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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARKICE LEONARD, Defendant and Appellant.	B272147 (Los Angeles County Super. Ct. No. TA136191)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tammy Chung Ryu, Judge. Affirmed.

Law Office of Paul Kleven and Paul Kleven, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Markice Leonard was charged with second degree robbery of Laquala McKinley (Pen. Code, § 211; count 1), with further allegations that he personally used a handgun, and had been convicted of a serious or violent felony. (Pen. Code, §§ 12022.53, subd. (b), 667, subd. (a)(1).)[1]

A jury found defendant guilty of robbery as to count 1, and found true the firearm allegation. Defendant admitted the prior conviction allegation. He filed a motion for a new trial, which was denied. Defendant was sentenced to 21 years in prison.

On appeal, defendant contends that the trial court erred, and deprived him of the right to present a defense by precluding him from eliciting third–party culpability evidence during his cross-examination of a robbery victim. He also contends the trial court abused its discretion in denying his motion for a new trial. Finding no error, we affirm.

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[1] Defendant was charged with another count of second degree robbery (Pen. Code, § 211; count 2), and two counts of attempted second degree robbery (Pen. Code, §§ 664/211; counts 3 & 4). As to counts 2–4, it was alleged that he was a principal armed with a handgun (Pen. Code, § 12022, subd. (a)(1)), and had been convicted of a serious or violent felony (Pen. Code, § 667, subd. (a)(1).) He was acquitted on counts 2-4.

BACKGROUND

The Prosecution Case

On September 25, 2014, at about 10:00 p.m., McKinley was returning home from work. After parking her Ford Expedition near the intersection of 102nd Street and Towne Avenue in Los Angeles, McKinley noticed two men on the other side of the street. She recognized both men, but did not know their names. She did not pay them much attention and did not see them cross the street.

One of the two men, whom McKinley later identified as defendant, approached McKinley from behind a tree as she gathered items from her truck and stepped onto the sidewalk. She recognized defendant because she saw him on 101st Street and Towne Avenue "every day, [a]ll the time," and had seen him just that morning. Defendant wore a dingy burgundy sweater and khaki cargo pants. He held a gun at his side. Defendant asked what her name was and where she lived. She told him her name and that she lived "right [t]here."

McKinley knew defendant planned to rob her and handed him her purse, a brown "Calvin Klein." The purse contained McKinley's wallet, credit and bank cards, two phones, identification and credentials, among other things. Defendant stood about 12 inches from McKinley. He said someone had killed his sister. A second, unidentified man emerged from the tree putting on gloves.

McKinley's hands were in the air and she pled with defendant not to "do this to [her]." Making a "clicking" sound with the gun, defendant demanded McKinley's gold chain and diamond pendant from around

her neck. The man wearing gloves told her to "shut the F up. . . . Shut up and hurry up." Extremely nervous, McKinley was unable to undo the latch on her necklace, snatched it from her neck and handed it to the man wearing gloves. As McKinley removed the chain, defendant raised a silver metal gun to her chest, causing her extreme fright.

After robbing her, the men ran off toward 101st Street. McKinley yelled for her husband who came immediately, as did others. Her husband and nephew ran in different directions after the robbers. Police officers drove by. McKinley flagged them down and told them she had just been robbed at gunpoint. She gave the officers descriptions of the robbers, told them that she had seen the men around the neighborhood and showed them which way they fled. The police picked up defendant's brother, Marcus, one street over. An officer asked McKinley to come see him; she said he was not one of the robbers.[2]

McKinley did not leave her home for three months after the robbery. On one of the first days after she emerged, she saw defendant. He wore the same pants and haircut he had worn during the robbery. By early December 2014, McKinley had learned defendant's name, which she gave to the police. In December, McKinley identified defendant at the police station in a photo lineup. In a written

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[2] At that time, McKinley did not know the man's name or that he was defendant's brother. The following day, Marcus went to McKinley's home to introduce himself and say that he had not robbed her. It is unclear when McKinley learned Marcus and defendant were brothers.

statement, McKinley said she had "picked No. 4 [defendant] because he robbed me at 10:00 p.m. on September 25th. He was with another boy. He came from behind a tree. He asked me my name." McKinley also said that she "had seen [the person depicted in photo No. 4] before and after the robbery." McKinley did not recover the property stolen on September 25, 2014.

The Defense Case

Kenneth Williams (Williams) testified for defendant. In September 2014, Williams and defendant, William's brother, lived at their mother's house in the same neighborhood where McKinley was robbed. Unlike Williams, defendant did not hang out in the neighborhood. Defendant was always working, or at school or fixing cars.

Williams learned about this case against defendant in mid–January 2015. He did not contact the police and did not get in touch with the Public Defender's Office until a few weeks before trial, in September 2015. His purpose in contacting defendant's counsel was to admit that he was the person who robbed McKinley. Williams had seen that things had gone "too far," he was "tired of somebody else doing . . . time for [his] crime" and he was "looking out for [his brother]."

