Filed 4/30/18 P. v. Roberson 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. DOMINICK BLAIR ROBERSON, Defendant and Appellant.	B279934 (Los Angeles County Super. Ct. No. NA103012)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesse I. Rodriguez, Judge. Affirmed.

Sally Patrone Brajevich, 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, Zee Rodriguez and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Dominick Blair Roberson appeals his convictions for multiple counts of second degree robbery and attempted robbery. He raises a variety of claims of error related to the prosecution's evidence that he wore eyeglasses at trial in an attempt to change his appearance. He further contends the prosecutor committed misconduct by misstating the standard of proof; the trial court erred by admitting a DNA expert's testimony; and the trial court's conduct impermissibly created the impression it was aligned with the prosecution, thereby violating his due process rights to a fair trial.[1] Discerning no prejudicial error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Roberson was charged with committing a series of "follow-home" robberies of casino patrons in October and November 2015.[2] It was undisputed that Roberson frequently gambled at the Hawaiian Gardens and Hollywood Park casinos, and aspired to be a professional gambler. At the time of the robberies, he lived with his mother, Cynthia Roberson. He owned a silver BMW and his mother owned a silver Toyota Echo.

---

[1] In his opening brief, Roberson also argued the trial court committed sentencing error. He has subsequently withdrawn this contention, and accordingly we do not consider it.

[2] In a typical follow-home robbery, the perpetrator waits in the casino and watches as a patron leaves with money. The perpetrator then follows the patron and robs him or her en route or once the victim arrives home.

1. *The robberies*

a. *Attempted robbery of Luyen Van Pham*

In the early morning hours of October 8, 2015, Luyen Van Pham played poker at the Hawaiian Gardens Casino in the City of Hawaiian Gardens. At 2:41 a.m., he cashed out his chips and headed home with approximately $1,500 in cash. He parked in front of his house, sat in the car for two or three minutes, and then walked to a gate leading into his residence. As Pham opened the gate, a thin African-American man, between five feet eight and six feet tall, pointed a black gun at Pham's head and said, "Hey." Pham ran through the gate, shut it behind him, and called for help. By the time police arrived, the robber was gone. Pham could not remember the robber's face.

The Hawaiian Gardens Casino was equipped with multiple surveillance cameras. Video footage showed that Roberson, driving his BMW, arrived at the casino at 2:11 a.m. He sat at an inactive table with a view of other players and the cashier's cage; he did not gamble. At 2:41 a.m., when Pham cashed out his chips and retrieved his car from the valet, Roberson followed Pham. While walking to his own vehicle, Roberson looked at the valet area where Pham was waiting for his car. Roberson pulled out of his parking space, moved his BMW to a driveway where he had a view of the valet, stopped his car, and waited. When Pham pulled out of the lot, Roberson followed directly behind him.

b. *Robbery of Jennifer Chhin*

In the early morning hours of October 9, 2015, Jennifer Chhin played Baccarat at the Hawaiian Gardens Casino. At approximately 3:00 a.m., she cashed out her chips. Chhin walked to her car in the parking lot and drove to her Long Beach home with $1,000 in her purse. She pulled into her driveway and sat in

the car for several minutes, looking for her house keys. When she opened her car door, an African-American man, approximately five feet nine inches to six feet tall, was pointing a black gun at her forehead. He reached across Chhin into the passenger seat, took her purse, and walked quickly away. The purse contained Chhin's cash, driver's license, credit cards, and automatic teller machine (ATM) cards.

Video footage showed that Roberson arrived at the casino at approximately 2:16 a.m. He made small bets and moved through various areas of the casino. At 3:02 a.m., Chhin cashed out at the cashier's cage. Both Chhin and Roberson walked to their vehicles in the parking lot. Roberson moved his car closer to Chhin's. Chhin sat in her vehicle for several minutes, and Roberson followed suit. When Chhin's car pulled out of the parking lot onto the street, Roberson followed.

Bank and store records showed that on October 9, 2015, between approximately 3:43 and 3:54 a.m., one of Chhin's credit cards was used to purchase gasoline at pump 7 at a Chevron station located across the street from the Hawaiian Gardens Casino. Video surveillance footage from the Chevron showed Roberson pumping gas into his silver BMW, at pump 7, at the time the card was used.

A few weeks after the robbery, Chhin viewed a six-pack photographic lineup and selected photograph number two, of Roberson, as looking "very much like" the robber. Photograph number four also looked like the robber. Chhin identified Roberson as the robber at the preliminary hearing, but not at trial.

c. *Robbery of Thi Duyen Anh Bui*

On October 12, 2015, Thi Duyen Anh Bui played poker at the Hawaiian Gardens Casino in the early morning hours. She cashed out her chips, left the casino at 1:58 a.m., and drove home. In her purse, Bui had approximately $3,100 in cash, jewelry, credit cards, an identification card, her social security and green cards, and a Buddha pendant. Bui treasured the Buddha pendant, which had been a gift. She was in the habit of praying with it and believed it brought her luck. She had attached an 18-karat gold ring to it so she could hang it up.

When Bui arrived home she sat in her car for several minutes, counting her money. She placed approximately $1,300 in her pocket and left the remainder in her purse. A tall, slender African-American man appeared at her car door and tapped a black gun on the window, indicating Bui should roll the window down. He was wearing a black mask or handkerchief over his face, through which only his eyes were visible. He pointed the gun at Bui's forehead, demanded her bag, and reached in the car and yanked it away from her. As the robber left, Bui ran after him and knelt on the ground, begging him to return her papers, including the green card and social security card. The robber demanded $1,000 for the papers. Bui began to count out money from her pocket. The robber pointed the gun at her again, snatched the cash, and ran away without returning her papers.

Casino surveillance footage showed a silver BMW with a partial license plate of 323 arriving in the parking lot at 1:55 a.m. on October 12, 2015. Roberson's BMW's license plate number was 5URR323. The BMW drove through the parking lot and circled around, eventually stopping next to Bui. When Bui drove out of the parking lot at 1:58 a.m., the BMW followed.

When shown a sequential photographic array on November 17, 2015, Bui identified two photographs, numbers 1 and 3, as the robber, with 50 percent certainty, based on the subjects' eyes. Photograph number 1 was of Roberson. She was unable to identify Roberson at trial.

d. *Robbery of Catherine Lee*

In the early morning hours of October 21, 2015, Catherine Lee, a semi-professional poker player, was playing at the "top section," or VIP area, of the Hollywood Park Casino in Inglewood. She did not carry a purse. At 5:16 a.m., Lee cashed out her chips and placed the money in her right pants pocket. She picked up her car from the valet and drove straight home, with a total of $7,820 in her pocket. She sat in her car for approximately two minutes, gathering up some to-go food she had taken from the casino. When she exited her car, a man pressed a black gun to the back of her neck and said, "Hey." Lee turned, saw the gun, and screamed. The robber, who was a tall, thin Black man, had a cloth over his face and wore a hat or a hood. Lee could only see his eyes. He demanded "the money." He hit Lee in the face with his fist, causing her to fall to the ground and scrape her knuckles on her garage door. The man reached for her right pants pocket and grabbed the cash with both hands, tearing the pocket away from the pants in the process. Although Lee's pants had two pockets and her jacket had two more, the robber went directly for the pocket with the money inside.

