Filed 11/13/14 P. v. Williams CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DARWIN WILLIAMS, Defendant and Appellant.	B244946 (Los Angeles County Super. Ct. No. BA395582)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael D. Abzug, Judge. Affirmed.

Robert Bryzman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Darwin Williams appeals from his conviction of first degree burglary and attempted first degree burglary.[1] His sole contention on appeal is that he was denied due process and a fair trial as a result of the trial court's order allowing a witness to identify defendant as the person in a surveillance video, the original of which was not introduced into evidence.[2] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Attempted Burglary (Count 1)*

Viewed in accordance with the usual rules on appeal, the evidence established that at about 6:25 a.m. on February 9, 2012, Ginny Hollar was on the way from her bedroom to her kitchen when she saw defendant standing in the backyard, reaching for the handle of the open back door leading into the media room. Hollar had never seen defendant before. After they stared at each other for a few seconds, Hollar clapped her hands and said, "Get out of here." Defendant ran away. By the time Hollar got to the door, she saw that defendant had already jumped over a locked gate and was running down the long staircase leading from the backyard to the street. Several weeks later, Hollar was out of the country when police emailed her a PDF of a photographic lineup (six-pack) along with the usual admonition. Hollar immediately identified a photograph of defendant as the person she saw at her back door on February 9th. A few days later, Hollar went to the police station where she was shown the same six-pack she had seen as a PDF. Hollar circled defendant's photograph and wrote that she recognized him as her intruder from the eyes and facial structure. Hollar also identified defendant in court.

---

[1] Defendant was charged by second amended information with attempted burglary (count 1) and burglary (count 2); prior conviction and prison term enhancements were also alleged, including pursuant to the Three Strikes law. A jury convicted defendant on both substantive counts and, following a bifurcated trial, found true the enhancements. He was sentenced to a total of 16 years, 4 months in prison. Defendant timely appealed.

[2] Defendant represented himself at trial, but has appointed counsel on appeal. Defendant's "Request for Leave to File Pro Se Supplemental Brief" was forwarded to the California Appellate Project.

Debra Gainor lived directly across the street from Hollar. Gainor's home had two surveillance cameras pointed towards the street from different angles. Gainor reviewed the video recorded by those cameras between 6:29 and 6:30 a.m., and then at 6:36 a.m., on February 9, 2012. Because she did not know how to make a hard copy of the video from the recorder to which the cameras transmit digital images, Gainor used her cell phone to record a copy of the video (presumably by pointing the phone's camera at the video screen). Gainor saved the video thus recorded onto a flash drive which she gave to a detective. The flash drive and four still photographs created from the video were introduced into evidence. Without objection, two portions of the video from the flash drive were played for the jury while Gainor described what was happening on the screen. In the first black and white video, a light is goes on at a neighbor's home, a man walks up the hill, towards a neighbor's home and then towards Hollar's home. In the second color video, a man is seen running from Hollar's home.[3] The video images Gainor saw on the surveillance equipment were clearer than the images captured on her phone. Gainor testified that she had never seen defendant before the trial, but recognized him as the person in the surveillance video.

2. *Burglary (Count 2)*

On February 26, 2012, Antonia Blyth lived about one-and-one-half miles from Hollar. Blyth's two roommates were out of town when she was awakened by her barking dog at about 5:40 a.m. that day. Blyth heard male voices. When someone opened her bedroom door, her dog jumped on that person. The person yelled, "Get off me," and slammed the bedroom door shut. Blyth opened the door and ran up the stairs shouting, "Hello, hello, who's here? Who's in my house?" Blyth saw defendant in the living room. His back was turned to Blyth and he appeared to be looking at things on her bookcase. After Blyth entered the room and shouted, "Hello," defendant turned towards

---

[3] The first video was in black and white because it was taken using night vision equipment; the second video was in color because, when it is light out, the equipment automatically switches to color.

her, said, “Hello,” and then quickly walked out of the house through the front door. Blyth locked the door behind him and called 911. After the police left, Blyth found the bathroom window screen lying on the bathroom floor. Blyth surmised that defendant may have entered the house through that window by climbing a tree and pushing in the screen. Also after police left, Blyth discovered that a pair of Michael Kors sunglasses was missing. A few days later, Blyth went to the police station where a detective showed her the same photographic six-pack that had been shown to Hollar. Blyth immediately identified defendant as her intruder. Blyth also identified defendant in court.

Defendant was detained near Weidlake Drive and Deep Dell Place by Los Angeles Police Officers Jeremy Lee and Tracye Fields at about 2:00 p.m. on February 26, 2012. The officers were responding to a report of a suspected burglar possibly casing the area, which was not far from the location of the Hollar and Blyth burglaries. Defendant matched a description of the suspect. They also believed defendant looked like the person depicted in a “Crime Alert” circular. Defendant gave the officers false identifying information. While defendant was being detained, another officer, John Collyer, arrived with a copy of the surveillance video provided by Gainor. Fields recognized defendant as the man seen in that video running from Hollar’s house. Defendant gave Collyer the same false identifying information he had given to the other officers. Defendant was arrested and charged with burglary.

DISCUSSION

The Surveillance Video

Defendant’s appellate contentions conflate two separate issues: (1) admissibility of the copy of the surveillance video Gainor recorded on her cell phone and (2) admissibility of Gainor’s testimony that defendant was the person depicted in that video. We conclude that defendant forfeited the issue of the video’s admissibility by failing to timely object. Although defendant timely objected to Gainor’s opinion evidence, and the trial court erred in overruling that objection, we find the error harmless.

1. Forfeiture

The People contend defendant forfeited any challenge to the admissibility of the video and Gainor's testimony by failing to timely object. Defendant is correct as to the video, but not as to Gainor's testimony.

After the surveillance video was played without objection, and after Gainor explained how she had made it, there occurred the following colloquy: "[THE PROSECUTOR]: Now, is your surveillance footage, is it clearer than it appeared on the screen here? [¶] [THE WITNESS]: Yes. [¶] [THE PROSECUTOR]: Were you able to see the individual's face? [¶] [THE WITNESS]: Yes. [¶] Do you see the person in court today that you saw in the surveillance footage? [¶] [THE WITNESS]: Yes. [¶] [THE PROSECUTOR]: Can you tell me where that person is sitting and what they are wearing? [¶] [THE WITNESS]: Seated over there wearing a blue button down shirt. [¶] [DEFENDANT]: Objection. [¶] THE COURT: The witness has identified the defendant. [¶] [THE PROSECUTOR]: And do you know the defendant? [¶] [THE WITNESS]: No. [¶] [THE PROSECUTOR]: Have you ever seen him other than in the surveillance footage? [¶] [THE WITNESS]: No. [¶] THE COURT: I'm sorry, Mr. Williams. Did you say something? [¶] [DEFENDANT]: I said objection. [¶] THE COURT: The objection is overruled."

The record is thus clear that while defendant did not object to the admissibility of the video itself, he timely objected to the evidence of Gainor's opinion that defendant was the person depicted in the video. Accordingly, defendant forfeited any challenge to the admissibility of the video, but preserved for appellate review his challenge to the admissibility of Gainor's opinion.

2. The Cell Phone Video was an Admissible Duplicate of the Surveillance Video

Even assuming, for the sake of argument, defendant did not forfeit the issue, we find the video was admissible under the Secondary Evidence Rule.

Evidence Code section 250 defines a "writing." A video recording is a "writing" within the meaning of that definition. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266 (*Goldsmith*).) "A 'duplicate' is a counterpart produced . . . by mechanical or electronic rerecording . . . which accurately reproduces the original." (Evid. Code, § 260.) Under the former Best Evidence Rule (Evid. Code, § 1500 et seq.), a duplicate was "admissible to the same extent as an original unless (a) a genuine question is raised as to the authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original." (Former Evid. Code, § 1511; see *People v. Garcia* (1988) 201 Cal.App.3d 324, 327-328 [photograph of artist's sketch of suspect was admissible duplicate under former Evid. Code, § 1511].)

In 1998, the Best Evidence Rule was repealed and replaced with the "Secondary Evidence Rule," codified at Evidence Code sections 1520 through 1523. (*People v. Skiles* (2011) 51 Cal.4th 1178, 1187.) The Secondary Evidence Rule does not make express reference to the admissibility of a "duplicate," as did the former rule. Under the Secondary Evidence Rule, the content of a writing may proved by the original or by "otherwise admissible secondary evidence." (Evid. Code, § 1521, subd. (a).) As with the former rule, the Secondary Evidence Rule requires exclusion of "secondary evidence of writing if the court determines either of the following: [¶] (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion. [¶] (2) Admission of the secondary evidence would be unfair." (Evid. Code, § 1521, subd. (a)(1) & (2); see *Goldsmith, supra*, 59 Cal.4th at p. 266 [to be admissible a writing, including a video recording, must be an original writing or otherwise admissible secondary evidence of the writing's content].)

To be "otherwise admissible," secondary evidence must be authenticated. (*People v. Skiles, supra*, 51 Cal.4th at p. 1187.) A writing is authenticated by evidence sufficient to sustain a finding the writing is what the proponent claims it is. (Evid. Code, §§ 1400, 1401.) A video recording, which as previously stated is a writing under Evidence Code section 250, is typically authenticated by showing it is a fair and accurate representation of the scene depicted. (*Goldsmith, supra*, 59 Cal.4th at p. 267.)

Here, Gainor's testimony that she made the video introduced into evidence by using her cell phone to record the video taken by the surveillance cameras at her home was sufficient to authenticate the cell phone video as a duplicate of the surveillance video. Defendant has not shown that there is any genuine dispute either that the surveillance cameras recorded events occurring on the street in front of Gainor's house the morning of February 9, 2012, or that the cell phone video was not an accurate recording of the surveillance video. Nor has he shown that admission of the cell phone video was otherwise unfair. That the images were not particularly clear goes to the weight of the evidence, not its admissibility.[4]

3. Admission of Gainor's Opinion that the Defendant was the Person in the Video Was Harmless Error

Defendant's contention that Gainor's identification of him as the person in the video was inadmissible lay opinion is well taken.

