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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CARL STANLEY BROWN, Defendant and Appellant.	B235561 (Los Angeles County Super. Ct. No. VA 071021)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip H. Hickock, Judge. Affirmed.

Jeff Dominic Price for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

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On May 11, 2002, appellant Carl Stanley Brown stole some miscellaneous items from a Walmart store in Lakewood; he was apprehended on the scene. This simple set of facts has led to three trials, three convictions and three appeals, this being the third. What we have previously characterized as the bane of this case is the testimony of a Walmart loss prevention officer, Richard Rojas, that he took photographs of the stolen items on May 11, 2002. As we discuss below, in the second appeal we remanded this case with directions that the jury be informed that Rojas testified twice under oath that he took the photographs on May 11, 2002, but that, in fact, the photographs were taken during or after September 2002 and that Rojas's testimony to the contrary was false. The trial court initially did as our mandate required but at the end of the case refused to repeat the instruction. For reasons set forth below, we find no error in this and therefore affirm.

We first summarize the procedural history of this case, which includes a successful petition for a writ of habeas corpus in the United States District Court, and then the third trial and conviction, which has led to this appeal. We limit our summary of the operative facts to those developed in the third trial. We note preliminarily that appellant's third trial ended with a conviction and six-year prison sentence but, given his credit of 3,321 days, he was released from custody upon his third conviction.

PROCEDURAL HISTORY AND OPERATIVE FACTS

1. The First Two Trials and Appeals

In *People v. Brown* (June 25, 2004, B166415), a nonpublished opinion, we affirmed the judgment convicting appellant of second degree robbery and petty theft with a prior. The issue of the falsity of the May 11, 2002 photograph was raised in the sense that appellant contended that the photograph was fabricated. We rejected the contention on appeal that appellant should have been allowed to impeach Rojas with a showing that the photograph was fabricated because we concluded the photograph was not an important part of the case, which rested on eyewitness testimony by Rojas and another Walmart employee of the theft itself. The California Supreme Court denied appellant's petition for review.

Appellant filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California. Relying on the principle that the prosecution is constitutionally required to report to the defendant and the trial court whenever a government witness lies under oath, and finding that there was no independent evidence corroborating Rojas's testimony as to the actual taking of the merchandise inside the store, the court concluded that the evidence impeaching Rojas's credibility was important and material. We set forth the applicable principles in the margin, which we summarized in our second opinion.[1] The district court ordered appellant's discharge unless he was promptly retried.

Appellant's second trial now took place. It is not necessary to repeat here the extended summary of the second trial, which we set forth at pages 5-15 of our second opinion in *People v. Brown, supra*, B211202, that followed the second trial. The gist of it was that the trial court in the second trial failed to appreciate that the jury had to be instructed, per the district court's conclusion, that Rojas had testified falsely about taking the photographs on May 11, 2002. We concluded in our second opinion that when the second trial concluded, ". . . the state of the record was that Rojas had again testified that he took the photograph on May 11, 2002, and there was *no evidence to the contrary*. In other words, the false testimony that led to the judgment of the district court granting appellant's petition for a writ of habeas corpus had been presented at the second trial, as well." (*People v. Brown*, *supra*, B211202.)

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1 "The prosecution is constitutionally required to report to the defendant and to the trial court whenever a government witness lies under oath. This principle is based on *Mooney v. Holohan* (1935) 294 U.S. 103 . . . and *Napue v. Illinois* (1959) 360 U.S. 264, 269-272 . . . and has been articulated into three elements. To prevail under these cases, the defendant must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material. (*U.S. v. Zuno-Arce* (9th Cir. 2003) 339 F.3d 886, 889.) A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. (*Giglio v. United States* (1972) 405 U.S. 150, 154.)" (*People v. Brown* (Jan. 25, 2010, B211202) [nonpub. opn.].)

This was the mandate set forth in our second opinion: "We remand with directions for a new trial. If Rojas is called as a witness, the jury must be made aware that Rojas testified on two separate occasions under oath that he took the photograph on May 11, 2002. The jury must also be made aware that the photograph was not taken on May 11, 2002, but was in fact taken in or after September 2002 and that Rojas's testimony to the contrary was false." (*People v. Brown*, *supra*, B211202.)

2. The Third Trial

a. The Initial Instruction

Appellant's third trial commenced in January 2011. Appellant was charged with petty theft with a prior and second degree robbery. Before the first witness, Rojas, testified, the trial court instructed the jury as follows: "Ladies and gentlemen, before we get started, just one thing. Mr. Rojas has testified on two prior occasions under oath that he took a photograph on the day of the incident in this case, which is May 11, 2002, when in fact the photograph which was admitted into evidence on those occasions was taken on or after the date of September 2002. Mr. Rojas' testimony to the contrary on both of these occasions was false."

b. Trial Testimony

Rojas testified that he saw appellant enter the Walmart store and take some items of clothing from a display shelf. He put them in a shopping cart and went to the hardware department. He took a power drill from a display shelf and put it in his shopping cart. Next, he put these items in a backpack that was also in the shopping cart and went to the front of the door, stopping to pick up a baseball cap that he put in his right pocket. He exited the store without stopping at any of the registers.

Rojas and a Walmart sales associate followed appellant outside, where Rojas identified himself by showing his Walmart badge. Appellant became combative, swinging his arms as if he wanted to fight. Rojas and the sales associate grabbed appellant's arms and wrestled him to the ground. They handcuffed appellant and walked him and the merchandise back to the store. A fireman who happened to be in the parking lot witnessed the altercation between Rojas, the sales associate and appellant.

Rojas called the police, who arrived on the scene, after which a receipt was rung up for the merchandise appellant had taken. Rojas testified that he also took a photograph of the merchandise.

Appellant was interviewed at the sheriff's station two days after the foregoing. After his *Miranda*[2] rights were read to him, appellant admitted he took the merchandise, that he resisted *Rojas*, and explained that he stole in order to sustain his cocaine habit.

Appellant testified in his defense, which was that he had bought the merchandise in question from a stranger and was taking it back to the Walmart store. Not finding anyone at the customer service station, he left the store with the merchandise in his possession.

c. The Possibility of a Substitution of the Photograph

During his redirect examination, Rojas described the process followed at Walmart in the case of stolen merchandise. The process was to photograph the merchandise; if it was not available, substitutes would be found in the store and photographed.

He was asked whether it was possible that someone substituted another photograph for the one he took on the day of the incident. He said it was possible. He also testified that he gave the photograph that he took on May 11, 2002, to a sheriff's deputy on the scene. The deputy sheriff who investigated the crime denied having received a photograph from Rojas.

d. The Trial Court Does Not Repeat the Instruction

At the close of the prosecution's case, the defense requested that the court again instruct the jury that Rojas's testimony was false that he took photographs of the merchandise on May 11, 2002. The trial court denied the request, explaining that another Walmart employee had testified that a second photograph was taken at another time, which would make Rojas's testimony "not false." The court left it to the jury to decide whether Rojas's testimony was false.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

e. The Prosecution's Closing Argument

The prosecution argued that there were two possibilities. One was that Rojas was lying about taking the photograph on May 11, 2002. The other was that Rojas did take a photograph as he testified but someone else substituted another photograph for the one Rojas took. If the latter was the case, Rojas was misidentifying the photograph in question as the one he took, in which event he did not know that he was testifying falsely.

f. Conviction

Appellant was found guilty of petty theft with a prior but not guilty of second degree robbery.

DISCUSSION

1. Rojas's Testimony

Appellant contends that it was error to allow the prosecution to again present false testimony by Rojas that he took photographs of the merchandise on May 11, 2002.

There are two reasons why we reject appellant's argument.

First, once Rojas testified during the third trial that it was possible that someone switched the photograph, substituting one taken during or after September 2002 for the one Rojas took on May 11, 2002, the factual premise on which the district court rested its decision was no longer the only possible scenario. Until then, the date on the Polaroid photo showed without the possibility of contradiction that it was taken in or after September 2002. After Rojas's testimony during the third trial, the possibility existed that the photograph had been substituted for the one he took. (The trial court erred in stating that another Walmart employee had so testified; it was Rojas who testified that substitution was a possibility.)

Given that it was standard practice at Walmart to photograph merchandise that was the subject of a theft charge, Rojas's testimony that he took a photograph of the merchandise is not implausible. Granted that his testimony is not a ringing endorsement of the substitution theory, it nonetheless suggests that possibility. Rojas maintained during three trials that he took the photograph on May 11, 2002. Whether he took the photograph as he testified is somewhat collateral to the evidence that appellant stole the

merchandise and resisted attempts to recover it. That Rojas was adamant about this collateral issue, when he could easily have abandoned the point without impugning the rest of his testimony, is a circumstance that should not be ignored.

We agree with the trial court that this additional testimony by Rojas converted the issue whether he was falsely testifying about the photograph into an issue for the jury.

The second reason we disagree with appellant is that there is no question that the jury was aware of the circumstance that Rojas's testimony about the photograph was false, at least until his testimony that we discussed above. That is, this was not a case where the prosecution presented false evidence on a material issue and where this was not disclosed to the jury. (See fn. 1, *ante*.) The court's initial instruction flatly stated that his testimony was false. The prosecutor's closing argument was that this was one of two possibilities. Thus, the jury was well informed of this and therefore in a position to reject Rojas's testimony as not credible. In any event, as respondent notes, the prosecution's burden in these situations is also met if the false testimony that was given is corrected. (*People v. Vines* (2011) 51 Cal.4th 830, 873.) Telling the jury in advance that the testimony is false serves as a correction of that testimony.

We conclude that the trial court did not err when it refused to again instruct the jury that Rojas's testimony about the photograph was false. We also reject, for the reasons given, the argument that it was error to allow Rojas to testify that he took a photograph on May 11, 2002.

2. The Video

Appellant contends that Rojas lied in his preliminary hearing testimony that no video was taken of the incident. According to appellant, this is shown by his testimony at the third trial that there was a video.

Rojas testified during the third trial that the store had a video that took still photographs of parts of the store. The video did not cover the areas from which appellant took merchandise, but it did cover the area where appellant was apprehended. Thus, the video, even if it existed, would have played no role in the prosecution in that there was no dispute about the altercation outside the store. It does not necessarily follow that

appellant lied during the preliminary hearing in that the store did not really have a video in the normal sense of that term but rather only cameras that took still photographs.[3] In any event, this matter is of such a vanishingly small significance that we fail to see any error arising from the absence of a video. There is certainly no basis for the conclusion that Rojas lied about this subject.

3. The Sufficiency of the Evidence

Appellant contends that the evidence is insufficient because Rojas cannot be believed.

Rojas testified four times under oath about this shoplifting incident, if his testimony during the preliminary hearing is included. His testimony throughout remained consistent. Considering that it spans nine years, its consistency is its best recommendation. It is also corroborated by the testimony of the Walmart employee who helped Rojas apprehend appellant. In the end, there is no question that appellant was apprehended in the parking lot with unpaid Walmart merchandise. There is, of course, appellant's own confession to the crime, elicited by the sheriff's investigator. In short, there is no dearth of evidence that appellant committed the petty theft of which he was convicted.

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J. GRIMES, J.

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[3] The testimony about no videos in the store given during the preliminary hearing appears to have been very summary, without any exploration of the subject that might have revealed that there were cameras covering parts of the store.