Filed 2/6/13 P. v. Dotson CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHARLES LEE DOTSON, Defendant and Appellant.	B237707 (Los Angeles County Super. Ct. No. SA072408)

APPEAL from a judgment of the Superior Court of Los Angeles County. Katherine Mader, Judge. Affirmed.

John Alan Cohan, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Defendant and appellant Charles Lee Dotson (defendant) appeals from a final judgment following his conviction by jury of violations of Penal Code section 550, subdivisions (a)(1) (presentation of a false or fraudulent claim for loss or injury, including payment of a loss or injury under a contract of insurance); (a)(2) (presentation of multiple claims for the same loss or injury, including presentation of multiple claims to more than one insurer with intent to defraud); and (b)(3) (concealing or failing to disclose an event affecting a person's continued right to entitlement to any insurance benefit or payment).[1] We affirm.

CONTENTIONS

Defendant contends that he was afforded ineffective assistance of counsel because trial counsel failed to subpoena witnesses who could have provided exculpatory evidence on his behalf. Specifically, defendant contends that his counsel failed to subpoena as witnesses Karen Kowach, one of his insurance agents; Detective Tripp, whom defendant allegedly telephoned following a robbery on December 6, 2007; and Adell Nicholas, an insurance adjuster who evaluated defendant's sworn loss statement.

Defendant further contends that his counsel's errors were prejudicial, especially in light of the cumulative prejudice test.

STATEMENT OF THE CASE

On January 25, 2011, the Los Angeles District Attorney's Office filed an information charging four counts against defendant. Count 1 charged him with grand theft in violation of section 487, subdivision (a). Count 2 charged defendant with insurance fraud in presenting a false and fraudulent claim for the payment of a loss in violation of section 550, subdivision (a)(1). Count 3 charged defendant with insurance fraud in presenting multiple insurance claims for the same loss in violation of section 550, subdivision (a)(2). Count 4 charged defendant with insurance fraud in failing to

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

disclose the occurrence of an event which affected his right to an insurance benefit in violation of section 550, subdivision (b)(3).

The information also alleged that defendant had suffered two prior serious or violent felony convictions within the meaning of section 667, subdivisions (b) through (i), and section 1170.12, subdivisions (a) through (d).

Defendant pled not guilty. Count 1 was dismissed pursuant to a defense motion brought under section 1118. Defendant was thereafter found guilty of counts 2, 3, and 4. He admitted to one strike in case No. A803246, and the court dismissed the strike in case No. A700481 pursuant to section 1385.

Defendant was sentenced to four years in state prison. The court selected the low term of two years, which was doubled due to the prior strike. Defendant was given credit for a total of 98 days in custody. The sentences as to counts 3 and 4 were stayed pursuant to section 654.

On December 2, 2011, defendant filed a notice of appeal.

STATEMENT OF FACTS

Prosecution case

The prosecution's case was based on the theory that defendant established three insurance policies on the same items of jewelry, then claimed that the jewelry was stolen on one date in a burglary, and on another date in a robbery.

On August 21, 2007, Hernan Golbert (Golbert) of 18 Karat Appraisers completed a jewelry appraisal for defendant. The appraisal pertained to five pieces of jewelry: (1) a white gold diamond ring valued at $7,000; (2) another white gold diamond ring valued at $5,400; (3) a white gold diamond bracelet valued at $25,800; (4) a white gold diamond pendant and necklace valued at $1,350; and a white gold diamond Rolex wristwatch valued at $16,000.

Defendant lived in a home in Lancaster which was purchased by his brother, Mark Watts (Watts). Watts bought a homeowner's insurance policy on the Lancaster home with Wawanesa Insurance (Wawanesa). Defendant later added the two rings and

the pendant to the Wawanesa policy, based on the appraisal. Defendant also obtained an insurance policy from Farmers Insurance for two rings and a Rolex watch. He obtained surplus insurance coverage with Sutter Insurance (Sutter) to cover the white gold diamond bracelet and the white gold diamond pendant. The effective date of the Sutter policy was September 20, 2007.

The September 21, 2007 burglary

On September 21, 2007, defendant was the victim of a residential burglary at the Lancaster residence. He initially reported the incident to law enforcement, but Watts, who was not living at the Lancaster home at the time, spoke with the sheriffs who came to the house. Watts didn't really know what had been stolen, so he had defendant make a list. Watts signed the list, and he and defendant had it notarized.