Lee initially informed police that the robber had worn a black short-sleeved T-shirt. The next day, however, after she had time to think about it, she told police that he had worn a light colored, long-sleeved sweater or sweatshirt.

Like the Hawaiian Gardens Casino, the Hollywood Park Casino was equipped with multiple surveillance cameras. Video footage and casino records showed that Roberson was playing poker from the evening of October 20 through the early hours of October 21. He was wearing a white hooded sweatshirt. Roberson sat in a spot with a view of the top section, the cashier's cage, and the valet. When Lee cashed out, Roberson turned and watched as Lee put the cash in her right pants pocket. Lee reached the valet at 5:21 a.m. Roberson cashed out his chips and headed to the casino exit. When Lee's car arrived from the valet, Roberson walked in front of her and then ran down a steep ramp toward his vehicle. He drove out of the parking lot, following Lee's route onto westbound Century Boulevard, exiting 45 seconds to a minute after Lee's car.

Lee positively identified Roberson as the robber at trial, based on the appearance of his eyes.

DNA analysis of Lee's pocket revealed the presence of Roberson's DNA.[3]

e. *Roberson's visit to the Hawaiian Gardens Casino parking lot on October 24, 2015, and the wreck of the BMW*

Surveillance personnel at the Hawaiian Gardens Casino identified Roberson as a suspect in the robberies, and were therefore on the lookout for him and his BMW. On October 24, 2015, shortly after 2:00 a.m., Roberson arrived at the casino's parking lot, driving the BMW. He exited the car and walked around the parking lot. Casino surveillance personnel notified security officers of his presence. Security Captain Ismeal Garcia, who was in uniform, and three other officers went to the parking

---

[3] The frequency of unrelated individuals having the same results was one out of 1.1 trillion.

lot to monitor Roberson's movements. Because Garcia believed Roberson might be armed and dangerous, when two security officers got too close to him Garcia transmitted an order to stand down. However, the command was inadvertently broadcast throughout the parking lot. Roberson looked toward the location from which the broadcast had emanated and quickly drove out of the parking lot.

Also on October 24, 2015, Roberson's BMW was wrecked in an accident.

f. *Robbery of Xia Liang*

On November 9, 2015, Xia Liang played cards at the Hawaiian Gardens Casino. She cashed out and left at approximately 4:00 a.m., with $2,400 in cash in her purse. When she arrived home, she opened her car door and found a man pointing a gun at her head. He told her to give him her purse or he would kill her. Frightened, she complied. The robber wore a light-colored, triangular cloth over his face that appeared to be made of silk. After Liang gave him the purse, he ran off. Liang's home was equipped with a surveillance system, and a video of the robbery was played for the jury.

Video from the casino showed that at 3:16 a.m., the silver Toyota Echo belonging to Roberson's mother drove around the casino's east and west parking lots, sometimes briefly parking. The vehicle's occupant never entered the casino but walked through the parking lot twice. When Liang exited the casino and drove off the property, the Echo followed.

2. *Roberson's arrest and the searches of his residence and the Toyota Echo*

On November 9, 2015, at approximately 11:00 a.m., Roberson arrived at the Hustler Casino in Gardena, driving the

Toyota Echo. He went inside and began playing poker. Casino personnel, who had been alerted to look out for him, notified a detective. Roberson was arrested. He had $1,916 in his pocket in addition to money he had placed on the casino table.

The Toyota Echo was searched pursuant to a warrant. A black, replica-style gun was under the rear of the driver's seat. A white silk "do rag" was on the vehicle's back seat.

Roberson's mother's apartment was likewise searched pursuant to a warrant. A Buddha pendant was on the television stand in the living room. Bui positively identified it at trial as the one stolen from her in the robbery.

3. *Roberson's defense*

Cynthia Roberson, Roberson's mother,[4] testified that Roberson had attended college in Arkansas on a football scholarship and obtained his bachelor's degree. He had always been honest. He moved in with her in September 2015. The Buddha pendant found in her apartment was his. Roberson had found it in a vacant apartment when Cynthia was an apartment manager several years earlier. The replica handgun was hers. Approximately fifteen years earlier, when Roberson was in the eighth grade, Cynthia found him playing with it and confiscated it. In 2013 she began keeping it in her car to fend off aggressive transients. When Roberson's BMW was wrecked, Cynthia allowed him to drive her Toyota Echo.

Roberson testified on his own behalf. After he was unsuccessful in his bid to play professional football, he, his fiancée, and their child moved back to California. Cynthia

---

[4] For ease of reference, and with no disrespect, we hereinafter sometimes refer to Ms. Roberson by her first name.

showed the couple how to work as apartment managers, and he found the Buddha pendant during an apartment walk-through. He put a clasp on it and sometimes used it as a card holder when he gambled. Since then, he had become a semi-professional poker player, had a potential sponsor lined up, and had won considerable sums gambling during the fall of 2015. He had also been working as a loan agent but failed to pass a qualifying test. He did not own a gun. He admitted being the person depicted in the videos taken at the casinos on the dates of the Pham, Chhin, Bui, and Lee robberies, but denied robbing or following any of the victims. He admitted getting gas for his BMW at the Chevron as depicted in the surveillance video, but denied using Chhin's credit card. He admitted being in the Hawaiian Gardens Casino parking lot the night the security alert was inadvertently broadcast, but he did not hear it and left simply because he was hungry. The "do-rag" found in the Echo was his, but he never used it as a mask in a robbery.

Roberson's aunt, as well as a retired Los Angeles Police Department officer who was dating one of Roberson's relatives, testified to Roberson's good character.

4. *Procedure*

Trial was by jury. Roberson was convicted of the attempted second degree robbery of Pham (Pen. Code, §§ 664, 211)[5] and the second degree robberies of Chhin, Bui, Lee, and Liang.[6] The trial

---

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

[6] The People also charged Roberson in count 5 with the robbery of a sixth victim, Tiffanie Vu Le, who left the Hawaiian Gardens Casino at approximately 5 a.m. on October 12, 2015, and was robbed shortly thereafter when she arrived home. The jury

court sentenced Roberson to a term of eight years eight months in prison, comprised of the high term of five years on count 2, the Lee robbery, plus consecutive terms of one-third the midterm on the remaining counts. It imposed a restitution fine, a suspended parole revocation restitution fine, a court security fee, and a criminal conviction assessment. Roberson appeals.

CONTENTIONS

Roberson contends: (1) the trial court erred by admitting a DNA expert's testimony; (2) there was prosecutorial misconduct and trial court error relating to the prosecution's evidence intended to establish that Roberson wore eyeglasses at trial in an attempt to change his appearance; (3) the prosecutor misstated the standard of proof in closing argument; and (4) the trial court created the impression it was aligned with the prosecutor, thereby denying him a fair trial.

