 680.) However, *Van Arsdall* also made clear that trial courts retain wide latitude “to impose reasonable limits on such cross-

examination based on concerns about, among other things, . . . prejudice, confusion of the issues, . . . or interrogation” on collateral matters that are “only marginally relevant.” (*Id.* at p. 679; see *People v. Hayes* (1999) 21 Cal.4th 1211, 1266, fn. 15 [disallowing impeachment of prosecution witness on collateral matter did not restrict defendant’s right to confrontation and cross-examination]; *People v. Quartermain* (1997) 16 Cal.4th 600, 625 (*Quartermain*) [same].)

Evidence is relevant if it has a “tendency in reason to prove or disprove any disputed fact.” (Evid. Code, § 210; see also *People v. Harris* (2005) 37 Cal.4th 310, 337.) A “collateral matter” is “‘one that has no relevancy to prove or disprove any issue in the action.’ [Citation.]” (*Rodriguez, supra*, 20 Cal.4th at p. 9.) However, “[a] matter collateral to an issue in the action may nevertheless be relevant to the credibility of a witness who presents evidence on an issue” (*Ibid.*) As we explain below, although at least some of the excluded evidence might have marginal probative value, it was clearly collateral and its exclusion fell well within the trial court’s discretion and did not “‘impermissibly infringe on [appellant’s] right to present a defense.’” (*Cudjo, supra*, 6 Cal.4th at p. 611.)

C. *The Standard of Review*

Appellant contends the trial court abused its discretion and violated his right to a fair trial by excluding a recording of the 911 call Jones placed to the Cerritos LASD station to report a crime, as well as his contract with the fumigation company. He further contends the court erred in refusing to permit him to refer (presumably) to Detective Rubino’s testimony from the first trial for purposes of impeachment. This evidence was relevant, according to appellant, to demonstrate that Jones was not a credible witness and that the evidence against appellant was fabricated.

A trial court's exercise of discretion in excluding evidence will not be overturned on appeal absent the showing of an abuse of discretion resulting in a miscarriage of justice. (*Rodriguez, supra*, 20 Cal.4th at pp. 9-10; *People v. Raley* (1992) 2 Cal.4th 870, 895.) As a general proposition, the ordinary rules of evidence do not infringe on a defendant's right to present a defense. (*Rodriguez, supra*, 20 Cal.4th at p. 10, fn. 2.) Accordingly, the judgment may be reversed only if it is reasonably probable the appellant would have obtained a more favorable result absent the error. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103-1104.)

II. *The Court did not Abuse its Discretion by Excluding the Evidence*

A. *The Recording of the 911 Call*

Appellant argues the trial court erred in refusing his request to play the 911 recording for the jury. He contends that his purpose in offering the recording was to refute Jones's testimony regarding appellant's purported threat to shoot him, as well as the timing and sequence of events. The recording purportedly captures the sounds of a confrontation between Jones and the suspects he chased, and the firing of a gun. The court excluded the recording on the grounds that the recording could not be authenticated because the 911 operator had not been subpoenaed. Also, because the transcript of the recording does not establish the timing of events and reflects only "yelling," without transcribing the content of that yelling, the recording could not be used to contradict the purported threat which could be appellant saying "I'll shoot you" to Jones. Thus, the court found appellant could not impeach Jones with the 911 recording which was not inconsistent with Jones's testimony.

Appellant is correct that the operator was not necessary to authenticate the recording. Jones could have authenticated it. Further, the passage of time is a

function of the length of the recording, which the jury could judge for itself and requires no authentication.

As for the recording, the fact that it may be significantly unintelligible does not render it inadmissible. ““To be admissible, tape recordings need not be completely intelligible for the entire conversation as long as enough is intelligible to be relevant without creating an inference of speculation or unfairness.” . . . [¶] Thus, a partially unintelligible tape is admissible unless the audible portions of the tape are so incomplete the tape’s relevance is destroyed. [Citations.] The fact a tape recording ‘may not be clear in its entirety does not of itself require its exclusion from evidence “since a witness may testify to part of a conversation if that is all he heard and it appears to be intelligible.” [Citations.]’” (*People v. Polk* (1996) 47 Cal.App.4th 944, 952–953.)

Nevertheless, the unintelligibility of some or all of the 911 call is beside the point. The issue at trial was not the threat or occurrence of a shooting, but the attempted burglary charge. Regardless of the erroneous bases for its exclusion, the 911 call was not relevant to impeach Jones. The yelling and struggle recorded in that call involved a collateral issue likely to mislead the jury because it was not relevant to the underlying charge. “[B]urglary consists of entry into a home . . . ‘with intent to commit . . . [a] felony.’ (§ 459.)” (*People v. Prince* (2007) 40 Cal.4th 1179, 1255.)