Wawanesa had an independent claims investigator, Carl Scholten (Scholten), investigate the claim of loss related to the burglary. On October 7, 2007, Scholten went to the Lancaster residence to investigate the claim. When he arrived, he spoke with defendant, who introduced himself as "Mark Watts" and held himself out to be Watts.

However, Watts testified that he was present at the house when Scholten came to investigate the burglary. According to Watts, he introduced himself as "Mark Watts" to Scholten, and informed Scholten that he was sick with high blood pressure and the flu, so defendant would talk on his behalf during the inspection.

Defendant showed Scholten around the house and showed him the forced entry locations. Scholten took a recorded statement, so that he could have a complete inventory. Defendant also made a personal loss claim worksheet with Scholten. Scholten prepared the list based on his discussion with defendant and the notes taken from the recorded statement. Defendant claimed that he had lost one 18 karat diamond and platinum bracelet, one 16 karat diamond and platinum ring, one 14 karat white gold diamond ring, one 14 karat white gold ring, one 14 karat white gold diamond cross necklace, and two diamond stud earrings.

On March 5, 2008, defendant was examined under oath by Heather Kirby (Kirby), a fraud investigator for Wawanesa Insurance. During the examination, defendant admitted that he added jewelry to his Wawanesa homeowner's policy. The items were a diamond pendant with a chain and two diamond men's rings. Defendant was shown the appraisal from 18 Karat Appraisers, and he confirmed that the pendant and rings described on the appraisal were the items that were added to the Wawanesa policy. Defendant claimed he was not aware of any other policies that covered this jewelry.

Defendant was shown the sworn statement of loss signed by Watts on October 1, 2007. Defendant stated that the two diamond rings listed on the statement of loss were the same ones appraised by 18 Karat Appraisers. Defendant stated that a diamond bracelet, which was not covered by the Wawanesa policy, was also stolen. When he was asked why it was not listed on the sworn statement of loss, he stated that he had intended it to be there. There were other items that defendant claimed should have been listed on the sworn statement of loss, including a vase, an egg, and a Rolex watch valued at $15,000 to $16,000.[2]

During cross-examination of Kirby, defendant's attorney suggested that it was unclear whether defendant's testimony indicated that he was claiming that the Rolex watch was stolen or whether the stolen watch was a different watch, made by Guess. In addition, defendant's trial attorney suggested that defendant had in fact claimed that both watches were missing prior to the burglary. Kirby testified that she thought defendant stated that the vase, the egg and the Rolex should have been on the inventory of loss, but she would have to review his testimony to be sure. In addition, Kirby confirmed that when defendant was asked about the description of the bracelet that was stolen, he stated he did not know.

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[2] Kirby testified that it is customary that all stolen items, whether or not covered by the policy, should be noted when reviewing a claim.

During the March 2008 examination under oath, defendant was asked about a claim made to Farmers Insurance and/or Sutter Insurance. Defendant stated that the claim to Farmers and Sutter did not involve the same jewelry.

Wawanesa Insurance eventually denied the claim for personal property to Watts and defendant.

The December 6, 2007 robbery

On December 6, 2007, defendant claimed that he was the victim of a robbery. Los Angeles Police Officer Erik Mejia testified that defendant came into the police station at approximately 2:50 a.m. on that date. Defendant reported that he had been robbed while changing a flat tire on his vehicle in the area of 112th Street and Compton Boulevard. Defendant stated that two individuals approached him and asked if he needed help changing the tire. When he responded that he did not, one of the individuals stuck a hard object in his back, which he assumed was a handgun, and told him "if you don't give me your money, I will shoot you." Defendant removed his jewelry and gave it to the robber. One of the robbers reached into defendant's back pocket, removed his wallet, and took a ring from his hand. In addition to the wallet and the ring, defendant informed the officer that an additional ring and a watch were taken. Defendant stated that the two rings were worth $25,000, the watch was worth $25,000, and the wallet was worth $10. He did not mention to Officer Mejia that he had lost any cash or a diamond bracelet.

