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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY SCOTT MCGARRY,

Defendant and Appellant.

2d Crim. No. B270618
(Super. Ct. No. 2014023603)
(Ventura County)

Timothy Scott McGarry appeals from the judgment entered after his conviction by a jury of felony vandalism. (Pen. Code, § 594, subd. (b)(1).) The trial court suspended the imposition of sentence. It placed appellant on probation on condition that he serve 90 days in county jail and pay $1,977 in restitution for damage he had caused to the victim's vehicle.

Appellant's sole contention on appeal is that the trial court erroneously "permitted [Deputy John] Popp to testify, over objection, as an expert witness about the possible causes of the damage to [the victim's vehicle]." Appellant argues that Popp "was wholly unqualified" to render such an opinion.

A previous trial on the same charge had ended in a mistrial. The jury was deadlocked 11 to 1 in favor of a guilty verdict. Deputy Popp did not testify at the previous trial. Appellant asserts: "[P]rejudice is . . . established by the different results in [the] first and second trial[s], as the first trial . . . lacked the challenged expert testimony."

We affirm because appellant forfeited his claim that Popp lacked the qualifications to render an expert opinion on causation. Even if appellant had not forfeited the claim, we would affirm because the trial court did not err and any error would have been harmless.

Facts

Sharon Morgan's Toyota RAV4 was stopped at an exit from a parking lot. Appellant walked toward the vehicle and created a dent in the left rear door panel. The parties dispute whether the dent was caused by appellant's deliberate kicking of the door or his accidental kneeing of the door. Morgan testified that, with a smile on his face, appellant kicked the door. "The car shook, hard." Morgan "was shocked." Appellant was wearing sandals. An insurance appraiser opined that it would cost $1,977 to repair the damage.

Appellant, who weighed 260 pounds, testified as follows: While walking on the sidewalk with his wife and two children, he crossed over an area "where the sidewalk dips to let cars out." Appellant was walking "at a normal pace" and was "looking at [his] daughter." When he heard his wife yell, he "looked up [and] there was a car right in front of [him.]" The car was only two to four inches away. Appellant was "mid stride." He quickly "brought [his] knee up to [his] groin." His knee hit the vehicle "very hard." Everything happened "[e]xtremely quickly."

John Popp, a senior deputy in the Ventura County Sheriff's Department, testified as an expert witness for the People. Popp is a supervisor in the traffic division, where he works in the field of traffic accident investigation and reconstruction. When he examined Morgan's vehicle, Popp saw "a softball-sized impact mark in the middle of a door, approximately three feet off the ground." The dent was three-quarters of an inch deep. A photograph of the damage showed "a scuff mark right in the same area of the dent." It was "some kind of vinyl or rubbery shaped mark." Popp opined that the damage to the door "could be consistent with a kick or a knee or somebody using a lot of force with an elbow or a hand. . . . You just don't walk into something that leaves a dent here that creases a door." A knee could have caused the dent "if the person had a lot of velocity running and jumping into the car and raising a knee. . . . [Y]ou're not going to get this kind of damage by just coming up and kneeing it." "[A] good running force, somebody running hard and jumping into the car" would be required. "[W]e walk like three miles an hour. A normal step is about three feet. So you're not having a lot of velocity there to run into the side of a car and leave dents in certain places. We're not built that way."

Appellant's Claim that Popp Was Not Qualified to Render an Expert Opinion on Causation

Appellant asserts that he does not "dispute that Popp would have been qualified to render an opinion on causation in an accident where a moving vehicle strikes a pedestrian." Nor does he "dispute that Popp was qualified to testify regarding the location of the impact point, or the types of scuff or transfer marks that might result from a pedestrian being struck by a vehicle." Appellant contends that Popp was not qualified "to

render an opinion on causation where [as here] a *pedestrian strikes a stationary vehicle*." Appellant claims that there is "no evidence that Popp had ever investigated an incident where a pedestrian damaged a stationary vehicle, or that he was trained to analyze causation in that situation. Instead, his training and experience involved accidents where a moving vehicle struck some other object or person." "In summary," appellant argues, "Popp's expertise was limited to accidents involving a vehicle striking [another] vehicle or pedestrian, and there was no foundation to establish his ability to analyze causation in the context of a stationary [vehicle] struck by a pedestrian."

Qualification as an Expert

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates. Whether a person qualifies as an expert in a particular case . . . depends upon the facts of the case and the witness's qualifications. [Citation.] The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown. [Citations.]" (*People v. Bloyd* (1987) 43 Cal.3d 333, 357.)

Appellant Forfeited His Claim That Popp Was Not Qualified to Render an Expert Opinion on Causation

Our Supreme Court has "long and repeatedly held that a defendant who fails at trial to object that a witness lacks the qualifications to render an expert opinion may not on appeal contest the opinion's admissibility. [Citations.] This rule helps the trial court 'take steps to prevent error from infecting the remainder of the trial' and to develop an adequate record.

