Filed 4/26/18 P. v. Boone CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EMANUEL LEWIS BOONE, Defendant and Appellant.	B275344 (Los Angeles County Super. Ct. No. BA434941)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed.

Andrea Keith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, and Steven E. Mercer, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Emanuel Lewis Boone of assault with a deadly weapon, with a great bodily injury enhancement. Boone appeals, contending the trial court erred by denying his self-representation request and failing to sua sponte instruct the jury regarding expert witness testimony. Discerning no prejudicial error, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts

In March 2015, Boone and the victim, Demond Bartley, were both incarcerated at the Twin Towers County Jail in Los Angeles. Boone was a dormitory representative assistant and had limited access to other inmates' cells. Bartley had been recently discharged from the hospital and was housed in a medical dormitory. Boone had assisted him into a cell upon his arrival and checked periodically to see if he needed food. There were no negative or hostile interactions between the men.

On March 4, 2015, when the cells were unlocked for breakfast at approximately 4:00 or 5:00 a.m., Boone, wearing blue latex gloves and armed with a homemade shank, that is, a razor equipped with a handle, entered Bartley's cell. Bartley was asleep. Boone slashed Bartley's face, inflicting two lacerations, including a five-inch cut that ran from Bartley's cheekbone to the base of his neck. Bartley awoke, asked what Boone was doing, and attempted to fight Boone off. As the men struggled, Bartley grabbed the shank, which sliced across his palm. Boone "took off running" and closed Bartley's cell door, causing it to lock. Bartley summoned deputies and told them Boone had inflicted his injuries. Bartley needed stitches in his face and hand. The attack was recorded by the jail's video cameras, and the video was shown to the jury. The shank was never found.

Bartley told a deputy that, just prior to the attack, Boone had been in the cell talking to Bartley's cellmate while Bartley dozed. Boone's cellmate came to the door and handed Boone something, and Boone then committed the assault.

Los Angeles County Sheriff's Deputy Isaac Minaya, who had worked in the jail for three years, investigated the incident and interviewed Bartley. He testified that inmates commonly hide or dispose of contraband, for example, by flushing it down the toilet or concealing it in their anal cavities.

Boone presented no evidence.

2. Procedure

Trial was by jury. Boone was convicted of assault with a deadly weapon with the infliction of great bodily injury. (Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (a).)[1] In a bifurcated proceeding, the trial court found Boone had suffered four prior "strike" convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and four prior serious felony convictions (§ 667, subd. (a)(1)), and had served two prior prison terms within the meaning of section 667.5, subdivision (b). It denied Boone's *Romero* motion,[2] but struck the prior prison term allegations in the interest of justice (§ 1385). The court sentenced Boone to a determinate term of 13 years in prison, plus 25 years to life, to be served consecutively to his terms in two unrelated cases. It imposed a restitution fine, a suspended parole revocation restitution fine, a court security fee, and a criminal conviction assessment. Boone appeals.

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[1] All further undesignated statutory references are to the Penal Code.

[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

DISCUSSION

1. The *Faretta* motion

a. *Additional facts*

Boone was arraigned on September 18, 2015.[3]

On January 12, 2016, at "day 6 of 10," defense counsel informed the trial court that Boone had requested self-representation. (*Faretta v. California* (1975) 422 U.S. 806.) The trial court stated the case was being sent to another courtroom for trial in two days, and asked Boone whether he would be ready to go to trial at that time. Boone said no, and explained he intended to ask for "a reasonable amount of time" to prepare for trial. The court stated it would not grant a continuance, noting "[t]he case is over a hundred days old." It explained: "[W]e're six of ten. It's a bit late to ask to represent yourself. I'm going to make a finding, if that's what you want to do, that it's untimely."