DISCUSSION

1. *Admission of the DNA expert's testimony was not error*

Roberson argues the DNA expert's testimony should have been excluded because (1) its admission violated his Sixth Amendment right to confront witnesses as interpreted in *Crawford v. Washington* (2004) 541 U.S. 36; (2) the expert's testimony lacked foundation; and (3) the People failed to establish an adequate chain of custody. He is incorrect.

a. *Additional facts*

Nicole Salim, a Senior Forensic Identification Specialist with the Torrance Police Department's Forensic Identification

---

deadlocked on count 5, voting 11 to 1 in favor of guilt. The trial court declared a mistrial. Over the prosecutor's objection, the court dismissed count 5 in the interest of justice. (§ 1385.)

Section, testified that she swabbed victim Lee's torn pants pocket for DNA, sealed the swab in an individual evidence envelope labeled with the relevant information, and transported the swab to the Torrance Police Department. Torrance Police Officer Ryan Galassi, who was trained in the collection of DNA samples, similarly testified that he obtained a DNA swab from Roberson's mouth, sealed and labeled the sample, and transported it to the police department's property room.

The People offered the expert testimony of John Bockrath, a Senior Criminalist with the Los Angeles County Sheriff's Department, Scientific Services Bureau, regarding the DNA evidence. Roberson objected that "other analyst[s]" had completed portions of the DNA testing; therefore admission of Bockrath's testimony would violate the Sixth Amendment's confrontation clause as interpreted by *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 and *Bullcoming v. New Mexico* (2011) 564 U.S. 647.

At an Evidence Code section 402 hearing, Bockrath detailed his credentials, education, and experience. The Sheriff's Department Crime Laboratory was located at California State University Los Angeles, and was accredited. Bockrath personally picked up the Roberson and Lee swabs from the Torrance Police Department's property room and transported them to the laboratory. He then prepared the swabs for robotic processing via the laboratory's "batching system."

Bockrath described the batching system as follows. Analysts place DNA samples in a plastic plate with 96 wells, or holes, one for each sample. Different analysts place other samples to be tested onto the plate, with the appropriate documentation, and seal them. When the plate is full, testing is

done robotically. Using a standardized procedure, a "batching analyst" takes the plate from the refrigerator, places it onto the robot, programs the robot, and pushes the start button. The robot is a "liquid handling device that is programmed to add liquid, extract liquid, move samples from one plate to another." The robot chemically treats the samples and extracts the DNA from the swabs. It reads the genetic code and electronically converts the data into a readable format. Once the plate is placed in the robot and the robot programmed, "human contact is removed, and a robot does all the processing of the DNA samples from that point on." Quality control samples are submitted with each batch and a batching analyst reviews the results to ensure accuracy. Another analyst rechecks the quality control data. A batching analyst also documents the dates different steps were performed. At some point during the process, the batching analyst moves the tray from one robot to another. When testing is complete, the plate is sealed and put into a storage chamber.[7] Each analyst retrieves the electronic data for his or her samples and performs the DNA analysis of it. That analyst draws conclusions from the data and determines what the test results indicate.

The Roberson and Lee DNA samples were processed in accordance with the foregoing procedure. Bockrath opened the samples and documented their contents. He prepared them for submission to the batch by putting them on the plate and sealing them. The robot then extracted the DNA from the samples. Bockrath then examined the data and "made the determinations

---

[7] The batching system allows the laboratory to process a higher volume of samples more quickly.

of what the genetic results" meant, compared the data with the reference samples, and presented his report.

The trial court overruled Roberson's confrontation clause and lack of foundation objections. It concluded the batch analysts' functions were "semi-robotic" and were not testimonial in nature, and therefore no Sixth Amendment violation was apparent.

Bockrath's trial testimony was consistent with his testimony at the Evidence Code section 402 hearing.

b. *Discussion*

(i) *There was no* Crawford *violation*

Roberson argues Bockrath's testimony violated the Sixth Amendment because two nontestifying analysts performed the DNA testing, and their work was reviewed by a third nontestifying analyst. He argues that "admission of the DNA expert's testimony based on the work by other non-testifying technicians violated [his] federal confrontation rights." He is incorrect.

The Sixth Amendment to the federal Constitution gives a criminal defendant the right to confront and cross-examine adverse witnesses. (*People v. Lopez* (2012) 55 Cal.4th 569, 576.) In the seminal case of *Crawford v. Washington*, *supra*, 541 U.S. 36, the high court overruled its prior precedent and held that the Sixth Amendment "bars the admission at trial of a testimonial out-of-court statement against a criminal defendant unless the maker of the statement is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination." (*People v. Lopez*, at pp. 580–581; *People v. Capistrano* (2014) 59 Cal.4th 830, 871.) *Crawford* declined to provide a comprehensive definition of "testimonial." The high court has

offered various formulations of what makes a statement testimonial, but has not yet provided a definition upon which a majority of the court agrees. (*People v. Sanchez* (2016) 63 Cal.4th 665, 687; *People v. Holmes* (2012) 212 Cal.App.4th 431, 437.)

Both the United States Supreme Court and our California Supreme Court have tackled application of *Crawford* in the context of forensic testing. In *Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. 305, the prosecution introduced laboratory analysts' certificates, in lieu of live testimony, that stated a substance connected to the defendant was cocaine. (*Id.* at p. 307.) The court concluded the certificates, which constituted affidavits, were testimonial and their introduction into evidence violated the Sixth Amendment. (*Id.* at pp. 310–311.)

In *Bullcoming v. New Mexico*, *supra*, 564 U.S. 647, the court held a certified blood alcohol report signed by a nontestifying analyst was testimonial. Another analyst, who had taken no part in the testing, testified about the report. (*Id.* at pp. 651–652.) Because the testimonial statement of the first analyst was "enter[ed] into evidence through the in-court testimony of a second person," *Bullcoming* reversed. (*Id.* at p. 658.)

In *Williams v. Illinois* (2012) 567 U.S. 50, a Cellmark laboratory derived a DNA profile from swabs taken from a rape victim. In an unrelated case, a state crime lab derived a DNA profile from the defendant. At the defendant's trial for the rape, the prosecution's expert, relying in part on the Cellmark analysis, testified that the two DNA profiles matched. (*Id.* at pp. 56–57, 61–62.) No analyst from Cellmark testified. In a fractured opinion, the Supreme Court held there was no confrontation violation, but a majority could not agree on a rationale. (See

Lopez, *supra*, 55 Cal.4th at pp. 578–580.) Justice Alito's plurality opinion held that out-of-court statements offered to explain the basis for an expert's assumptions are not offered for their truth; alternatively, the Cellmark report was not testimonial because it was not prepared for the primary purpose of accusing a targeted individual. (*Williams v. Illinois*, at pp. 56–58, 81–82 [plur. opn. of Alito, J.].) Justice Thomas, in a separate opinion, concluded Cellmark's statements were indeed offered for their truth, but lacked sufficient solemnity and formality to be considered testimonial. (*Id.* at pp. 103–105 [conc. opn. of Thomas, J.].) The four dissenting justices concluded the expert's testimony about Cellmark's statements violated the Sixth Amendment. (*Id.* at pp. 119–120, 125 [dis. opn. of Kagan, J.].)