Defendant made a claim to Sutter Insurance concerning the alleged robbery. Elaine Jackson (Jackson) was hired by Sutter to investigate the claim. Jackson was aware that Sutter insured for defendant a white gold diamond bracelet valued at $25,800 and a white gold diamond pendant valued at $1,350. The two items had been appraised by 18 Karat Appraisers. The claim that Sutter received from defendant was for the theft of the diamond bracelet.[3]

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[3] Jackson also explained "how and why" defendant obtained insurance coverage for these two pieces of jewelry from Sutter Insurance. Defendant explained that he toured with certain rap stars and musicians, and he would acquire jewelry through this

On January 10, 2008, Jackson met with defendant at which time defendant described the circumstances of the alleged robbery. He said that the items taken from him were a gold Rolex watch, a gold diamond cluster ring from his left pinky, the bracelet insured through Sutter, and a white gold and diamond ring from his right pinky. Defendant also said he had six $100 bills in his wallet which was taken. Defendant stated that the value of the watch was $16,000. Defendant informed Jackson that his Farmers Insurance policy "insured the watch and the two pinky rings."

During the meeting, Jackson showed defendant the appraisal form from 18 Karat Appraisers. Defendant confirmed that the items listed in the appraisal were the items stolen from him during the robbery, with the exception of the pendant valued at $1,350. Defendant stated he was not wearing the pendant when he was robbed. When Jackson asked to see the pendant defendant replied that he was not sure where it was at the time.

At some point, Jackson became concerned that the bracelet which defendant was claiming as a loss through Sutter had been claimed as a loss through another insurance company, Wawanesa. Jackson developed this suspicion based on notifications to the Insurance Service Index Bureau that serves the insurance industry. On November 23, 2008, Jackson met again with defendant for an examination under oath. At the examination, defendant stated that the two bracelets were not the same and that he could get paperwork to show that the two bracelets were different. He never provided any such paperwork.

To Jackson's knowledge, Sutter did not pay defendant's claim on the insured bracelet.

With regard to the robbery, defendant spoke twice with Los Angeles Police Sergeant Adrian Koval. They first spoke by telephone on December 23, 2007. Sergeant

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occupation. People advised him that he should have insurance to protect himself. He informed Jackson that he had a tenant homeowner policy through Farmers Insurance, but that they would only cover a certain dollar amount of jewelry. The Farmers agent told him he would have to obtain a floater for the larger dollar amounts, particularly the bracelet.

Koval could not recall if defendant informed him of what was taken during that initial call. On January 23, 2008, defendant again spoke with Sergeant Koval. At that time, defendant told Sergeant Koval that two rings, a wallet, and a watch were taken from him. He did not mention that a bracelet or any cash had been taken. However, later defendant informed Sergeant Koval that a bracelet had been taken, and that it should have been in the original report.

Defendant also spoke with investigator Albert Abolos (Abolos), with I.C.S. Merrill, an investigation corporation on January 23, 2008, regarding the alleged robbery. Defendant informed Abolos that the robbers had demanded his jewelry and also removed his wallet from his back pocket. Defendant specified that his California driver's license and $800 cash were in the wallet.

When Abolos first met with defendant, he found it odd that defendant used his California driver's license to identify himself, since he also claimed it was taken from him in the robbery. Abolos noted that the issue date on the driver's license was July 2007, a date that preceded the alleged robbery. Abolos inquired of defendant as to how he had the driver's license. Defendant replied that he was a bounty hunter and would get in foot chases with bad guys, during which he would lose his license or his wallet, and later would get it back. Defendant added that he had numerous drivers licenses that had been lost and replaced over the years.

Defense case

The defense made a motion to exclude references that defendant held himself out to be his brother, Mark Watts, on relevance grounds. The prosecution opposed it on the ground that one of the insurance policies was in Watt's name, and defendant held himself out to be Watts with investigators. The motion was denied.

Defendant did not testify and presented no witnesses in his defense.

DISCUSSION

I. Legal principles and standard of review

Defendant argues that his counsel's failure to subpoena witnesses who would have provided exculpatory evidence on his behalf amounted to ineffective assistance of counsel. Defendant points to *People v. Rodriguez* (1977) 73 Cal.App.3d 1023, 1031, in which it was held that "[a] failure by defense counsel to investigate and produce potential witnesses who might cast doubt on the identification testimony of the prosecution's witnesses, and thus support the credibility of defendant, . . . constitutes a withdrawal of a crucial defense."

The Sixth Amendment guarantees a right to effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*).) "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Ibid.*) Defendant is required to show that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." (*Id.* at p. 687.) Essentially, the defendant must show that his counsel's assistance "fell below an objective standard of reasonableness." (*Id.* at p. 688.)