A lay witness's testimony is inadmissible unless the witness has personal knowledge of the subject matter of his or her testimony. (Evid. Code, § 702.) Under some circumstances, a lay witness's opinion is admissible. (See Evid. Code, § 800 [lay opinion testimony "is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony."].) It is well settled that a witness's identification of a person appearing in a photograph or video is admissible as lay opinion testimony if the foundational requirement of personal knowledge is met. (*People v. Ingle* (1986) 178 Cal.App.3d 505, 513; *People v. Mixon* (1982) 129 Cal.App.3d 118 (*Mixon*); *People v. Perry* (1976) 60 Cal.App.3d 608 (*Perry*).)

In *Perry*, *supra*, the court held that a police officer's identification of the defendant as one of the two robbers seen on a surveillance film of the crime was

---

[4] The comment to Evidence Code section 1521 states that one factor that may be considered in determining whether subdivisions (a)(1) and (2) of section 1521 apply is whether there is a dramatic difference between the original and secondary evidence.

admissible as lay opinion testimony because the officer was familiar with the defendant from numerous contacts over the previous five years. (*Perry, supra*, 178 Cal.App.3d. at p. 610.) Similarly, in *Mixon, supra*, the court held that a police officer's identification of the defendant as the person seen in surveillance photographs taken during the commission of the robbery was admissible as lay opinion testimony because the officer had "previously acquired familiarity with [the defendant's] features." (*Mixon, supra*, 129 Cal.App.3d at pp. 131-132.)

In *Ingle, supra*, the defendant argued that a robbery victim's testimony that the defendant was the person in a surveillance video of the crime was inadmissible because the victim had never seen the defendant before the crime. Relying on *Perry* and *Mixon*, the *Ingle* court rejected the contention. The *Ingle* court observed: "It is now clearly established that lay opinion testimony concerning the identity of a robber portrayed in a surveillance camera photo of a robbery is admissible where the witness has personal knowledge of the defendant's appearance at or before the time the photo was taken and his testimony aids the trier of fact in determining the crucial identity issue. [Citations.]" (*People v. Ingle, supra*, 178 Cal.App.3d at p. 513.) Accordingly "it was entirely appropriate" for the robbery victim to testify "based upon her personal observations and perceptions at the time the robbery occurred, that the person portrayed as the robber in the videotape was the defendant. The victim's observation of the robber during the crime was sufficient." (*Id*. at p. 514.)

Here, there is no dispute that Gainor had no personal knowledge of defendant at or before the time the surveillance video was taken. Gainor was not a witness to the crime. The first time she saw defendant was in the court room. Accordingly, defendant's objection to her testimony should have been sustained.

The People's reliance on *People v. Larkins* (2011) 199 Cal.App.4th 1059, for a contrary result, is misplaced. In that case, the defendant was convicted of various theft-related offenses arising out of six incidents occurring at different gyms over a period of several months. The evidence included a surveillance video taken at one of the gyms. The gym's loss prevention manager testified that defendant, who was not a member of

that chain of gyms, was the person seen in the surveillance video. The manager testified that he was able to recognize the defendant because he had seen the defendant in 20 to 30 surveillance videos. The appellate court rejected the defendant's contention that the manager's testimony was inadmissible under *Mixon* and *Perry* because he had no "previously acquired familiarity" or "personal knowledge" of the defendant's appearance. The court noted that, in addition to viewing 20 or 30 surveillance videos, the manager had also viewed the defendant's driver's license and booking photographs. (*Larkins*, at p. 1068.) *Larkins* is inapposite to this case because Gainor did not view a larger number of other surveillance videos, defendant's driver's license or booking photos.[5]

Although we have found Gainor's identification testimony was inadmissible, as we shall explain, we find the error harmless. A verdict may not be set aside by reason of the erroneous admission of evidence unless the error resulted in a miscarriage of justice. (Evid. Code, § 353, subd. (b).) A miscarriage of justice should be declared only when, after an examination of the entire record, it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Here, in light of the other evidence of defendant's guilt, it is not reasonably probable that a more favorable result would have been reached if Gainor's opinion testimony had been excluded. First, as we have observed, the video itself was admissible, and defendant does not claim on appeal that the video depicted anyone other than him. Second, both victims identified defendant from a six-pack and in court as the man they saw inside (in the case of Blyth) or about to enter (in the case of Hollar) their respective homes. The fact that both women ran after the intruder shows that they were not so shocked by the intruder as to be unable to accurately observe his appearance. Finally, evidence that defendant gave the arresting officers false identifying information supports

---

5 The *Larkins* court suggested that application of *Mixon* and *Perry* was limited to identifications by law enforcement witnesses and still photographs (*Larkins*, at pp. 1066-1067) and did not discuss *Ingle* at all. We are not convinced that *Mixon* and *Perry* should be so limited.

an inference of consciousness of guilt. (*People v. Liss* (1950) 35 Cal.2d 570, 576.) On this record, the error in refusing to exclude Gainor's opinion was harmless.

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.