An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission. (Pen. Code, § 21a.) “[U]nder California law, “[a]n attempt to commit a crime is itself a crime and [is] subject to punishment that bears some relation to the completed offense.” . . . [Citations.]” (*People v. Medina* (2007) 41 Cal.4th 685, 694.) The pertinent inquiry was whether appellant had the requisite intent to

commit larceny or another felony when he and two others slit the fumigation tent and entered Jones's home. The 911 recording is of no relevance to this question. Its admission would have had no probative value and would have caused the jury to focus on events not relevant to whether appellant committed the charged crime. Appellant's claim must be rejected.

Further, even if the court had erroneously excluded the 911 recording as impeachment evidence to attack Jones's credibility, appellant suffered no prejudice. Such an error requires reversal only if the judgment resulted in a miscarriage of justice. (*Rodriguez, supra*, 20 Cal.4th at pp. 9-10.) A miscarriage of justice would mean that, absent the erroneous exclusion, it is reasonably probable the jury would have reached a result more favorable to appellant. (Evid. Code, § 353; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) It is appellant's burden to demonstrate the jury would have had a significantly different impression of Jones's credibility had the purportedly impeaching 911 call been admitted. (*People v. Williams* (1997) 16 Cal.4th 153, 207-208 (*Williams*).) No such showing was or could have been made here. The 911 recording is not at odds with Jones's testimony and relates only to the collateral matter of his struggle with the purported perpetrators. It does nothing to disprove the evidence that appellant and two other men emerged, uninvited, from a slit in a fumigation tent, into the backyard of Jones's house while that house—later found in some degree of disarray and in a condition different than that in which Jones had left it several hours earlier—with gloves, a box cutter and other tools. An inquiry into how Jones eventually caught appellant was not reasonably likely to produce a significantly different impression of Jones's credibility. (*People v. Belmontes* (1988) 45 Cal.3d 744, 780-781, overruled on another ground by *People v. Cortez* (2016) 63 Cal.4th 101, 118.) Thus, whether Jones lied about whether appellant threatened to shoot

him or about his struggles with the fleeing men would not change the outcome here.

B. Exclusion of Jones's Fumigation Contract

Appellant next contends that the trial court violated his confrontation rights when—notwithstanding his offer of proof of the contractual terms—it refused to permit him to impeach Jones on the terms of his contract with the fumigation company. Appellant argues that the contract required Jones to leave the drawers and cabinets inside the house open during fumigation. If this requirement had been followed, it would contradict Jones's claim that the fact that drawers were found open during the walk-through inspection was one of several clues that someone had been inside his home after it was sealed for fumigation. The court refused to permit appellant to cross-examine Jones on this subject on the grounds that it was both “more prejudicial than it is probative,” and that the fumigation “contract [was] of no relevance in this case.”

Appellant argues the trial court erred because its ruling wrongly assumed the only relevant issue was whether he intended to burglarize the home. He argues this rationale ignores the fact that Jones was the sole witness, and that if any juror found him not credible as to one matter—e.g., the requirements of his contract with the fumigator—that juror could, consistent with CALCRIM No. 226, also find Jones not credible as to other matters and refuse to find appellant guilty as to the charged crime, just as jurors had done in his first trial on the burglary charge.

We find no error. Whether some drawers in the home were left open was not a material fact in dispute. The issue for the jury was whether appellant had the requisite intent to commit a burglary before entering the residence. Further, even if we were to find that the court erred in excluding this purportedly impeaching

evidence to attack Jones's credibility, it is not reasonably probable that appellant would have achieved a more favorable result. (Evid. Code, § 353; *Watson, supra*, 46 Cal.2d at p. 836.) The evidence supporting appellant's conviction was substantial. Given the volume of harmful evidence, an inquiry into whether some drawers or cabinets inside the house were or should have been left open was not reasonably likely to produce such a significant difference in terms of the jury's impression of the homeowner's credibility as to outweigh all the other evidence against appellant. Accordingly, whether Jones was mistaken—or whether he lied—about whether he left the drawers inside the house closed would not have altered the result.

C. Cross-Examination of Detective Rubino Using Prior Trial Transcript

Appellant's final assertion of error relates to the trial court's denial of his request to cross-examine LASD Detective Rubino as to aspects regarding items of physical evidence recovered at the crime scene. Detective Rubino also testified at the first trial and appellant insists the court erred in preventing him from impeaching the detective by referring to testimony from that trial.

During cross-examination of Detective Rubino at this trial regarding evidence found at the crime scene, the following colloquy occurred:

“[APPELLANT]: And was there any D.N.A. testing of anything or forensic testing of any of these items you found?

“[DETECTIVE RUBINO]: That would have been handled by the handling detectives on the case. That's their call if they want to do that, and I'm not sure if they did or not. I couldn't tell you.