In addition, defendant must show that his counsel's ineffective assistance was prejudicial. (*Strickland, supra*, 466 U.S. at p. 697.) To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.)

In reviewing trial counsel's performance, our scrutiny must be "highly deferential." (*Strickland, supra*, 466 U.S. at p. 689.) We must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional

assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (*Ibid.*)

II. Appellant was not denied effective assistance of counsel

When a defendant's assertion of ineffective assistance of counsel is based on a failure to call particular witnesses, "there must be a showing from which it can be determined whether the testimony of the alleged additional defense witness was material, necessary, or admissible, or that defense counsel did not exercise proper judgment in failing to call him." (*People v. Hill* (1969) 70 Cal.2d 678, 690.) The court can also consider whether the testimony was sufficient to create a reasonable doubt. (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1101.) Further, the court can consider whether counsel took reasonable steps to procure the witness, and whether the witness would have been helpful to the defense. (*People v. Williams* (1980) 102 Cal.App.3d 1018, 1031-1032.)

As set forth below, we find that defendant has failed to make a showing that his trial counsel committed reversible error in failing to call any of the three witnesses raised in this appeal.

A. Failure to subpoena Karen Kowach

Karen Kowach (Kowach) was an independent insurance agent. She wrote defendant's policies for both Farmers Insurance and Sutter Insurance. She prepared the claim form based on the December 6, 2007 robbery, which then became the basis for the investigation by Jackson. The prepared form did not specify what jewelry was being claimed.

After the prosecution rested its case, the following colloquy took place:

> "[Defendant's counsel]: We're having issues with those witnesses that are on the witness list not being called. This was my concern in the beginning of the trial. Is [Kowach] coming?
>
> "[Prosecutor]: Karen is in Houston, Texas. I have tried earnestly to get her. She's in Texas and says she doesn't want to come. . . . She has a

family issue because her husband is now moving to Cartagena, Columbia, et cetera, et cetera. I don't intend on calling her.

"[Defendant's counsel]: Okay.

"The court: I don't think that the prosecution is obligated to produce every witness on the list. . . .

"[Defendant's counsel]: Right. I understand. But, you know, again, my concern is that those witnesses are in Texas [and] I'm fairly limited in terms of my ability to subpoena somebody from Texas.

"The court: So are they [referring to the People]. Same situation. They're in the same situation as you.

"[Defendant's counsel]: Okay. Well, I would like Adell Nicholas here. Can you give me her phone number?

"[Prosecutor]: Adell Nicholas, like I said, I received word due to medical restrictions she's unable to come. I do have her number. If you'd like to call her and confirm, it's fine. But it's my understanding that she was unable to travel from San Diego.

"[Defendant's counsel]: She's in San Diego?

"[Prosecutor]: Yes."

Defendant's trial counsel then asked the court if there was any way of getting the testimony of Kowach, from Texas, via telephone, adding "I know this [request] is ridiculous." The court's response was "No."

As set forth above, in order to make a successful claim for ineffective assistance of counsel, defendant is required to make a showing that the testimony of the missing witness was material and necessary to the defense. (*People v. Hill, supra,* 70 Cal.2d at p. 690.) Defendant made no showing as to what Kowach's testimony would be, or how it might have changed the outcome of the case. Thus, defendant has failed to show that his trial attorney performed deficiently, or that any such deficiency was prejudicial.

B. Failure to call Detective Tripp

During trial, defendant's counsel indicated that she would like to call Detective Tripp, another witness listed on the prosecution witness list but not called. The prosecutor responded that defendant's acquaintance with Detective Tripp was that he "worked with [defendant] with a gang."

At trial, the following colloquy occurred:

> "[Defendant's counsel]: Your Honor, all I know is he's on the prosecution list, and my client says I need to talk to him. I can't give you an offer of proof right at this moment.
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> "The court: You can't call him without an offer of proof.
>
> "[Defendant's counsel]: I understand. I will have him here. If that's what we decide to do and if he can make it, I'll make my offer of proof.
>
> "The court: Let's be clear about something. If he has a prior relationship with [defendant] and he has had conversations with [defendant] about the robbery, that would be hearsay.
>
> "[Defendant's counsel]: I understand.
>
> "The court: Okay.
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> "[¶] . . . [¶]
>
> "The court: The only relevancy I could see at this point is, you know, he [Tripp] could say he's always had honest dealings with [defendant], which would be a huge mistake to put him on because that would open up bad character questions.
>
> "[Defendant's counsel]: . . . I need to call him, find out if we have anything here to talk about. If I have him here, I will have an offer of proof that will hopefully satisfy everybody. If I don't have a sufficient offer of proof, I won't call him."