Two days later, on January 14, 2015, the matter was transferred to another courtroom for trial, and Boone renewed his *Faretta* request. The court queried whether, if it granted the self-representation request, Boone would be prepared to go to trial. Boone stated he would not, and would ask for a continuance. Boone was unsure how much time he would need, admitted he had not thought about how long it would take him to prepare, and estimated he would need "[m]aybe a few months." When the court asked why Boone wished to represent himself, Boone replied, "I feel like I could put together a better defense maybe."

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[3] Boone was already serving 16 years 4 months on one unrelated case, and 16 years concurrent on another. He had two pending cases in addition to the instant matter, and was representing himself on one of them.

Boone had consulted with appointed counsel regarding his case, had no complaints about her, and was satisfied with her representation. However, he thought "[s]he may not see the same things I see – not saying anything is wrong with [counsel], but maybe I might catch something she may not." The trial court noted that the People had experienced difficulty securing the attendance of their witnesses, and it had been obliged to issue body attachments for the victim and another witness. Boone averred that these facts had no impact on his request for a continuance. However, he acknowledged that if the court granted a continuance the People might not be able to find the witnesses in the future, a circumstance that would benefit him.

Expressly citing *People v. Windham (*1977) 19 Cal.3d 121, the trial court denied Boone's request. It explained the request was untimely in that a panel of 65 prospective jurors was waiting and defense counsel had announced ready for trial. Boone had no complaints about defense counsel's representation, and the court's observations suggested counsel was conscientious, respectful and careful to protect Boone's rights. Boone had not made previous *Marsden*[4] or *Faretta* motions. His reasons for requesting self-representation were "highly speculative"; he was unable to articulate how he might be able to do a better job than counsel. Boone's request would cause disruption and delay because the People's witnesses might not be available if a continuance were granted. Boone was representing himself on another case; he was therefore aware of his self-representation right and could have made his request earlier.

Jury selection commenced on January 14, 2016, shortly after the trial court's ruling on the *Faretta* motion.

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[4] *People v. Marsden* (1970) 2 Cal.3d 118.

b. *Applicable legal principles*

A criminal defendant has a Sixth Amendment right to represent himself at trial. (*Faretta v. California, supra,* 422 U.S. at pp. 807, 819; *People v. Williams* (2013) 58 Cal.4th 197, 252.) This right is absolute, but only if the defendant knowingly and intelligently makes an unequivocal request within a reasonable time prior to trial. (*People v. Doolin* (2009) 45 Cal.4th 390, 453; *People v. Stanley* (2006) 39 Cal.4th 913, 932.) " 'When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion.' [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 959; *People v. Boyce* (2014) 59 Cal.4th 672, 702.) The defendant has the burden of justifying the delay. (*People v. Horton* (1995) 11 Cal.4th 1068, 1110; *People v. Valdez* (2004) 32 Cal.4th 73, 102.)

When exercising its discretion to rule on an untimely *Faretta* request, a trial court should consider the familiar *Windham* factors: (1) the quality of counsel's representation; (2) the defendant's prior proclivity to substitute counsel; (3) the reasons for the request; (4) the length and stage of the proceedings; and (5) the disruption or delay that might reasonably be expected to follow the granting of the request. (*People v. Windham*, *supra*, 19 Cal.3d at pp. 127-129; *People v. Bradford* (2010) 187 Cal.App.4th 1345, 1353; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1204.)

c. *Boone's January 12, 2016 Faretta request was untimely and properly denied; any error was harmless*