[Citation.] 'Equally important,' it 'afford[s] the prosecution the opportunity to . . . provide additional foundation for the admission of evidence . . . .' [Citation.] It thus ensures that the party offering the evidence has an opportunity to address any objection and "'prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error.'" [Citation.]" (*People v. Dowl* (2013) 57 Cal.4th 1079, 1087-1088; see also Evid. Code, § 353, subd. (a); *People v. Williams* (2008) 43 Cal.4th 584, 620 [""'questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal'"].)

Before the trial began, defense counsel objected "on foundation grounds" to Popp's "ability to opine" on the cause of the damage to the vehicle.[1] In response to the objection, the court asked the prosecutor to make an offer of proof. After the offer of proof, defense counsel protested, "I don't think he's offering any information beneficial to a jury. He's simply -- sounds like a lay opinion . . . it's just not scientific at all. There's no measurements as far as the amount of force or type of -- I think no weight at all, that's my argument -- at all or very little." The trial court responded: "[I]t's something for proof about education, training, and experience, and *assuming the foundation is laid in that regard*, it becomes an issue of weight subject to cross-examination

[1] Defense counsel stated: "My understanding is Deputy Popp will testify as far as the -- basically give an opinion on the case as to whether he believed that the damage caused [to] the car was due to running -- walking into the vehicle, as per accident, or whether the damage was caused by a deliberate kick. And I'm objecting on foundation grounds for his ability to opine on that."

not admissibility. [¶] So I would rule that -- I would permit Deputy Popp *if properly qualified* to render an opinion. I think it's sufficiently beyond the normal or general or common understanding of jurors." (Italics added.) "[T]he opinion you're describing is well within the realm of typical expert opinion, and becomes an issue of cross-examination and weight."

In the above colloquy between the court and defense counsel, counsel did not object that Deputy Popp lacked the qualifications to render an expert opinion on the cause of the damage to Morgan's vehicle. He first objected "on foundation grounds" to Popp's "ability to opine" on the cause of the damage. (See *People v. Roberts* (1992) 2 Cal.4th 271, 298 ["lack of foundation" objection "never sought to challenge the witnesses' qualifications as experts, and it is too late to raise the issue now"].) After the prosecutor had made her offer of proof, counsel in effect objected that Popp's opinion was not "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a); see *People v. Chapple* (2006) 138 Cal.App.4th 540, 546-547 ["'Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness'"].) The trial court ruled that Deputy Popp's opinion was "sufficiently beyond the . . . common understanding of jurors" and "well within the realm of typical expert opinion."

Even if appellant had objected that Popp lacked the qualifications to render an expert opinion on causation, the trial court did not rule on the objection. Instead, the court said it "would permit Deputy Popp *if properly qualified* to render an opinion." (Italics added.) "Because the trial court did not rule on

[appellant's purported] objection[] *in limine* [that Popp was not qualified to render an expert opinion on causation], he 'was obligated to press for such a ruling and to object to [the evidence] until he obtained one. . . .'" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171.) As we will show below, appellant "'failed to do so, thus depriving the trial court of the opportunity to correct potential error.' [Citation.]" (*Ibid.*) Thus, appellant "has failed to preserve the issue for appeal." (*Ibid.*; see also *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1181 [defendant forfeited claim that trial court had erroneously excluded evidence because "the trial court deferred ruling on [the People's] motion to exclude the evidence and none of appellants ever raised the issue again"].)

During jury selection, appellant objected to Popp's proposed testimony that a dark scuff mark in the damaged area of Morgan's car had been caused by a shoe. Defense counsel claimed that Popp was not "qualified" to render such an opinion and that "it's just pure speculation that [the scuff mark] is from a shoe." Counsel continued: "The mark, scratch, whatever that is wasn't analyzed. It wasn't studied. It's just [Popp] simply saying, oh, that's from a shoe." Counsel complained that he had been informed only "yesterday" about the scuff mark and Popp's proposed testimony. The trial court decided to conduct an Evidence Code section 402 (section 402) hearing on the matter because it "need[ed] more information." The court explained, "I need to know in specific what the factual basis will be [for Popp's opinion that the scuff mark was caused by a shoe] and if it's going to be supported by the evidence. And then I'll make a determination about w[h]ether it's within the realm of expert opinion or speculation."

Appellant acknowledges: "The trial court held a hearing the following day as to the admissibility of the scuff mark evidence. . . . [T]he Evidence Code section 402 hearing was in regard to the scuff mark evidence, not Popp's causation opinion."

After Popp had testified at the section 402 hearing, the trial court ruled in appellant's favor that Popp could not opine that the scuff mark had been caused by a shoe or was consistent with a shoe. The court stated: "There's no way that that would be anything other than speculation, no way. [¶] So all he can say is, [the scuff mark is] there. And he can say everything is consistent with a forceful, direct impact. Is that consistent with somebody kicking it? Yeah. Can you say more beyond that? No."[2]

Appellant did not object to the trial court's ruling. Instead, on the ground of "late discovery," defense counsel requested "to exclude any mention of this . . . black mark." The court denied the request.

Appellant's objection during jury selection and the section 402 hearing was directed at Popp's proposed testimony that the scuff mark had been caused by a shoe. The objection was not directed at Popp's proposed testimony on the cause of the dent. The objection therefore did not preserve the claim that Popp was not qualified to render an expert opinion on the cause of the dent. (See *People v. Farnam* (2002) 28 Cal.4th 107, 161-

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[2] Deputy Popp complied with the court's ruling. In his testimony before the jury, Popp opined that the damage to the door "could be consistent with a kick or a knee or somebody using a lot of force with an elbow or a hand." When the prosecutor asked about the scuff mark, Popp replied: "I have no idea what it is. It is some kind of vinyl or rubbery shaped mark. But that's all I can tell you there."

162 [defendant forfeited claim that expert was not qualified to testify about blood splatter evidence and crime scene reconstruction when he objected only to expert's "qualifications with respect to estimating the amount of time elapsing from the start to finish of the attack on the victim"].)

During Deputy Popp's direct examination before the jury, appellant objected to the prosecutor's question: "Now, a normal reaction for people [who walk into a car] is to put their hands out, isn't it? To push away from something. If something is just all of a sudden in front of them, they're going to push away. Now they don't see it." Appellant interrupted, "Object; lack of foundation, speculation." The trial court overruled the objection, which did not raise the issue of Popp's qualifications to testify as an expert on the cause of the dent.

Accordingly, appellant forfeited his claim that Popp lacked the qualifications to render an expert opinion on causation.

We Lack Authority to Consider Appellant's Forfeited Claim

Appellant argues that this court has the authority to consider his forfeited claim. Whether we should do so, he asserts, is entrusted to our discretion. Appellant relies on *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6. But the cited footnote from *Williams* shows that we lack authority to consider the forfeited claim because it involves the allegedly erroneous admission of evidence. Our Supreme Court stated: "An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. [Citations.] Indeed, it has the authority to do so. [Citation.] True, *it is in fact barred when the issue involves the admission (Evid. Code, § 353) or exclusion (id., § 354) of evidence*." (*Williams*, at p. 161, fn. 6,

italics added.) Evidence Code section 353 provides that a judgment shall not "be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . . ." (*Ibid.*)

If We Had the Authority to Consider Appellant's Forfeited Claim, We Would Affirm

If we had the authority to consider appellant's forfeited claim, we would conclude that the trial court had not abused its discretion in ruling that Popp was qualified to render an expert opinion on the cause of the dent in the vehicle's door. "A ruling that constitutes an abuse of discretion has been described as one that is 'so irrational or arbitrary that no reasonable person could agree with it.' [Citation.]" (*Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 773.)

Popp's expertise was based on his training and experience in the field of traffic accident investigation and reconstruction. Popp testified: "I have in excess of a thousand hours of structure training in a lot of facets of traffic accident investigation and reconstruction ." "[T]here's all the specialty fields of biomechanics, tire forensics, speed analysis from damage of vehicles." "And then a lot of other fields, pedestrian and bike versus vehicle, a lot of pedestrian kinematics." It is especially important that Popp stated, "Depending on the type of crash . . . , we can measure cars and *get a speed that it takes to bend these metals*." (Italics added.)

The trial court could have reasonably concluded that, based on his training and experience, Popp had developed special

knowledge as to the force necessary to bend metal so as to cause "a softball-sized impact mark" three-quarters of an inch deep in the door of Morgan's vehicle. Popp testified that, whatever struck the door, "it was enough to bend the metal and stretch it to where it won't rebound and reshape." The court could have reasonably concluded that Popp knew that the requisite force could not have been generated by a 260-pound man walking "at a normal pace" into the door.

Even if the trial court had abused its discretion, the admission of Popp's testimony on causation would not have been reversible error. The erroneous admission of evidence "warrants reversal of a conviction only if the appellate court concludes that it is reasonably probable the jury would have reached a different result had the [evidence] been excluded. [Citation.]" (*People v. Scheid* (1997) 16 Cal.4th 1, 21.)

It is not reasonably probable that the jury would have reached a different result had Popp's testimony on causation been excluded. Key evidence was presented during the second trial that had not been before the jury during the first trial. The key evidence is the scuff mark that, according to Popp, was "right in the same area of the dent." The mark was "going toward the center of where that softball-sized impact is." Popp described it as "some kind of vinyl or rubbery shaped mark." Ron Cisar, an insurance appraiser, touched the mark. "[I]t felt like just a plastic or a rubber transfer." "[I]t looked like some type of a black rubber or a black plastic transfer onto the paint of the door." The jury reasonably concluded that the scuff mark had been caused by appellant's sandal striking the door. It is common knowledge that sandals often have rubber-like soles that can leave dark scuff marks. Appellant offers no explanation how

his knee could have left a black rubbery mark in the same area of the dent.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Matthew P. Guasco, Judge

Superior Court County of Ventura

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