Later, defendant's counsel made a further offer of proof as to Detective Tripp: it "would be in response to the suggestion that [defendant's] wallet did not get taken in the

course of a robbery. All he would testify to is that on December 6, he learned of a robbery that happened to [defendant]. And the way he learned is that [defendant] called him and told him about it. That's it." The court responded that this would be hearsay and irrelevant. The court also characterized it as an "after-the-fact self-serving statement."

Defendant's trial counsel later explained, "it would be extremely brief testimony" limited to a corroboration of the fact that a robbery had occurred.

The court stated that the purpose of Detective Tripp's testimony would be "to bolster [defendant's] credibility without him taking the witness stand that he, in fact, was the victim of a robbery." The court concluded that the detective's testimony would be of such low probative value that its value would be substantially outweighed by the confusion it would cause. The court also indicated that the prosecution could cross-examine the detective on whether he was aware of defendant's extensive criminal record.

After a recess defendant's counsel withdrew her request to call Detective Tripp as a witness.

The dialogue at trial reveals that trial counsel's decision not to call Detective Tripp as a witness was a tactical one. Ultimately, defendant's counsel withdrew her request to call Tripp, stating: "[W]e've decided that it probably won't be necessary. So, therefore, we won't be calling him." This tactical decision should not be subject to review by the court. (See *People v. Knight* (1987) 194 Cal.App.3d 337, 345 ["choice of which, and how many, potential witnesses to interview or call to trial is precisely the type of choice which should not be subject to review by an appellate court"].)

Furthermore, we must indulge a strong presumption that trial counsel's tactical decision was reasonable and constituted sound trial strategy. (*Strickland, supra,* 466 U.S. at p. 689.) Defendant's attorney could have reasonably believed that allowing Detective Tripp to testify might have opened the door to testimony regarding defendant's past crimes. And considering the court's observation that much, if not all, of Detective

Tripp's testimony would be excluded as hearsay, defendant's counsel could reasonably have determined that the best tactical decision was to forego calling him as a witness.

Defendant has failed to show that his trial counsel's failure to call Detective Tripp constituted deficient performance, or that any such deficiency was at all prejudicial.

C. Failure to subpoena Adell Nicholas

As set forth above, defendant's trial counsel wanted to call Adell Nicholas (Nicholas), a Wawanesa Insurance adjuster, who was on the prosecution witness list. She was informed that due to medical restrictions, Nicholas could not attend the trial and was given Nicholas's telephone number.

Later, defendant's counsel again stated that she wished to call Nicholas, and admitted that she failed to subpoena this witness, stating, "I failed to properly make sure or subpoena the prosecution witnesses myself in order to ensure their presence." Counsel explained the failure to subpoena Nicholas was due to her understanding that the witness had been subpoenaed to be at trial. Counsel attempted to argue that Nicholas "ha[d not] been released" from her subpoena by the prosecution.

The next day, defendant's counsel confirmed that Nicholas was not able to attend trial. However, she stated that Nicholas did have exculpatory evidence. Counsel explained that Nicholas would testify that she took notes on September 25, 2007, on behalf of Wawanesa. These notes, according to defendant's counsel, would show that defendant did not claim that the Rolex or the diamond bracelet were stolen in the burglary:

> "[Defendant's counsel]: The exculpatory items I'm referring to are chiefly two things. Number one is notes that [Nicholas] took on September 25th of '07. And these are logged in notes to an activity log report produced by Wawanesa Insurance. And in those notes, for that particular date, she indicates that the two jewelry items of significance were the two that were recently scheduled with the underwriting department.[**4**] And it says she advised the insured of the jewelry limit for the remaining jewelry

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4 Defendant's counsel later explained that the "recently scheduled" items referred to in the log entry were a cross pendant and two rings.