The trial court did not err by denying Boone's untimely January 12, 2016 self-representation request.[5] Boone made his request at day 6 of 10, two days before the case was to be sent to a courtroom for trial. "[T]imeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made." (*People v. Lynch* (2010) 50 Cal.4th 693, 724, abrogated on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638.) However, courts have held "on numerous occasions that *Faretta* motions made on the eve of trial are untimely." (*People v. Lynch*, *supra*, at p. 722 [*Faretta* motion filed two weeks before trial was untimely where case had been ongoing for four years and the victims were elderly]; see, e.g., *People v. Clark* (1992) 3 Cal.4th 41, 98-100; *People v. Frierson* (1991) 53 Cal.3d 730, 740, 742 [motion made on September 29, 1986, when trial was scheduled for October 1, 1986, was untimely]; *People v. Scott*, *supra*, 91 Cal.App.4th at p. 1205 [motions made just prior to the start of trial are not timely]; *People v. Rudd* (1998) 63 Cal.App.4th 620, 624-626 [motion made within three calendar days of the commencement of trial did not give rise to an unqualified right of self-representation]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1688-1689 [motions made on the day preceding or the day of trial have been considered untimely]; *People v. Hill* (1983) 148 Cal.App.3d 744, 757 [*Faretta* motion made five days before trial was untimely and could have been denied]; *People v. Ruiz* (1983)

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[5] Boone does not challenge the trial court's ruling on his January 14, 2016 request.

142 Cal.App.3d 780, 789-791 [motion made six calendar days prior to trial was in such " 'close proximity' " to trial that court had discretion to deny it].) Boone was not ready to proceed to trial, but needed a continuance in order to represent himself. (See *People v. Hernandez* (1985) 163 Cal.App.3d 645, 651, fn. 4.) Moreover, Boone knew of his self-representation right because he was representing himself on another pending case; nonetheless, he did not seek self-representation in the instant matter until just before trial was set to commence.

Boone argues his request was timely because the jury had not yet been ordered, the case had not been sent out to a trial court, neither side had announced ready, and the deputy district attorney had just conveyed an offer to the defense. But, none of these circumstances take away from the fact that the request was made on the eve of trial.

Because the request was untimely, the trial court had discretion to deny it after consideration of the *Windham* factors. Boone contends the trial court abused its discretion because when ruling on his January 12, 2016 request, it failed to consider the *Windham* factors.

A trial court need not explicitly consider the *Windham* factors, but may do so implicitly, as long as substantial evidence in the record supports an inference that the court had them in mind when it ruled. (See *People v. Bradford*, *supra*, 187 Cal.App.4th at p. 1354; *People v. Perez* (1992) 4 Cal.App.4th 893, 904 ["While the court did not specifically make [a *Windham*] inquiry, we conclude there were sufficient reasons on the record for the court to exercise its discretion to deny the request"]; *People v. Scott*, *supra*, 91 Cal.App.4th at p. 1206.)

We can infer from the record that the first trial court considered some, but not all, the *Windham* factors. The court clearly considered the length and stage of the proceedings; it noted the lateness of Boone's request, the imminent commencement of trial in two days, and the fact the case had already been pending for some time. It also indicated it would not have granted a request for a continuance even if made by counsel. The court's focus on Boone's need for a continuance indicates it considered the disruption and delay that would be occasioned by the request. "The fact that the granting of the motion will cause a continuance, and that this will prejudice the People, may be evidence of the defendant's dilatory intent." (*People v. Burton* (1989) 48 Cal.3d 843, 854.)

The record does not reflect that the court considered the other three *Windham* factors. Although a court may deny an untimely motion for self-representation solely on the basis that a continuance would be required, it must nevertheless consider the *Windham* factors, including the defendant's reasons for making the request and the quality of counsel's representation. (*People v. Hernandez*, *supra*, 163 Cal.App.3d at p. 651, fn. 4 [a trial court may deny an eve-of-trial request that necessitates a continuance, but "simply because this may be a legitimate ground for denial of the motion does not entitle a trial court to completely disregard the mandate established" by *Windham*].)

Boone relies on *Hernandez* in support of his contention that the court's failure to consider all the *Windham* factors compels reversal, but in fact *Hernandez* suggests the opposite result. In *Hernandez*, the defendant made a self-representation request on the day trial was scheduled to begin. The trial court stated it would deny the request unless he was ready to proceed without a

continuance. When the defendant attempted to explain the basis for his request, the court cut him off. (*People v. Hernandez*, *supra*, 163 Cal.App.3d at pp. 648-649, 650-651.) The trial court's failure to conduct the *Windham* inquiry made it impossible for the appellate court to adequately review the appropriateness of the ruling. (*Id.* at pp. 651, 653.) Consequently, the appellate court appointed a referee to inquire into the factors underlying the defendant's request. (*Id.* at p. 653.) Upon review of the referee's findings, *Hernandez* determined the *Faretta* request was properly denied. It had been untimely, and the defendant showed no reasonable cause for its lateness. Granting the motion would have resulted in substantial delay because Hernandez sought a six-month continuance. Defense counsel was experienced and competent and provided good representation. (*Id.* at pp. 654-655.) And, defendant's "central reasons for his request were hardly persuasive." (*Id.* at p. 655.) Accordingly, the trial court's error in failing to consider the *Windham* factors was not fatal to the conviction. (*Ibid.*)

Here, two days after the first trial court denied Boone's request, the second trial court ruled on his renewed request. That court expressly addressed the *Windham* factors, fulfilling the same function as did the referee in *Hernandez*.[6] The

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[6] Citing *People v. White* (1992) 9 Cal.App.4th 1062, Boone argues that we may not consider any information discussed by the second judge at the January 14, 2016 hearing. But *White* does not so hold. *White* made the point that, when considering the question of timeliness, an appellate court considers the facts as they appeared at the time of the hearing on the *Faretta* motion, " ' " 'rather than on what subsequently develops.' " ' " (*Id.* at p. 1072.) Therefore, the fact the trial in *White* was ultimately continued was irrelevant. (*Ibid.*) But here, the circumstances

proceedings before the second judge demonstrate that the first denial of the *Faretta* request was proper. Boone offered no explanation for the lateness of his request. Counsel was performing satisfactorily, and Boone confirmed he had no complaints about her representation. Granting the request would have necessitated a substantial delay of at least several months. This delay would have caused significant disruption. The trial court explained that the People had experienced difficulty securing the attendance of their witnesses, and body attachments had been issued for them. The witnesses were in court by the time of the January 14, 2016 hearing, but had a continuance been granted, the court was concerned the "People might not be able to find" them in the future. And, as in *Hernandez,* Boone's asserted reasons for his request were not compelling: he simply advanced the vague notion that he "could put together a better defense maybe" and he "might catch something" counsel might not see. As in *Hernandez,* given this record, the trial court's January 12, 2016 denial of the self-representation request was not error.

Finally, even assuming denial of the first *Faretta* motion was error, it was harmless. The erroneous denial of a timely,

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considered at the second hearing were not facts that "subsequently developed"; they were circumstances in existence at the time of the original hearing, insufficiently explored by the court. If, in *Hernandez*, a referee's findings on the *Windham* factors, made long after the fact, provided an adequate basis for review (see *People v. Hernandez*, *supra*, 163 Cal.App.3d at pp. 653-655), certainly we may consider the trial court's inquiry upon Boone's second *Faretta* motion, made two days after the first.

unequivocal *Faretta* motion made by a competent defendant is constitutional error and requires reversal per se. (*People v. Williams*, *supra*, 58 Cal.4th at pp. 252-253; *People v. Butler* (2009) 47 Cal.4th 814, 824; *People v. Nicholson* (1994) 24 Cal.App.4th 584, 594.) However, the erroneous denial of an *untimely Faretta* motion is reviewed under the harmless error test of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050; *Nicholson*, at pp. 594-595.) There is no indication in the record that Boone would have achieved a more favorable result had he represented himself. "[A] defendant who represents himself virtually never improves his situation or achieves a better result than would trained counsel." (*Rivers*, at p. 1051.) Boone had no complaints about his appointed counsel or her performance. He was unable to articulate any way in which he could have improved upon her representation. On appeal, Boone offers no cogent explanation for how he was prejudiced, except the conclusory assertion that "had Appellant represented himself, a different outcome would have occurred" because he "knew the case better than anyone." He does not contend he would have presented different evidence or a stronger case or a different defense strategy. This speculative showing is insufficient to demonstrate prejudice.

2. Purported instructional error

Boone also contends the trial court prejudicially erred by failing to sua sponte instruct the jury with CALCRIM No. 332, regarding the consideration of expert testimony, in regard to Deputy Minaya's testimony about the shank.

a. *Additional facts*

Deputy Minaya described a shank as "basically an object that is sharpened to a point." Inmates are provided with razors for shaving, and the blade can be removed from its housing and made into a shank. Shanks were contraband in the jail. When an inmate uses a shank, deputies are not always able to recover it; it was "very common for the inmates to get rid of the evidence" by flushing it down the toilet or inserting it into their anal cavities. In an incident such as this one, where it was clear a weapon was used but the weapon was not found, Deputy Minaya presumed it had been hidden or disposed of by one of these methods. This was Deputy Minaya's first and only investigation involving a shank. It was part of his job to know whether inmates hide contraband, and he had received Sheriff's Academy and jail operations training on the subject.

The trial court instructed the jury with CALJIC No. 2.20, regarding witness believability, and with CALJIC No. 2.81, regarding the opinion testimony of a lay witness. It did not instruct with CALCRIM No. 332, the pattern instruction regarding expert testimony.

b. *Applicable legal principles*

We review a claim of instructional error de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570; *People v. Fiore* (2014) 227 Cal.App.4th 1362, 1378.) In assessing such a claim, we examine the instructions as a whole. (*People v. Tully* (2012) 54 Cal.4th 952, 1025; *Fiore,* at p. 1378.)

"Expert opinion is qualitatively different from eyewitness testimony and from physical evidence. Expert witnesses are by definition witnesses with 'special knowledge, skill, experience, training, or education' in a particular field (Evid. Code, § 720),

and they testify 'in the form of an *opinion*' [citation]. The word 'opinion' implies a subjective component to expert testimony. Moreover, expert witnesses may only testify about matters that are 'beyond common experience' ([Evid. Code], § 801, subd. (a))." (*In re Richards* (2012) 55 Cal.4th 948, 962.)

Section 1127b requires the court to instruct sua sponte on expert testimony whenever an expert testifies in a criminal proceeding. (§ 1127b; *People v. Reeder* (1976) 65 Cal.App.3d 235, 241.)[7] As relevant here, CALCRIM No. 332 states that jurors must consider the expert's opinion, but are not required to accept it as true or correct. CALCRIM No. 332 further provides: "In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may

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[7] Section 1127b provides: "When, in any criminal trial or proceeding, the opinion of any expert witness is received in evidence, the court shall instruct the jury substantially as follows: [¶] Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable. [¶] No further instruction on the subject of opinion evidence need be given."

disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence." When a witness testifies as a percipient witness, rather than an expert, CALCRIM No. 332 is unnecessary. (*People v. Haynes* (1984) 160 Cal.App.3d 1122, 1136-1137.)

The erroneous failure to give an expert witness instruction is evaluated under the *Watson* standard, that is, whether it is reasonably probable that a result more favorable to the defendant would have occurred had the instruction been given. (*People v. Williams* (1988) 45 Cal.3d 1268, 1320, abrogated on another ground in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190; *People v. Reeder*, *supra*, 65 Cal.App.3d at pp. 241, 243; *People v. Watson, supra,* 46 Cal.2d 818.) Probability under *Watson* does not mean more likely than not, but merely a reasonable chance that is more than an abstract possibility. (*People v. Sandoval* (2015) 62 Cal.4th 394, 422.)

c. *The failure to instruct with CALCRIM No. 332 was not prejudicial error*

Boone contends the trial court was required to give CALCRIM No. 332 because Deputy Minaya testified as an expert. He urges that Deputy Minaya had special training in determining how inmates hide or dispose of contraband; his testimony was based on this training and experience, rather than on his personal knowledge, in that he did not observe anyone hide or dispose of the shank; and he gave his opinion on what might have happened to the shank. The People, on the other hand, urge that Deputy Minaya was not testifying as an expert. The prosecutor did not call or qualify him as an expert; the court did not designate him as such; and his testimony was based upon his personal observations as a jail deputy. (See *People v.*