Our California Supreme Court thereafter issued its own trio of opinions addressing the constitutionality of a prosecution expert's testimony about information in a report prepared by someone who did not testify at trial. (*People v. Lopez*, *supra*, 55 Cal.4th at pp. 582–584; *People v. Dungo* (2012) 55 Cal.4th 608, 620 [factual observations by a nontestifying pathologist, recorded in an unsworn autopsy report, were not testimonial because they lacked formality and criminal investigation was not the autopsy's primary purpose]; *People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661 [any error in allowing lab director to testify about tests performed by others was harmless beyond a reasonable doubt].)[8]

---

[8] In an earlier decision, *People v. Geier* (2007) 41 Cal.4th 555, our Supreme Court found no confrontation violation when a lab director who co-signed a DNA report, rather than the analyst who performed the DNA testing, testified at trial. (*Id.* at pp. 605–606; see *People v. Barba* (2013) 215 Cal.App.4th 712, 721–722.) *Geier* concluded, among other things, that the laboratory reports were not testimonial because they were

In his dissenting opinion in *People v. Lopez*, Justice Liu observed that the California Supreme Court's "nine separate opinions offered" in *Lopez*, *Dungo*, and *Rutterschmidt* reflected the "muddled state of current doctrine concerning the Sixth Amendment right of criminal defendants to confront the witnesses against them." (*Lopez*, *supra*, 55 Cal.4th at p. 590 (dis. opn. of Lui, J.).) Fortunately, we need not "wade further into the complexities of the issue" (*People v. Capistrano*, *supra*, 59 Cal.4th at p. 872), because here the answer is clear: Bockrath's testimony did not violate Roberson's confrontation rights.

First, the fact Bockrath relied upon machine-generated data to arrive at his opinion did not violate the confrontation clause. *People v. Lopez*, *supra*, 55 Cal.4th 569, compels this conclusion. There, a nontestifying analyst tested the defendant's blood alcohol level using a gas chromatograph, and produced a written report. His colleague testified at trial about the report's contents, and the report itself was admitted into evidence. (*Id.* at p. 574.) *Lopez* concluded the machine-generated portions of the

---

contemporaneous recordations of observable events. (*Id.* at pp. 605–606.) *Geier*'s "continued validity has been questioned" (*People v. Barba*, at p. 741), because two years after it was issued, *Melendez-Diaz* concluded a laboratory report "may be testimonial, and thus inadmissible, even if it ' "contains near-contemporaneous observations of [a scientific] test" ' [citations]." (*People v. Lopez*, *supra*, 55 Cal.4th at p. 581.) *Barba* observed that *Geier* has not been abrogated by the United States Supreme Court or overruled by the California Supreme Court. (*Barba*, *supra*, at p. 741.) We need not address the continuing validity of the "contemporaneous recordation of observable events" rationale because our conclusion that there was no confrontation violation does not rest upon it.

report "consis[ting] entirely of data generated by a gas chromatography machine to measure calibrations, quality control, and the concentration of alcohol in a blood sample" did not implicate the Sixth Amendment's right to confrontation. (*Id.* at p. 583.) Instrument readouts are not "statements" and machines are not "declarants"; "unlike a person, a machine cannot be cross-examined." (*Ibid.*; *People v. Steppe* (2013) 213 Cal.App.4th 1116, 1126.) Similarly, here, the data generated by the robotic testing process does not implicate Roberson's confrontation rights. Bockrath's use of that data as the basis for his analysis and conclusions does not offend the Sixth Amendment.

Second, unlike in *Melendez-Diaz* and *Bullcoming*, the instant case does not involve a laboratory report offered in lieu of testimony, or an expert's testimony about a report prepared, or conclusions reached, by a nontestifying witness. The analyst who actually analyzed the DNA data – Bockrath – testified at trial and was subject to cross-examination. Bockrath alone interpreted the data generated by the robotic testing process, and Bockrath alone concluded that Roberson was a possible contributor to the DNA mixture found in Lee's pocket. (See *People v. Barba*, *supra*, 215 Cal.App.4th at p. 742.)

The fact nontestifying batching analysts completed mechanical steps in the testing process does not give rise to a confrontation violation, because they did not make any out-of-court statements that were introduced at trial. (See *People v. Sanchez*, *supra*, 63 Cal.4th at p. 680 [first step in *Crawford* inquiry is whether statement offered is hearsay].) "[I]t is not the case . . . that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or

accuracy of the testing device, must appear in person as part of the prosecution's case." (*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. 311, fn. 1.) The batching analysts did not prepare reports, offer conclusions, or analyze Roberson's DNA sample. Bockrath did not testify about any conclusions other than his own. Thus, no hearsay statements from the batching analysts were at issue, and the Sixth Amendment was not implicated by their mere participation in aspects of the robotic testing process. "[I]t makes no sense to exclude evidence of DNA reports if the technicians who conducted the tests do not testify. So long as a qualified expert who is subject to cross-examination conveys an independent opinion about the test results, then evidence about DNA tests themselves is admissible." (*People v. Barba*, *supra*, 215 Cal.App.4th at p. 742.)

Moreover, even if the batching analysts' participation in the process could somehow be said to constitute "statements," the "forensic data and reports" generated from the robotic testing in this case are "unsworn, uncertified records of objective fact," and therefore are not testimonial because they "lack 'formality.' " (*People v. Holmes*, *supra*, 212 Cal.App.4th at p. 438 [rejecting argument that, because DNA experts who testified did not personally perform all the testing upon which they relied in reaching their opinions, right to confrontation was infringed]; *People v. Barba*, *supra*, 215 Cal.App.4th at pp. 741–743.) "Unsworn statements that 'merely record objective facts' are not sufficiently formal to be testimonial." (*People v. Holmes*, at p. 438.) In sum, admission of Bockrath's testimony did not infringe upon Roberson's Sixth Amendment right to confront the witnesses against him.

(ii) *Alleged defects in the chain of custody and lack of foundation*

Roberson further argues that the DNA evidence should have been excluded because "it lacked adequate foundation, and the chain of custody was not properly established."

The People contend Roberson has forfeited such claims because he did not object on these specific grounds below. (See *People v. Brooks* (2017) 3 Cal.5th 1, 42 [objection must fairly inform trial court and party offering the evidence of the specific reasons evidence should be excluded].) But defense counsel did state below that he had an unspecified "objection to the chain of custody." Counsel also objected that there were "foundational issues" with the evidence, i.e., it might have been compromised during testing. Counsel renewed general "foundation" objections during Bockrath's trial testimony. Even if these objections were inadequate to preserve his argument on appeal, because Roberson avers his counsel was ineffective for failing to interpose more specific objections, we consider the merits.

Roberson posits that there was an inadequate foundation for Bockrath's testimony because Bockrath did not monitor or perform the DNA testing, and therefore there was no showing it was done correctly. As best we understand Roberson's cursory argument, he suggests that reliability of the testing process was a preliminary fact the People were required to establish before the evidence could be admitted.

Where the admissibility of evidence depends on the existence of a preliminary fact, the trial court must determine whether a trier of fact could reasonably find the existence of the preliminary fact by a preponderance of the evidence. (Evid. Code, § 403; *People v. Clark* (2016) 63 Cal.4th 522, 583.) A court should

exclude the proffered evidence only if the preliminary fact showing is too weak to support a favorable determination by the jury. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1120, disapproved on another ground by *People v. Rundle* (2008) 43 Cal.4th 76, 151.) We review the trial court's decision for abuse of discretion. (*People v. Guerra*, at p. 1120.)

Bockrath's testimony provided ample evidence that the DNA testing process was reliable. DNA testing at the laboratory was conducted pursuant to a standardized, written procedure and performed on a daily basis by qualified DNA analysts, who acted as batching analysts on a rotating basis. Analysts wore masks, gloves and lab coats to avoid contamination. Control samples were submitted with each batch as a system of "checks and balances." For each batch run, an analyst documented the results of the quality control sample testing. Another analyst reviewed the batch analysts' work to ensure accuracy and reliability. The laboratory was accredited; inspectors regularly reviewed its policies, procedures, instrumentation, quality controls, calibration, and case work. Each analyst was tested every six months, and was required to fulfill continuing education requirements. Bockrath saw no evidence of contamination in the instant case, and no indication any error occurred in the testing process.

Roberson's lack of foundation argument ignores this evidence. Moreover, the only authority he cites, *People v. Loy* (2011) 52 Cal.4th 46, is readily distinguishable. There, the People offered an entomologist's testimony about insects found on a murder victim's body, to establish when the body was left in a vacant lot. (*Id.* at pp. 69–71.) Because the People failed to establish the date the insect sample was collected, the trial court

erred by overruling defense counsel's lack-of-foundation objection. (*Id.* at pp. 69–70.) Nothing remotely similar occurred here.

Roberson's chain of custody argument fares no better. "A chain of custody is adequate when the party offering the evidence shows to the satisfaction of the trial court that, ' " 'taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration.' " ' [Citation.]" (*People v. Hall* (2010) 187 Cal.App.4th 282, 294.) The reasonable certainty requirement is not met when a vital link in the chain of possession is not accounted for. (*Ibid.*) However, "when there is only the barest speculation that the evidence was altered, ' " 'it is proper to admit the evidence and let what doubt remains go to its weight.' " ' [Citation.]" (*Ibid.*; *People v. Catlin* (2001) 26 Cal.4th 81, 134.) We review a trial court's exercise of discretion in admitting evidence over a chain of custody objection for abuse of discretion. (*People v. Hall*, at p. 294; *People v. Catlin*, at p. 134.)

There was no abuse of discretion here. The chain of custody was complete and unbroken. Salim and Galassi, the persons who took the DNA samples from Lee and Roberson, testified that they placed the swabs in sealed, labeled envelopes and transported them to the police department property room. Bockrath personally picked up the samples, which were still sealed and labeled, from the property room and transported them to the laboratory. His practice was to store samples in his personal freezer in the lab's biology section until he began analysis. He personally prepared the swabs, placed them on the plate, and sealed them. There were no links missing from this chain of custody, and there was no evidence of tampering. Roberson's contention — that gaps existed because the two

batching analysts who ran the robotic testing did not testify — is mere speculation. The chain of custody here bears no resemblance to the "woefully inadequate" chain found lacking in *People v. Jimenez* (2008) 165 Cal.App.4th 75, 80–81, cited by Roberson.

2. *Contentions related to Roberson's eyeglasses*

Over repeated defense objections, the People introduced evidence to establish Roberson attempted to make it more difficult for the victims to identify him by wearing a pair of nonprescription eyeglasses during a portion of the trial. Roberson asserts multiple claims of error in regard to the trial court's and the prosecutor's treatment of the issue.

a. *Additional facts*

(i) *The parties' discussions about Roberson's eyeglasses*

Before the presentation of evidence, the prosecutor asked the trial court to order Roberson to remove his eyeglasses when the victims testified, because the robber had not worn eyeglasses. Defense counsel objected that the glasses were prescription lenses and suggested Roberson could remove them when the victims were asked to identify him. The court agreed with defense counsel's suggestion. Roberson removed his glasses when Chhin, the first witness, was asked to identify him.

A few days later, on October 11, 2016, the prosecutor asked that Roberson be precluded from wearing the glasses entirely unless he could show he had a prescription for them. Defense counsel said that, according to Roberson, the glasses were prescription, and averred that "unless they are prescription glasses, the Sheriff's Department does not allow" defendants to have glasses. Deputy Marian Schaefer, who was filling in for

Deputy Loney, the regular courtroom bailiff, stated that Roberson's mother had attempted to bring a pair of glasses to Roberson in the courtroom before trial began; however, pursuant to courtroom policy, Deputy Loney declined to allow them because they were not prescription glasses. At the trial court's direction, Deputy Schaefer examined the eyeglasses that Roberson had in the courtroom on October 11,[9] and advised the court that they had clear lenses without prescription. Defense counsel also examined the glasses and stated he could not tell "one way or the other." Roberson, through counsel, explained that the glasses his mother had unsuccessfully attempted to bring to court were prescription glasses. The glasses the deputy and counsel had just examined were a different pair, which he wore to help him with the "light in the courtroom."

The prosecutor requested that the glasses Roberson was wearing be confiscated and used as an exhibit because they indicated consciousness of guilt, presumably on the theory Roberson was using the glasses to change his appearance. The trial court stated that if Roberson's ability to see became relevant later, the court would have the jurors inspect the glasses. Defense counsel advised that Roberson had decided not to wear the glasses, and queried whether the court would still have the jurors examine them. The court stated it was a possibility. Roberson then opted to "put the glasses back on." After the court gave the prosecutor permission to photograph the glasses during the recess, defense counsel advised, "Mr. Roberson has now taken off the glasses."

---

[9] Although the record is not entirely clear, it appears that the glasses Roberson had in court on October 11, 2016, were the same pair he wore at the beginning of trial.

Thereafter, the court and parties repeatedly discussed the eyeglasses issue out of the jury's presence. The court ordered Roberson to bring to court the original glasses he had worn at trial. On October 18, 2016, at an Evidence Code section 402 hearing, Deputy Loney testified that when Cynthia, Roberson's mother, brought glasses to the courtroom, Cynthia stated they were not prescription glasses. Loney examined the glasses Roberson brought to court on October 18 and testified that they were reading glasses of the sort available for purchase in the jail, not the same ones Cynthia had attempted to drop off.[10] At some point, the court had Sheriff's Department personnel search the jail for the original glasses. The courtroom bailiff indicated that jail personnel had checked Roberson's bunk and no glasses were found. When Roberson was arrested, he did not have prescription glasses in his possession.

(ii) *Roberson's testimony about the eyeglasses*

During cross-examination, the prosecutor asked Roberson about his use of glasses at the beginning of trial. He stated that the glasses he had originally worn at trial had been lost. The prosecutor elicited that Roberson had not worn glasses at the preliminary hearing; two witnesses identified him as the robber at that time; both said they recognized his eyes.

When defense counsel made a relevance objection, the court conducted a sidebar. The prosecutor explained his theory that Roberson had worn the glasses in an attempt to hide his face and eyes. The trial court stated: "I had no idea when the issue came up with these glasses. I had no idea that many of those I.D.'s

---

[10] Although, again, the record is not entirely clear, it appears the reading glasses Roberson had in court on October 18 were a different pair than those he had in court on October 11.

were just eyes. . . . Now it is becoming very relevant because it makes sense . . . that your client is wearing fake glasses." Defense counsel requested that the court "stop pointing at me in front of the jury. Histrionics in front of the jury matters." The court, without verbally responding to counsel's comment, explained it now understood that by wearing "fake glasses" Roberson was "trying to basically hide his eye area." The court found it significant that Roberson failed to bring the original glasses he wore at the beginning of trial back to court when ordered to do so. Defense counsel objected that the trial court was "joining with the D.A. on the case" and, by accusing Roberson of failing to comply with the court's order to bring the original glasses back, had essentially called Roberson a liar, demonstrating bias. Counsel moved for a mistrial. The trial court denied counsel's allegations as well as the mistrial motion.

Cross-examination of Roberson resumed. The prosecutor elicited that Roberson had not worn glasses when playing poker on October 8, 2015, or at various poker tournaments. Roberson explained that the original glasses had a "very light" prescription. Roberson denied that he intended to wear the glasses throughout the trial; he "was planning on wearing them just because I felt like wearing them." When asked whether he stopped wearing the glasses only after the prosecutor brought attention to them, Roberson replied, "No. You just made a big deal. Filed a motion. I thought it was no point of fighting it. I don't need the glasses. I have nothing to hide."

(iii) *Exclusion of the prescription*

During redirect examination, defense counsel sought to introduce a 2008 document from Crystal Vision Optometry that purportedly showed Roberson had a prescription for eyeglasses.

The prosecutor objected at sidebar that the document was hearsay. Defense counsel stated the document was not offered for the truth of the matter asserted, but to show Roberson's "state of mind about wearing glasses, and they're reading glasses." The trial court concluded the document was being offered for its truth and sustained the prosecutor's objection.

When redirect resumed, defense counsel elicited that Roberson had obtained a prescription for reading glasses in his senior year of high school. When he read or looked at things for a long period of time, his eyes hurt; he wore the glasses to prevent this; he did not need the glasses to drive, play poker, or for distance; and he was not trying to hide his face during trial.

Subsequently defense counsel moved for a mistrial on the ground the prosecutor had engaged in misconduct by asking questions about the absence of an eyeglass prescription when, in fact, the defense had offered one. The trial court denied the motion.

(iv) *Deputy Schaefer's rebuttal testimony*

In rebuttal, the People called Deputy Schaefer. Over defense counsel's objections that the testimony was speculative, lacked foundation and was unduly prejudicial under Evidence Code section 352, Schaefer testified that she had filled in as the bailiff for just over a day while Roberson's trial was being heard. She observed Roberson wearing glasses. She inspected the glasses and they appeared to be plain glass; she saw "absolutely no change" when she looked through them. She was familiar with reading glasses, and these had not appeared to be reading glasses. During cross-examination, defense counsel elicited that Schaefer was not an optometrist and had no medical training "when it comes to vision."

(v) *The prosecutor's argument*

During argument, the prosecutor urged that Roberson wore "fake glasses" as props aimed at conveying a false image, and at making it more difficult for the witnesses to identify him.

b. *Discussion*

Roberson raises a plethora of arguments related to the eyeglasses issue. We conclude there was no error, and to the extent there was any error, it was manifestly harmless under any standard.

(i) *Prosecutorial misconduct*

Roberson contends it was misconduct for the prosecutor to present evidence and argument aimed at showing he deliberately changed his appearance, when, in fact, the prosecutor knew he had a prescription for eyeglasses.

"In California, the law regarding prosecutorial misconduct is settled: 'When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.' [Citation.]" (*People v. Masters* (2016) 62 Cal.4th 1019, 1052.) Prosecutors have " ' "wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]" ' [Citation.]" (*People v. Sandoval* (2015) 62 Cal.4th 394, 439.)

A prosecutor does not commit misconduct by arguing that a defendant has changed his or her appearance in order to deceive the jury. Our Supreme Court has held "that a prosecutor's argument that the defendant had deliberately altered his appearance between the time of the murder and the time of trial 'was not improper, because it related to the issues of identity and consciousness of guilt.' [Citations.]" (*People v. Sandoval*, *supra*, 62 Cal.4th at p. 439 [prosecutor's argument that defendant grew out his hair in anticipation of trial, to deceive the jury, was not improper]; *People v. Foster* (2010) 50 Cal.4th 1301, 1355 [prosecutor's suggestion that the defendant had changed his appearance in order to confuse witnesses was relevant to the issues of defendant's identity and consciousness of guilt]; *People v. Cunningham* (2001) 25 Cal.4th 926, 1001.) Here, the robber covered his face during some of the robberies, and some of the victims focused on Roberson's eyes when identifying him. There was, therefore, nothing improper about the prosecutor arguing Roberson wore "fake" glasses to try to change his appearance or obscure his eyes.

Roberson is correct that it is impermissible for a prosecutor to make such an argument when he or she knows the change in appearance was prompted by an innocent reason. "It is not improper for a prosecutor to suggest that a defendant deliberately altered his or her appearance to raise doubt concerning the defendant's identity as the perpetrator, *unless the prosecutor knows that the change in appearance was motivated solely by a reason unrelated to the reason suggested by the prosecutor*." (*People v. Foster*, *supra*, 50 Cal.4th at p. 1355, italics added; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 1001.) But there was no conclusive showing Roberson wore the glasses here

solely due to medical necessity. He testified he needed glasses when he read or wrote for long periods, but the prosecutor was not obliged to accept this explanation in light of other information: it appeared to Deputy Schaefer that the original glasses were unamplified glass; Roberson's mother reportedly told Deputy Loney that the glasses were nonprescription; Roberson was not wearing the glasses when he played poker; he did not have prescription glasses in his possession when arrested; he stated he did not really need the glasses and had not planned to wear them during the entire trial; and the prosecutor averred it was not clear "how to interpret" the proffered prescription. Under these circumstances, despite Roberson's production of the 2008 Crystal Vision Optometry document, it was far from clear that "the change in appearance was motivated solely by a reason unrelated to the reason suggested by the prosecutor." (*People v. Foster*, *supra*, at p. 1355.)

Roberson also contends the prosecutor committed misconduct by referring to evidence outside the record. During cross-examination, and before Deputy Schaefer testified, the prosecutor asked Roberson, "Do you remember when the bailiff looked [at] those glasses, they didn't appear to be prescription glasses?" Roberson answered, "That's what she said, sir." Defense counsel objected, and the trial court immediately sustained the objection and struck the testimony. It is, of course, improper for a prosecutor to refer to evidence outside the record. (*People v. Thomas* (2011) 51 Cal.4th 449, 494.) Assuming arguendo the prosecutor's question violated this precept, the single question – on a topic about which Schaefer ultimately testified – was not egregious, did not infect the trial with unfairness, and did not amount to a deceptive or reprehensible

method. The fact the court sustained the objection and struck Roberson's answer cured any possible prejudice.

(ii) *Purported evidentiary errors*

A. *Exclusion of the 2008 prescription*

Roberson insists the trial court erred by excluding the proffered evidence of the 2008 prescription. We review a trial court's decision to exclude evidence for abuse of discretion. (*People v. Wall* (2017) 3 Cal.5th 1048, 1069; *People v. Williams* (2006) 40 Cal.4th 287, 317.) The trial court correctly excluded the prescription on the ground it was hearsay. Hearsay is an out-of-court statement offered for the truth of its content, and is inadmissible unless each level of hearsay falls under an exception to the hearsay rule. (*People v. Sanchez*, *supra*, 63 Cal.4th at pp. 674–675; Evid. Code, § 1200, subds. (a), (b).) Roberson argues that the prescription was not offered for the truth of the matter asserted, i.e., that he needed a prescription for eyeglasses, but to show his state of mind, i.e., that he wore the glasses because he believed he needed them, rather than "to obfuscate justice." This argument is untenable. The only relevance of the prescription was to show the glasses Roberson wore at the beginning of trial were, in fact, prescription glasses rather than "fake" glasses. Indeed, he argues in his brief that the prescription was "admissible to corroborate [his] testimony he wore prescription glasses for reading." Roberson's belief about his need for prescription glasses was irrelevant unless the glasses he wore at trial were prescription lenses.[11]

---

[11] In his opening brief, Roberson provides a bare citation to Evidence Code section 1271, the business records exception, for the proposition that the evidence was admissible. Roberson did not argue below that the prescription was admissible as a

B. *Admission of Deputy Schaefer's testimony*

Next, Roberson argues it was reversible error to allow Deputy Schaefer's testimony, both because she was not qualified to opine about whether the glasses were prescription, and because she served as the courtroom bailiff.

1. *Lay opinion testimony*

A lay witness may testify to an opinion that is "[r]ationally based" on his or her perceptions. (Evid. Code, § 800, subd. (a); *People v. Jones* (2017) 3 Cal.5th 583, 602; *People v. Leon* (2015) 61 Cal.4th 569, 601; *People v. Farnam* (2002) 28 Cal.4th 107, 153.) A lay witness's opinion is admissible where no particular scientific knowledge or specialized background is required. (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1383; *People v. Chapple* (2006) 138 Cal.App.4th 540, 547.) "Unlike an expert opinion, a lay opinion must involve a subject that is ' "of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." ' [Citation.]" (*People v. Fiore*, at p. 1384.) Thus, it has been held a layperson can opine, for example, that a shoe and a shoe print appear similar (*People v. Maglaya* (2003) 112 Cal.App.4th 1604, 1606; *People v. Lucero* (1998) 64 Cal.App.4th 1107, 1111); and about the

---

business record, and he fails to explain how any of the requisites of that exception were met. (See Evid. Code, § 1271, subd. (c) [requiring custodian or other qualified witness to testify to business record's identity and mode of preparation]; cf. *In re Cruse* (2003) 110 Cal.App.4th 1495, 1500 [physician's report may be admissible as a business record if it is properly authenticated and a suitable foundation is laid].) Accordingly, we have no occasion to consider whether it qualified as such.

significance of marks on a shotgun shell (*People v. Lewis* (2008) 43 Cal.4th 415, 503–504, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919–920). On the other hand, matters that "go beyond common experience and require particular scientific knowledge may not properly be the subject of lay opinion testimony." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 131.)

Here, Deputy Schaefer testified she looked through the glasses and "saw absolutely no change when I inspected them with looking through them and then when I put them down to look with just my natural eyes without the glasses." Schaefer was familiar with reading glasses; they would "either make the writing or whatever I'm looking at blurry or bigger." Roberson's glasses "did absolutely nothing" and appeared to be clear glass or plastic. This testimony was proper lay opinion. It was based on Schaefer's own perception. Whether lenses are plain glass or provide magnification is readily ascertainable. The matter was not sufficiently beyond the realm of common experience to require scientific knowledge or expert testimony. (See *People v. Lewis*, *supra*, 43 Cal.4th at p. 504.) We cannot say that Schaefer's testimony lacked a rational basis. (See *People v. Farnam*, *supra*, 28 Cal.4th at p. 153.)

2. *Deputy Schaefer was not precluded from testifying*

The People contend Roberson has forfeited his contention that Schaefer should not have testified because she served as bailiff, because he did not object on this specific ground below. They are correct. " 'Evidence Code section 353, subdivision (a) requires that an objection to evidence be . . . 'so stated as to make clear the specific ground of the objection or motion . . . .' " (*People*

v. Jones (2013) 57 Cal.4th 899, 977; *People v. Geier*, *supra*, 41 Cal.4th at p. 609.)

Nonetheless, Roberson's claim fails on the merits. "A violation of the due process right to a fair trial may occur when the same sheriff's deputy testifies about evidence significant to the prosecution and also acts as bailiff for the jury." (*Espinoza v. Superior Court* (1994) 28 Cal.App.4th 957, 959; see *Gonzales v. Beto* (1972) 405 U.S. 1052; *Turner v. Louisiana* (1965) 379 U.S. 466.) A court "on its own motion must always be careful in assessing the potential prejudice when a bailiff is called to testify in the same proceeding [in which] he is functioning as the bailiff." (*People v. Turner* (1983) 145 Cal.App.3d 658, 677–678, disapproved on other grounds by *People v. Newman* (1999) 21 Cal.4th 413, 422–423, fn. 6 & *People v. Majors* (1998) 18 Cal.4th 385, 411.)

However, there is no per se rule against a bailiff testifying at trial. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1289; *People v. Turner*, *supra*, 145 Cal.App.3d at p. 677; *People v. Hill* (1998) 17 Cal.4th 800, 842–843.) In *Cummings*, for example, a deputy acted as a courtroom bailiff prior to being called as a witness. The defendant objected that the testimony of a trusted court officer, who had been involved in seating and escorting jurors and relaying juror messages to the court, would violate his rights to due process and a fair and impartial trial. (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1289.) Our Supreme Court disagreed. The deputy's involvement in courtroom activities and association with the jurors was so minimal and professional that the probative value of his testimony outweighed any prejudice. Moreover, the jury was admonished that all witnesses' testimony

was to be judged on the same basis and the deputy's testimony was not to be given greater weight. (*Id.* at pp. 1290–1291.)