> items. And she says that basically [defendant] says the remaining jewelry is only about $700 worth as opposed to what would be the price of a Rolex watch or a bracelet that were claimed on that Wawanesa claim. And the second item is another log-in entry on December 19 of '07 from [Nicholas]. And she said that she received a report from Diamond International for the replacement cost of the three scheduled jewelry items and that total cost of the replacement was $11,798.63, which would not include a gold Rolex watch or a bracelet. And in that sense I think that it was exculpatory and that I should have made sure that she was here."

The record shows that the first time defendant's counsel spoke to Nicholas about this evidence was the night before closing arguments. Defendant's counsel stated that the jury should have heard this evidence and "I made a mistake by relying on the prosecution's subpoena." Defendant claims that his counsel's failure to subpoena Nicholas -- and failure to interview her until the night before closing arguments were scheduled -- amounted to ineffective assistance of counsel.

Despite the outcome, the record shows that defendant's counsel made reasonable efforts to bring Nicholas to court. Nicholas was admittedly under subpoena by the prosecution. It had been the prosecution's intention to call her as a witness, but Nicholas was not willing or able to travel from San Diego due to a medical condition. In fact, defendant's counsel confirmed that Nicholas was unable to attend. Thus, even if defendant's counsel had subpoenaed Nicholas, there is no reason to believe that the subpoena would have secured Nicholas's presence at trial. Defendant's counsel reasonably believed that Nicholas would appear on the prosecution's subpoena; a second subpoena would not have made it more likely that Nicholas would attend trial.

Furthermore, even if defendant's counsel's performance was deficient in failing to subpoena Nicholas, defendant has not shown that any such failure was prejudicial. The record shows that Nicholas evaluated defendant's sworn loss statement, which was completed on October 1, 2007. The prosecution presented evidence that defendant met with Scholten on October 7, 2007, and at that meeting defendant claimed the watch and the bracelet had been taken in addition to the items listed on the initial sworn loss

statement. Further, the prosecution presented evidence that in March 2008, defendant again claimed that the watch and bracelet were taken and that these items should have been included on the initial loss statement sheet. Thus, the jury was already aware that defendant had not initially listed the Rolex watch and the diamond bracelet as part of his claim of loss. The jury heard that those items were added to the claim later, during the October 2007 meeting with Scholten and during an interview under oath in March 2008. Nicholas's testimony was cumulative of what the jury already knew -- defendant did not initially claim the Rolex and diamond bracelet were lost in the burglary, but did so later, on two occasions. Because Nicholas's testimony was insufficient to create a reasonable doubt, defendant suffered no prejudice by his counsel's failure to call her. (See, e.g., *People v. Dunn, supra*, 205 Cal.App.4th at p. 1101 [duplicative testimony would not have altered outcome of case].)

In sum, defendant has failed to show that his counsel's failure to call Nicholas constituted deficient performance, or that any such deficient performance was prejudicial.

III. The cumulative prejudice test is inapplicable

Defendant acknowledges that he is not entitled to a new trial unless his counsel's errors were prejudicial. As set forth in *Strickland, supra*, 466 U.S. at page 694, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Defendant argues that the question of prejudice must be considered in light of the cumulative prejudice test, in which "defense counsel's many deficiencies cumulatively prejudiced the defense." (*Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1434 (*Harris*).)

Defendant contends the cumulative prejudice in this case consisted of his counsel's failure to subpoena the three witnesses described above, coupled with numerous inconsistencies in the prosecution's case. Defendant recounts what he characterizes as a good deal of contradictory and ambiguous statements introduced in the

prosecution case, and criticizes the prosecution for the piecemeal, haphazard manner in which the information was presented. Defendant argues that the jury may have been hampered in reaching a correct factual analysis of the case.

The cumulative error analysis allows a court to find that several errors, even though they are individually harmless, can have a cumulative effect which can result in prejudice against the defendant. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488; see also *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282 ["Although individual errors looked at separately may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal"].) The cumulative error analysis may be used when there are several errors made by counsel. (*Harris, supra,* 64 F.3d at p. 1438). As we have found no substantial error in any respect, this claim must be rejected. (*People v. Butler* (2009) 46 Cal.4th 847, 885.) In addition, as set forth below, the federal cases cited by defendant are distinguishable.