Jablonski (2006) 37 Cal.4th 774, 823 [parole officer's testimony about defendant's mental condition was based on his questioning and observations of defendant, not on his professional expertise]; *People v. Nguyen* (2015) 61 Cal.4th 1015, 1032-1033 [gang expert's testimony, that witnesses typically claim they were in the restroom and did not observe shootings, was based on his personal knowledge].)

We need not determine whether Deputy Minaya gave expert testimony because even assuming arguendo he did, the trial court's failure to instruct with CALCRIM No. 332 was harmless in light of the other instructions given and the evidence in the case. (See *People v. Reeder*, *supra*, 65 Cal.App.3d at pp. 241, 243; *People v. Lynch* (1971) 14 Cal.App.3d 602, 609.) Much of the information contained in CALCRIM No. 332 was provided to the jury in other instructions. Similar to CALCRIM No. 332, CALJIC No. 2.81 told jurors that they were not required to accept a witness's opinion but should "give it the weight, if any, to which you find it entitled." CALCRIM No. 332 would have advised jurors that "[t]he meaning and importance of any opinion are for you to decide." CALJIC No. 2.20, given here, similarly informed jurors that they were "the sole judges of the believability of a witness and the weight to be given the testimony of each witness," and CALJIC No. 2.27 told the jury it should give the testimony of a single witness "whatever weight you think it deserves." CALCRIM No. 332 would also have instructed jurors that, "[i]n evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally." Here, jurors were given CALJIC No. 2.20, regarding witness believability generally, and we presume they looked to this instruction for guidance. (See *People v. Sandoval*,

supra, 62 Cal.4th at p. 422 [we presume jurors understand and follow the court's instructions].) On the facts of this case, the instructions given substantially conveyed the information contained in CALCRIM No. 332 and enabled the jury to adequately evaluate Deputy Minaya's testimony.

Moreover, the evidence that Boone attacked Bartley, inflicting serious cuts on his face and hands with a weapon, was overwhelming. Deputy Minaya's testimony was offered primarily on a collateral point, to explain why the shank was not found. Minaya's testimony that inmates may hide or dispose of contraband was undisputed and not controversial. The main difference between CALCRIM No. 332 (expert testimony) and CALJIC No. 2.81 (lay witness opinion testimony) is that the former instructs the jury to consider "the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion," whereas CALJIC No. 2.81 tells jurors to consider "the extent of [a lay witness's] opportunity to perceive the matters upon which his opinion is based and the reasons, if any, given for it." Given that there was no dispute inmates often hide or dispose of contraband, the difference in the two instructions could have had no significant impact on the case.

Contrary to Boone's argument, Deputy Minaya's testimony had very little bearing on the questions of whether the weapon was a dangerous or deadly weapon, whether the perpetrator inflicted great bodily injury, or whether Boone was the attacker. It was undisputed the attacker used a sharp object capable of inflicting multiple, serious cuts. As the evidence overwhelmingly established the perpetrator used such a weapon, there is simply no likelihood that jurors would have found Boone guilty of only

simple assault, rather than assault with a deadly weapon, had CALCRIM No. 332 been given, as he suggests. The jury's great bodily injury finding was based on the nature of the injuries – a five-inch long, one-third of an inch wide cut to the victim's face, in addition to a second facial cut and a cut across the palm, all of which required stitches – not the description of the weapon used. And on the facts of this case, we fail to see how Deputy Minaya's testimony that inmates hide contraband had any impact on the question of the perpetrator's identity.

In sum, it is not reasonably probable that jurors would have reached a more favorable verdict had they been instructed with CALCRIM No. 332.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

We concur:

EDMON, P. J. LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.