Williams testified that late one night in September 2014, he was coming home from the market when he saw a woman fitting McKinley's description pull up in a white truck at the corner of 102nd Street and

Towne Avenue.[3] Williams did not remember if he had been across the street from where the woman parked, or on the same side of the street. Williams was with a man named Trayvont,[4] whose nickname was Tyrie, whom he had known for two or three days. Williams grabbed a black and chrome toy gun that shoots plastic BB's (but is not capable of making a "clicking" sound), from a nearby yard and approached McKinley from behind a tree. He pulled out the toy gun and asked McKinley, "What's your name? Where do you live?" He demanded her purse and neck chain. Trayvont said nothing. Williams had not worn gloves, and was not sure if Trayvont had worn them. Williams took McKinley's purse. He was confident the purse was a brown or black "Kenneth Cole." He did not look inside the purse, or take anything out, and tossed it aside almost immediately (within 150 feet from McKinley). He took McKinley's neck chain. There had been a pendant on the chain, but Williams did not see what it was. He heard it drop to the ground when McKinley took the chain off, but did not see where the pendant landed and did not look for it. He and Trayvont ran away toward 101st Street. Williams sold the chain for $100.

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[3] When Williams first contacted defense counsel's office he reported that he committed the robbery on September 13. Later, he said it had been done during the third or fourth week of the month, closer to October 1 when he gets his food stamps.

[4] Defendant and Kenneth Williams have a brother named Travonne Williams. Williams testified that Travonne Williams was not with defendant or Williams the night McKinley was robbed.

Defendant was not with Williams when he robbed McKinley and defendant knew nothing about the crime. Initially, Williams told an investigator that appellant was at a football game the night McKinley was robbed. At trial, Williams testified that he was not sure whether defendant had been at a football game or at home during the robbery. Williams and defendant had spoken since September 2014, but not about this robbery.

When Williams first contacted defense counsel, he did not mention Trayvont's involvement in the robbery. Williams had learned at the "beginning [of the] year" that Trayvont had been killed in a traffic collision with a fire engine during a high–speed police chase. He had not mentioned Trayvont when he was interviewed by defense counsel's investigator shortly before trial. Williams said he had not done so because he had been told Trayvont had moved out of town, and because Trayvont "didn't do nothing," so he "shouldn't even be in the conversation."

DISCUSSION

1. *Exclusion of Evidence of Third–Party Culpability*

Defendant contends that the trial court deprived him of the right to present a complete defense by precluding him from eliciting evidence of third-party culpability for the crime during cross–examination of McKinley. We disagree.

a. *Pertinent Proceedings*

Before trial, the prosecution filed a motion pursuant to Evidence Code section 402[5] arguing that defendant should be precluded from suggesting, in his opening statement or through cross-examination of any prosecution witness, that the robbery of McKinley involved a case of mistaken identity, and that Williams was actually the perpetrator of the robbery. The prosecution argued that there was "no direct or circumstantial evidence to support a claim that [Williams] committed the [robbery of McKinley] and the Defendant did not[,]" and defendant had not satisfied the criteria for admissibility of third–party culpability evidence under *People v. Hall* (1986) 41 Cal.3d 826 (*Hall*). In addition, the prosecution observed that defendant would be able to introduce evidence that Williams had been the perpetrator only if Williams testified during the defense case. At the time trial began, Williams was in custody on unrelated charges. Thus, the jury in defendant's trial would never hear William's testimony if he chose to exercise his Fifth Amendment right not to testify. The court noted that it was "inclined to agree with the People that defense counsel not be permitted to mention third–party culpability until we determine whether Mr. Williams is going to testify or not. If he doesn't, . . . it'll not be appropriate."

In a side-bar conference after the prosecution's direct examination, and before he began his cross-examination of McKinley,

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[5] Statutory references are to the Evidence Code.

defense counsel requested permission to show her and the jury three photographs, one depicting defendant and the other two depicting his brothers, Kenneth and Travonne Williams, to see "if this jogs her memory at all." He argued that if McKinley saw photos of defendant's brothers, "she might realize she [had identified] the wrong person. Both his brothers, they bear a resemblance." The prosecutor revived his objection to the admission of any evidence of third–party culpability, arguing that defendant was simply trying to introduce the same evidence using a different vehicle. The court inquired whether, if Williams chose to testify, the prosecution would bring McKinley back on rebuttal. The prosecutor said he would not. He noted that her identification testimony had been consistent and unambiguous, there was "no reason to suggest to her [the perpetrator] could have been somebody else." This was simply "a back door way to try to get third–party culpability" evidence which the court had already excluded when it ruled on the prosecution's section 402 motion on this very issue. The court sustained the objection. It also noted that its ruling would be different if the defense had interviewed McKinley before trial and "she had expressed some reservation about her prior identification, then [defense counsel] could have brought [the photographs] in through either her or somebody else." Defense counsel argued that defendant had a right to put on a defense and present it to a jury, and objected on state and federal constitutional grounds, citing *Chambers v. Mississippi* [(1973) 410 U.S. 284].

b. *The Court Did Not Err in Excluding Defendant's Third–Party Culpability Evidence*

The standard for the admissibility of third–party culpability evidence was established in *Hall, supra,* 41 Cal.3d 826:

> "To be admissible, the third–party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability . . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Id.* at p. 833.)

Hall also directed that "courts should simply treat third–party culpability evidence like any other evidence: if relevant it is admissible (§ 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion (§ 352)." (*Hall, supra,* 41 Cal.3d at p. 834.) To be admissible, third–party culpability evidence offered by a defendant to demonstrate that a reasonable doubt exists as to his guilt must link the third party directly or circumstantially to the actual perpetration of the crime. (*People v. McWhorter* (2009) 47 Cal.4th 318, 372–373.) When "'assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352.'" (*Id.*

at pp. 367–368.) We review a trial court's ruling on the admissibility of third party culpability evidence for abuse of discretion. (*People v. Elliott* (2012) 53 Cal.4th 535, 581.)

On this record, we conclude the trial court correctly excluded evidence of third–party culpability offered by defendant which was not relevant in light of McKinley's several unequivocal identifications of defendant as the perpetrator, not capable of raising a reasonable doubt as to defendant's guilt and, as a result would not directly or circumstantially link Williams (the third party) to actual perpetration of the crime. At the time of defense counsel's request, other than irrelevant photographs of the siblings, and the unlikely possibility that McKinley would equivocate after viewing them, there was no evidence that third–party culpability would actually be put before the jury, and there was no evidence that Williams would waive his Fifth Amendment rights and testify that he robbed McKinley. In other words, at the time the court made its ruling, there was *no evidence* that Williams was the actual perpetrator. Third–party culpability evidence is relevant only if it links a third party to the crime. (See *Hall, supra*, 41 Cal.3d at p. 833.) Defendant's proposed evidence of third–party culpability failed to satisfy *Hall's* threshold requirements of relevance and admissibility.

While there was no evidence of third–party culpability, there was compelling evidence of defendant's guilt. This evidence included the fact that McKinley had no trouble identifying defendant as someone she saw in the neighborhood on a daily basis, had seen on the morning of the day she was robbed, and as the man who robbed her at gunpoint on

the night of September 25, 2014. McKinley's identification of defendant was firm and unequivocal; she picked defendant out of a photo lineup and identified him at both the preliminary hearing and at trial. In sustaining the prosecution's objection to defense counsel's request to show McKinley and the jury the photographs and question McKinley about them, the court observed that there was no basis to do so given that McKinley's identification of defendant as the perpetrator never wavered.

We reject defendant's contention that the trial court failed to engage in a balancing test under section 352. Again, the "proper inquiry [is] limited to whether [the third–party culpability] evidence could raise a reasonable doubt as to defendant's guilt and then applying section 352." (*Hall, supra*, 41 Cal.3d at p. 833.) The evidence defendant sought to introduce (and elicit) was relevant only if there was some evidence linking the third party to the crime. (*Hall, supra*, 41 Cal.3d at p. 833.) Here, the court implicitly concluded the evidence defendant sought to elicit by cross-examining McKinley regarding the photos was not capable of raising a reasonable doubt as to defendant's guilt. At that point in the trial, there was no foundation to support its admission because no evidence of third–party culpability had been put before the jury, and defendant had no more than counsel's speculation that Williams would testify. Because the evidence failed to satisfy the first prong of the test, there was no need for the court to proceed to the second prong of the section 352 analysis, and determine whether the

probative value of then non-existent evidence was substantially outweighed by its potential for prejudice.

c. *Defendant Was Not Denied a Meaningful Opportunity to Present a Defense*

A defendant has a right to present "a complete defense." (*California v. Trombetta* (1984) 467 U.S. 479, 485; *People v. Brown* (2003) 31 Cal.4th 518, 538.) Generally speaking, "'the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.]'" (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) This principle is equally applicable in the case of evidence of third–party culpability. (*Ibid.*)

The court's exclusion of the photographs and cross-examination of McKinley regarding them did not prevent defendant from presenting a defense. By the time defendant's counsel made his opening statement after the prosecution rested, it had been established that Williams would in fact be testifying during defendant's case. Thus, defense counsel's opening statement was focused on informing the jury that "this [was] a case about mistaken identification." The jury was told that it would "find out from [defendant's] brother Kenneth Williams that he was the perpetrator of [the armed robbery of McKinley]," and

that Williams had come to court "to accept responsibility" for that crime.

The court permitted defendant to present a defense of third–party culpability by calling Williams to testify, while also protecting William's rights. The court first appointed counsel to represent Williams and made sure that Williams was voluntarily waiving his Fifth Amendment right and that he understood all the consequences of his decision. The court went to great lengths to ensure that the jury's impression of Williams was not tainted by the fact that he was in custody (on unrelated offenses). The trial court: (1) permitted Williams to testify wearing civilian clothing; (2) ensured that he was already seated in the witness box before the jury entered the courtroom; (3) placed his attorney in the first row of public seats so he could closely, but inconspicuously, observe the proceedings; (4) refused to permit the prosecution to question Williams regarding his two pending criminal cases; and (5) gave Williams a secret signal to use ("Can I take a break") at any point that he wanted to stop, or to talk to his counsel, a sign that was designed not to alert the jury–which would be excused–to any irregularities in the proceeding.

Ultimately, the jury rejected defendant's third–party culpability defense. That does not mean defendant was prevented from presenting the defense that McKinley's identification of him was mistaken. Williams delivered on his promise and testified that it was he who committed the robbery. The jurors did not need photographs to compare any resemblance between the two brothers (brother Travonne

is irrelevant here). The jurors had ample time during trial to compare the brothers' features and decide for themselves whether McKinley might have mistaken defendant for Williams.

Defendant's assertion that he was denied the opportunity to present a defense is also belied by the fact that he retained–but never exercised–the ability to seek to recall McKinley during his case, or subpoena her on his own under proper circumstances. First, the record contains no indication that the trial court would not have afforded defense counsel an opportunity to recall McKinley and question her regarding the photographs in the event Williams testified. Second, during his affirmative case, defense counsel could have subpoenaed McKinley after Williams testified and a third–party culpability foundation was laid. Defendant had an opportunity to present his third–party culpability defense, and no error under state law was committed by the trial court. Defendant's rights of confrontation and due process were not violated. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1242-1243 [exclusion of third party culpability evidence did not constitute a violation of the federal constitutional rights to present a defense or to confront and cross-examine witnesses].)[6]

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[6] Having found no error, we need not address defendant's claim of prejudice. However, we make two brief observations on the subject. First, we reject defendant's contention that the mere erroneous exclusion of third–party culpability evidence implicates the federal constitution and is governed by the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18) standard of review. It is settled that the standard for determining prejudice where a court errs in excluding such evidence is *Watson's* harmless error standard

2. *The Court Did Not Err in Denying Defendant's Motion for a New Trial*

Defendant sought a new trial on three grounds: (1) his contention that the court improperly refused to allow him to confront McKinley with and question her regarding the photographs of the three brothers, (2) newly discovered evidence of his work records, and (3) newly discovered records confirming the death of Trayvont/Tyrie, the man Williams claimed was with him when he robbed McKinley. The motion was denied on all grounds. Only the first of the three bases for denial is at issue here.

A trial court's ruling on a motion for a new trial is reviewed for abuse of discretion. (*People v. Thompson* (2010) 49 Cal.4th 79, 140.) The court's discretion is broad, and its ruling will not be disturbed absent "a manifest and unmistakable abuse of discretion." (*People v.*

(*People v. Watson* (1956) 46 Cal.2d 818, 837). (*Hall, supra,* 41 Cal.3d at p. 836.) Reversal is not required unless it is "reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. [Citation.]" (*Ibid*.)

Second, under the *Watson* standard, even were we to conclude that the trial court erred—a finding we expressly do not make—in light of the extremely strong case against defendant, there was no prejudice: it is not reasonably probable that defendant would have achieved a more favorable result absent such assumed error. The jury was able to view Williams when he testified and determine whether it was reasonable that McKinley–who had seen the armed robber at a 12-inch distance–mistook him for defendant. Moreover, Williams was vague or mistaken on numerous details (the brand and color of the purse, the date of the robbery and his location in relation to McKinley before the robbery), and his testimony was suspect on others (he never looked inside McKinley's purse, which he tossed away within 150 feet, nor did he look for a diamond pendant that purportedly fell near his feet).

Fuiava (2012) 53 Cal.4th 622, 730.) The appellant has the burden to demonstrate that the trial court's decision was irrational or arbitrary, 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 contends that "[f]or the same reasons discussed [regarding the exclusion of third–party culpability evidence]," by which the trial court "prevent[ed] [him] from confronting his accuser with photographs of him, Kenneth Williams and Travonne Williams . . . , the trial court again abused its discretion in denying the motion for new trial." For the same reasons we found that defendant failed to demonstrate that the trial court abused its discretion in excluding the third–party culpability evidence, we find that defendant similarly failed to show that the court abused its discretion when it denied his motion for a new trial.

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DISPOSITION

The judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.