In *Harris*, the defendant sought a writ of habeas corpus after his conviction for first degree murder and death sentence were affirmed on appeal. The district court granted relief on the ground of ineffective assistance of counsel, and the state appealed. On appeal, the court discussed eight instances of the defendant's counsel's deficient performance that were not contested by the state, and three instances of alleged deficient conduct that the state disputed. (*Harris, supra,* 64 F.3d at p. 1435.) Among the undisputed deficiencies in the defendant's counsel's performance were his failure to investigate the facts and possible defenses; failure to consult adequately with the defendant; failure to investigate the defendant's mental and emotional status; failure to challenge the admissibility of statements made by the defendant prior to trial; failure to conduct proper voir dire of jurors; failure to object to certain items of evidence; failure to object to certain jury instructions; and failure to preserve meritorious issues for appeal. (*Id.* at pp. 1435-1436). Among the disputed deficiencies which the Ninth Circuit determined were "clearly below an objective standard of reasonableness" were defendant's counsel's advice to the defendant that he make a statement to the prosecutor

before trial without assurance of a reduction in the charges; his decision to call the defendant to the witness stand; and his closing statement, in which he attacked his own client's credibility "and even his humanity." (*Id.* at pp. 1436-1437.) Given the "plethora and gravity of [defendant's counsel's] deficiencies," the Court of Appeal determined that the proceeding was "fundamentally unfair." (*Id.* at p. 1438.) By making a finding of cumulative prejudice, the court "obviate[ed] the need to analyze the individual prejudicial effect of each deficiency." However, the court did not "rule out that some of the deficiencies were individually prejudicial." (*Id.* at p. 1439.)

The matter before us is not comparable to *Harris.* The record reveals no prejudicial deficiencies in defendant's counsel's performance. As to Kowach, there was no offer of proof of her testimony or how it might change the result, therefore we can find no error in defendant's counsel's failure to subpoena her. As to Detective Tripp, the request to call him as a witness was ultimately withdrawn, for tactical reasons that were well within an objective standard of reasonableness. And as to Nicholas, defendant's counsel reasonably relied on the prosecution subpoena to bring Nicholas to court and moreover, her testimony was unlikely to change the outcome of the case. Under the circumstances, because we have not found multiple specific errors or deficiencies, the cumulative prejudice test is inapplicable.

Defendant argues that the cumulative prejudice test may apply where there are sufficient inconsistencies in the prosecution case. Had counsel been effective in subpoenaing the exculpatory witnesses, and vigorously pointing out the inconsistencies in the prosecution case, defendant argues, the jury may well have reached a different outcome.

In support of this argument, appellant cites *Brown v. Myers* (9th Cir. 1998) 137 F.3d 1154 (*Brown*), which involved a prosecution for attempted murder. In *Brown*, the Ninth Circuit determined that the defendant's counsel's errors in failing to call alibi witnesses were prejudicial because those witnesses supported the defendant's description of his actions on the evening in question. (*Id.* at p. 1156.) An evidentiary hearing had

been held to determine the content of the testimony of certain witnesses who could have appeared on the defendant's behalf. After reviewing the testimony, the Ninth Circuit concluded that counsel's errors in not calling these individuals undermined confidence in the outcome of the trial. (*Id.* at p. 1157.) The court found that "[h]ad the additional witnesses appeared, the jury would have had to balance more evenly divided evidence to reach its verdict." (*Ibid.*) The court commented: "It is not certain, of course, that the jury would have chosen to believe [the defendant] and his witnesses and discredit the prosecution witnesses, but there were sufficient inconsistencies in the prosecution evidence to make that result sufficiently probable to undermine confidence in the outcome of the trial." (*Ibid.*) Those inconsistencies were in the prosecution witnesses' "first reports to the police, and their account of events" which appeared to be inconsistent with "photographs showing where the bullets had hit." (*Ibid.*)

Brown does not support a reversal in this matter. Unlike the circumstances in *Brown*, defendant's counsel's failure to call the three witnesses at issue did not amount to prejudicial error. There was no showing that Kowach's testimony would have any effect whatsoever on the verdict, and defendant's counsel ultimately withdrew her request to call Detective Tripp for tactical reasons. As to Nicholas, her proposed testimony that defendant's initial claim of loss did not include the Rolex watch or the bracelet was already known to the jury, because both Scholten and Kirby testified that defendant later added these items to his claim of loss. In sum, in contrast to the situation in *Brown*, we cannot say that the missing testimony "would have altered significantly the evidentiary posture of the case." (*Brown, supra,* 137 F.3d at p. 1157.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST