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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL WAYNE CULP,

Defendant and Appellant.

2d Crim. No.B279789  
(Super. Ct. No. 1359086)  
(Santa Barbara County)

Michael Wayne Culp appeals his conviction, by jury, of second degree robbery. (Pen. Code, § 211.)<sup>1</sup> The jury further found appellant had a prior conviction of the same offense. After finding that appellant had a prior serious or violent felony conviction within the meaning of the Three Strikes law, the trial court sentenced appellant to a total term in state prison of 15 years. (§ 667, subd. (a); § 1170.12, subd. (b)(1), (c)(1).) Appellant contends the trial court prejudicially erred in its resolution of

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

three evidentiary issues. First, the trial court allowed a police officer to read to the jury part of a witness statement contained in his report of the crime. Second, the trial court allowed another police officer to identify appellant in security camera video of the robbery based on her arrest of appellant on an unrelated charge, almost two months after the robbery. Third, the trial court admitted into evidence the booking photograph and video of appellant's arrest by the second police officer. We affirm.

### *Facts*

Appellant and another man, later identified as Bagsby, walked into a Santa Maria payday lending store about 30 minutes before it closed on a Saturday afternoon in August 2011. Security camera video shows both men wearing hats and sunglasses as they entered the store. Jane Doe was the only employee in the store at the time and she was in the midst of closing the store for the night. Her duties included counting cash that was in a safe behind the counter.

The first man to enter the store, later identified as appellant, started filling out a Western Union form. Bagsby walked behind the counter. At that point, the security camera video stopped recording because it was disconnected by one of the men.

Doe testified that she was putting some items into the safe when she felt a gun at her side. One of the men showed her a new client form on which he had written her name and address, some of her past employment information, the names of some of her relatives and her grandmother's address. He told her, "I have . . . your info, and I will kill you, so you better not tell anyone." He also told her to do as she was told, and she wouldn't get hurt.

Appellant told Doe to open the safe. She said it was already open. He took money and a box of gold jewelry from the safe. Doe was also instructed to open the cash drawers. Two of the drawers contained \$1000 bundles of cash, each of which included a dye pack designed to explode after reaching a certain distance from the store. The men felt the packs and decided to leave that money behind. Doe told them about an accordion folder full of cash that was kept in the back office. The men walked her back to the office, took the cash and instructed her to lie down on the floor. When she did, they taped her hands behind her back and taped her legs together. One of the men dumped out a trash can and used the bag to hold the money. Then, they left. It was later determined that \$5,703.75 in cash and \$3,496 in jewelry were missing from the store.

When Santa Maria Police Officer Matthew Jensen searched the store, he collected a Western Union money transfer form that was filled out in handwriting with the name Marvin Johnson, an address, and the word "Bakersfield," scratched out. Officer Jensen also found a second Western Union form which had "Marvin Johns" written on it, an Enterprise rental car receipt, a clipboard holding pieces of paper with customer identifying information, two receipts for cash and gold, and the tape Doe was bound with. Appellant's fingerprints were found on the Western Union forms and the Enterprise receipt.

The receipt was related to a car that had been rented in Bakersfield by a friend of appellant's named Tracy N. Tracy N. rented the car to visit her boyfriend, who was an inmate at California Men's Colony (CMC) in San Luis Obispo. Appellant, another man, and another woman drove with Tracy N. to CMC on the same day as the robbery. The group dropped Tracy N. off

at CMC and then left in the car. They went shopping for awhile and then the men went to a barbershop while the woman waited for them in a bar. While she was waiting, Tracy N. called to be picked up at CMC. In the early afternoon, the group returned to CMC, picked Tracy N. up and drove back to Bakersfield. They were home before dark. One of Tracy N.'s fingerprints was found on the Enterprise receipt recovered from the payday loan store.

About two months after the robbery, in October 2011, Bakersfield Police Detective Nicole Shihrer arrested appellant on an unrelated charge. When Det. Shihrer first contacted appellant, he said his name was Marvin. Det. Shihrer identified a booking photograph of appellant taken after that arrest. The jury was also shown a video of Det. Shihrer booking appellant into jail for the unrelated offense. The trial court instructed the jury that the charges on which appellant had been arrested were dismissed and were unrelated to this case. It further instructed the jury, "You are not to consider or speculate as to why [appellant] was arrested. You are not to use it for any purpose." In addition, the booking photograph was redacted to remove printing that appeared below it, including an FBI number, booking date and number and appellant's date of birth.

Det. Shihrer was shown the security camera video of the robbery and identified appellant as the first man to enter the store. She noted that appellant looked like he had when she arrested him. He was wearing his hair in braids and had light facial hair. The shirt he is wearing in the security camera video also appears to be same shirt he is wearing in the booking video.

#### *Discussion*

Past Recollection Recorded. Appellant's trial took place five years after the robbery. Doe testified that she could

not recall many details about the incident. For example, she could remember that each man was wearing a hat and sunglasses, but she could not identify appellant as one of the men. Doe could not remember what either man said to her during the robbery and could provide no details about the gun or remember which man was wielding it. She did not remember whether the robber pressed the gun into her left side or her right, nor did she recall whether the same man always held the gun.

Shortly after police arrived at the store, Doe gave a detailed statement to Officer Jensen. At trial, Doe testified that she recalled giving the statement. Reviewing it refreshed her recollection “a little bit,” but she was still unable to recall many details about the robbery. She testified that she was honest with the officer when she gave the statement and that she told the police “the honest truth.”

Officer Jensen took Doe’s witness statement. Officer Jensen testified that his report is an accurate record of the statements Doe made to him immediately after the robbery. He then read Doe’s statement to the jury.

The statement is more factually detailed than was Doe’s testimony. In it, Doe described to Officer Jensen each robber’s physical appearance, including a description of their clothing, hair, hat and sunglasses. Doe told Officer Jensen that the first man who came into the store “was a heavy built black male with a blue shirt and pants. She described them as being navy in color, but that he also had a blue cap on. She described the shirt as possibly being a button-up style. She stated that underneath the hat, he appeared to have braided cornrow type hair and was wearing black sunglasses while inside the store.” She also remembered that the second man who came into the

store held the gun in his left hand and pressed it into her left side. The first man who came in handed her the new client form that had her personal identifying information on it. The same man directed her to open the safe and the cash drawers and to show him the folder with additional cash in it.

Appellant contends the trial court prejudicially erred when it determined Doe's statement was admissible under the "past recollection recorded" exception to the hearsay rule. (Evid. Code, § 1237.) There was no error.

Evidence Code section 1237 provides that a prior statement is not hearsay if the statement would have been admissible had it been made by the witness while testifying and it concerns "a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately." (Evid. Code, § 1237, subd. (a).) The statement must also be contained in a writing which: "(1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; [¶] (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an accurate record of the statement." (*Ibid.*)

Appellant contends Doe's statement to Officer Jensen does not qualify as a past recollection recorded because Doe did not have "insufficient present recollection to enable [her] to testify fully and accurately." (Evid. Code, § 1237.) Appellant contends Doe reviewed Officer Jensen's report and testified that

it refreshed her recollection. Thereafter, she was able to recall many details about the robbery.

We review the trial court's decision to admit or exclude evidence for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.) The trial court's decision to admit this evidence will not be disturbed on appeal absent a clear showing that the decision was arbitrary, capricious, or patently absurd and resulted in a manifest miscarriage of justice. (*People v. Geier* (2007) 41 Cal.4th 555, 585.)

The trial court did not abuse its discretion when it allowed Officer Jensen to read Doe's statement to the jury. Her testimony established that, while she remembered some facts about the robbery, she had forgotten many details. Reading Officer Jensen's report only refreshed her recollection "a little bit." When asked whether, after reading the report, she now remembered what one of the men said to her during the robbery, Doe testified, "Well, today I don't remember, but, I mean, I can repeat what was said in the – what I gave in that, the testimony to the cops." She further explained, "As of today, I can't say I can remember what was said." Doe also testified that she was honest with the police and told the truth when she made her statement to Officer Jensen. Doe and Jensen also testified that her statement was taken immediately after the robbery, while the events were fresh in her mind, that her statement was recorded for the purpose of preserving it and that the written report was an accurate reflection of her statement. Given this testimony, the trial court did not abuse its discretion when it admitted the report under Evidence Code section 1237. (*People v. Cowan*

(2010) 50 Cal.4th 401, 465-467; *People v. Dennis* (1998) 17 Cal.4th 468, 530-531.)

Appellant contends the report was inadmissible because Doe was able to remember some facts; she did not testify that she was unable to recall anything about the robbery. But complete amnesia is not the standard. In *People v. Dennis*, *supra*, 17 Cal.4th 468, a witness's statement describing when he saw another man and the clothing that man was wearing was admissible under Evidence Code section 1237, even though the witness remembered other details about the circumstances under which he saw the man. (*Id.* at pp. 530-531.)

Here, Doe's memory of the robbery was sufficient to establish that the statement she made to Officer Jensen was accurate and truthful. (*People v. Cowan*, *supra*, 50 Cal.4th at pp. 467-468.) She could not, however, recall many details about the robbery, including which man had the gun and which man instructed her to open the safe. Doe's statement to Officer Jensen supplied those details and was properly admitted as a past recollection recorded.

Det. Shihrer's Identification Testimony. Bakersfield Police Detective Nicole Shihrer arrested appellant on an unrelated charge in October 2011, about two months after the robbery. She identified appellant in court, authenticated a booking photograph taken of him after she arrested him, and identified him on a video taken during the booking process. At that time, Det. Shihrer testified, appellant was wearing a blue and white striped, button down shirt, was wearing his hair in "braided cornrows" and had "[l]ight facial hair, a mustache and goatee." Det. Shihrer then identified appellant as the first man who appears on the security camera video taken during the



robbery. She noted that the facial features, hair and facial hair of the person in the robbery video matched those shown in appellant's booking photo and video from October 2011. She also noted that he appeared to be wearing the same shirt he was wearing when she arrested him.

Appellant contends the trial court abused its discretion when it permitted Det. Shihrer's lay opinion identification testimony because she was not a percipient witness to the robbery, had not met appellant before the robbery occurred, and lacked knowledge of his appearance at the time of the robbery. We review the trial court's decision to admit the evidence for abuse of discretion and find none. (*People v. Guerra, supra*, 37 Cal.4th at p. 1113.)

"A lay witness may offer opinion testimony if it is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony. [Citation.] '[T]he identity of a person is a proper subject of nonexpert opinion . . . .' [Citations.]" (*People v. Leon* (2015) 61 Cal.4th 569, 601.) The identifying witness need not have contact with the defendant before a crime occurred. It is sufficient if the identifying witness is "familiar with defendant's appearance around the time of the crimes." (*Ibid.*) A trial court does not abuse its discretion when it admits lay opinion testimony identifying a defendant where the testimony "was based on [the witness's] relevant personal knowledge and aided the jury." (*Ibid.*)

Here, the trial court properly admitted Det. Shihrer's identification of appellant. She had contact with appellant just two months after the robbery occurred. Her identification of appellant was based on her personal knowledge of his appearance. In addition, Shihrer's identification testimony was

helpful to the jury because appellant's trial took place nearly five years after the crime, when his appearance had changed with the passage of time. Shihrer was able to identify appellant, while Doe could not.

Booking Photo and Video. Appellant contends that the trial court erred when it admitted the booking photograph and videotape from his 2011 arrest because these items were not relevant to establish his identity and were probative only of his propensity to commit crimes. We disagree. The booking photograph and video allowed the jury to evaluate Det. Shihrer's testimony. In addition, jurors could compare for themselves the still photograph and video of appellant's booking with the video of the robbery suspects. The trial court did not abuse its discretion when it admitted the photograph and video because they were relevant to the evaluation of Det. Shihrer's testimony and to the identity of the robber. (*People v. Larkins* (2011) 199 Cal.App.4th 1059, 1066-1068.)

Harmless Error. Even if the trial court erred in its decisions on these evidentiary issues, we would affirm because any error was harmless. There is no reasonable possibility that appellant would have achieved a more favorable outcome had the evidence been excluded because the evidence against appellant was overwhelming. (*People v. Alexander* (2010) 49 Cal.4th 846, 909-910 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) standard of harmless error to erroneous admission of statement as a past recollection recorded]; *People v. Carter* (2005) 36 Cal.4th 1114, 1170-1171 [erroneous admission of photographic evidence subject to *Watson* harmless error analysis]; *People v. Bradley* (2012) 208 Cal.App.4th 64, 86 [applying *Watson* standard

of harmless error to erroneous admission of lay opinion testimony].)

Doe's testimony explained the basic facts of the robbery. Surveillance video showed appellant enter the payday lending store and head to the Western Union counter. Appellant's finger and palm prints were found on the counter and on Western Union forms recovered from the store after the robbery. A receipt from Enterprise rental cars was also found inside the store. Appellant's fingerprints were on the receipt. The receipt also bore a fingerprint from the woman who rented the car, a friend of appellant's from Bakersfield. On the day of the robbery, appellant drove with her and two other people from Bakersfield to San Luis Obispo, near the site of the robbery. Given this evidence, it is not reasonably probable that appellant would have obtained a more favorable result had the challenged evidence been excluded.

*Conclusion*

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

John McGregor, Judge

Superior Court County of Santa Barbara

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