“[APPELLANT]: You said . . . you're not sure if they did it?

“[THE COURT]: That's what he said, yes.

“[APPELLANT]: Okay. Can I refer to trial transcript?

“[THE COURT]: You can look at it. Whether or not you can use it or not we have to determine after I have read whatever it is you wish to have read. [¶] Are you talking about something – not the preliminary hearing transcript but something else?

“[APPELLANT]: Yes, sir. The first trial transcript –

“[THE COURT]: No, you cannot.

“[APPELLANT]: Huh?

“[THE COURT]: No, you cannot. You cannot use a prior transcript used in a trial.”

Relying on *Hosner, supra*, 15 Cal.3d 60, appellant argues that the trial court’s denial of his request for access to the trial transcript—presumably, to Detective Rubino’s testimony from the first trial—denied him the right to confront this adverse witness because, “the denial of a transcript of a former trial infects all the evidence offered at the latter trial, for there is no way of knowing to what extent adroit counsel assisted by the transcript to which the defendant was entitled might have been able to impeach or rebut any given item of evidence.” (*Id.* at p. 70.) Appellant argues that the trial court’s refusal to permit him to use the first trial transcript, coupled with its other erroneous evidentiary rulings, constituted repeated denials of his right to cross-examine witnesses against him and prevented him from demonstrating “a prototypical form of bias” on the part of those witnesses or exposing jurors to facts from which they could infer the lack of credibility of those witnesses. Appellant insists the court’s rulings denied him an essential method to test the credibility of prosecution witnesses, calling into question the integrity of the fact finding process.

The Confrontation Clause guarantees criminal defendants the right to confront adverse witnesses. (*Van Arsdall, supra*, 475 U.S. at p. 678.) However, it “guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20.) Trial courts have discretion to limit or exclude impeachment evidence when that evidence is of marginal relevance or likely to confuse the issues. (*Van Arsdall, supra*, 475 U.S. at p. 679.)

The court’s exclusion of impeachment evidence does not violate the Sixth Amendment unless the prohibited cross-examination might reasonably have produced “a significantly different impression” of the credibility of the witness in question. (*Van Arsdall, supra*, 475 U.S. at p. 680; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 350.) Appellant bears the burden to make this showing. (*Williams, supra*, 16 Cal.4th at p. 207.)

As discussed above, appellant forfeited any claim of constitutional error by failing specifically to raise it at trial. (See Evid. Code, § 353; *Carter, supra*, 30 Cal.4th at p. 1196, fn. 6; *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305, 314 [holding that the right to confrontation may be forfeited].) Moreover, courts have rejected defendants’ attempts to “inflate garden-variety evidentiary questions into constitutional ones” (*People v. Boyette* (2002) 29 Cal.4th 381, 427–428.) In any case, this assertion of error fails.

A court’s limitation on cross-examination related to a witness’s credibility does not “violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness’s credibility had the excluded cross-examination been permitted. [Citations.]” (*Quartermain, supra*, 16 Cal.4th at p. 624.) A defendant may be allowed to question the witness about and, if necessary, impeach a witness who appears to be trying to “improve” his or

her prior testimony. (See Evid. Code, §§ 770, 780, subd. (h), 1235; *People v. Holloway* (2004) 33 Cal.4th 96, 122.)

Here, however, it was not reasonably probable that appellant would have obtained a more favorable result had the court permitted him to try to impeach Detective Rubino with his testimony from the first trial. His testimony at that trial regarding what he knew about forensic tests conducted on physical evidence collected at the crime scene was virtually identical to the testimony he gave here. The following colloquy occurred during the first trial, when Detective Rubino was asked on cross-examination if he had conducted fingerprint tests on the box cutter recovered at the crime scene:

“[DETECTIVE RUBINO]: Did I personally? No.

“[APPELLANT]: Did you have one done?

“[DETECTIVE RUBINO]: I believe there was, yes.

“[APPELLANT]: Okay. And were they met with any results?

“[DETECTIVE RUBINO]: I wouldn’t be able to tell you that. I was in charge of collecting, documenting the scene and collecting the evidence.”

Thus, at both trials, Detective Rubino testified that he was unaware of the results of forensic testing, if any, that was done, as he was not responsible for that part of the investigation. The trial court did not abuse its discretion by declining to admit this largely consistent, duplicative testimony. Further, we reject appellant’s claim because, even if we assume the court erroneously excluded the impeachment evidence to attack Jones’s and/or Detective Rubino’s credibility, it is not reasonably probable that appellant would have obtained a more favorable result had the prior testimony been admitted. (Evid. Code, § 353; *Watson, supra*, 46

Cal.2d at p. 836.) This record contains ample evidence to support appellant's conviction for attempted residential burglary.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.