In *People v. Turner*, the prosecution called the courtroom bailiff to establish a witness's trial testimony was inconsistent with his earlier statements to the bailiff. *Turner* held there were "no evidentiary impediments" to this testimony. (*People v. Turner*, *supra*, 145 Cal.App.3d at p. 677.) The bailiff's testimony was brief, lasting only three or four minutes, and the prosecutor had not known before trial that the bailiff would be a witness. (*Id.* at pp. 677–678.) *Turner* explained the court should "use another bailiff whenever administratively possible in dealing with the jury" after his or her testimony. (*Id.* at p. 678.) *Turner* concluded that, "the error, if any, in permitting the bailiff to testify was harmless beyond a reasonable doubt." (*Ibid.*; see also *People v. Hill*, *supra*, 17 Cal.4th at pp. 842–843.)

Here, Deputy Schaefer was not the regular bailiff. She relieved another deputy at approximately 4:30 p.m. on October 7, 2015, and acted as the bailiff for a full day on October 11. Schaefer's contact with jurors was likely minimal on October 7, as court was adjourned at 4:33 p.m. Thus, for all practical purposes, Schaefer served as bailiff for one day in a trial that lasted approximately three weeks. The prosecutor did not know, prior to trial, that he would be calling Schaefer as a witness. Schaefer's testimony was quite brief, with both direct and cross-examination comprising only five pages of a 5000-plus page transcript. The glasses evidence pertained to a collateral issue and was clearly not the most damning evidence in the case. Schaefer had no role in investigating the crimes; her testimony did not concern the actual offenses; and she did not testify about a confession or admission. In short, she cannot be considered a

key or crucial witness. Schaefer did not act as bailiff at any time after her testimony. The record does not suggest she socialized or conversed with jurors. The jury was instructed that it must "judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have." Thus, under the circumstances of this case, it was not error to allow Deputy Schaefer to testify even though she had briefly acted as the courtroom bailiff.

Gonzales v. Beto and *Turner v. Louisiana*, cited by Roberson, are distinguishable as explained in *People v. Cummings*. (See *People v. Cummings*, *supra*, 4 Cal.4th at pp. 1289–1290.) Unlike in those cases, there is no showing Deputy Schaefer's role resulted in her developing a close association with jurors, and she was not a crucial witness for the prosecution. (See *Turner v. Louisiana*, *supra*, 379 U.S. at pp. 467–468, 474; *Gonzales v. Beto*, *supra*, 405 U.S. at pp. 1052–1053.) In any event, as we discuss *post*, any possible error in regard to Deputy Schaefer's testimony was harmless beyond a reasonable doubt.

C. *Evidence Code section 352 challenge*

Finally, Roberson briefly argues that even if the glasses were nonprescription, evidence about them should have been excluded because any slight probative value the evidence had was outweighed by its prejudicial effect. Relevant evidence may be excluded if it is substantially more prejudicial than probative, that is, if it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome. (*People v. Edwards* (2013) 57 Cal.4th 658, 713; Evid. Code, § 352.) " ' " 'Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores

up that of the proponent.' " ' " (*People v. Scott* (2011) 52 Cal.4th 452, 490.) Instead, evidence is prejudicial under Evidence Code section 352 if it uniquely tends to evoke an emotional bias against a party or would cause the jury to prejudge a person on the basis of extraneous factors, and has little effect on the issues. (*People v. Scott*, at p. 491; *People v. Cowan* (2010) 50 Cal.4th 401, 475.)

If Roberson wore glasses in an attempt to hide his eyes, this would tend to show consciousness of guilt. Evidence demonstrating a defendant's consciousness of guilt may be probative on the question of his or her identity as the perpetrator. (See *People v. Armstrong* (2016) 1 Cal.5th 432, 457; *People v. Harrison* (2005) 35 Cal.4th 208, 230.) The eyeglasses evidence was not inflammatory and was not of an ilk to evoke an emotional bias against Roberson. *People v. Fritz* (2007) 153 Cal.App.4th 949, cited by Roberson, bears little resemblance to the instant matter and does not assist him. (See *id.* at pp. 959–962 [nontestifying shoplifting defendant's false statement to police, that he had never shoplifted before, was not an attempt to avoid detection and did not pertain to the charged crime; evidence he had a prior shoplifting conviction was highly prejudicial].)

(iii) *Harmless error*

Even if admission of the eyeglasses evidence and exclusion of the prescription was error, it was manifestly harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818.) The evidence demonstrating Roberson was the perpetrator in the robberies was overwhelming. Roberson was at the casinos at the same time as each of the victims. He left the casinos at the same time each victim did,

following them out and then following in his car, sometimes waiting nearby until the victims left the parking lot. He admitted being the person depicted in the videos as to all but the Liang robbery. The robber used the same modus operandi in each robbery, following casino patrons home in the wee hours of the morning, appearing at or near the victims' car doors when the victims briefly delayed exiting the cars, and pointing a black gun at the victims' heads. The robber's first word in both the Pham and Lee robberies was "Hey." The description given by several of the victims was consistent with Roberson's appearance. In the Pham, Chhin, and Lee robberies, Roberson was inside the casino and in a position to observe when the victims cashed out their chips. When Roberson was in the Hawaiian Gardens Casino's parking lot and the "stand down" order was inadvertently broadcast, he quickly left, suggesting consciousness of guilt. Most significantly, compelling evidence tied Roberson to at least three of the five victims. Roberson's DNA was found in Lee's ripped pocket. Surveillance video and gas station records showed he was using Chhin's stolen credit card to pump gas into his BMW within minutes after she was robbed. And Bui identified the Buddha pendant found in Roberson's mother's apartment, where Roberson was living, as the one stolen from her in the robbery. Further, a black replica handgun was found under the driver's seat of the car Roberson drove to the casino on the morning of his arrest. A light colored silk "do-rag" similar to the item the robber used to cover his face in the Liang robbery was also found in the car. Even setting aside the victims' identifications or tentative identifications, the evidence against him was powerful. Jurors were unlikely to be persuaded by the

theory that the confluence of these circumstances was merely coincidental.

In contrast to this compelling evidence, the eyeglasses evidence placed before the jury was but a brief and collateral part of the People's case, and was far from the most damning evidence against Roberson. It is clear beyond a reasonable doubt that the jury would not have rendered a more favorable result for Roberson even had the evidence been omitted and the prescription admitted. The circumstances cited by Roberson for the contrary conclusion do not carry the day. As we have explained, even if none of the witnesses had identified Roberson, the evidence was overwhelming. The fact the jury during deliberations asked a single question about Roberson's height, asked to see the replica gun, and reviewed some of the videotapes, is a reflection of jurors' conscientiousness, not a showing that the case was close. Neither the question nor any of the requests pertained to the eyeglasses. It is true the jury deadlocked on one count, but the vote was 11 to 1 for guilt, providing little support for a finding the case was close.

3. *Prosecutor's misstatement during closing argument*

Roberson complains that the prosecutor committed prejudicial misconduct by misstating the burden of proof during argument. The prosecutor argued: "Reasonable doubt, the evidence need not eliminate all possible doubt because everything in life is open to some possible or reasonable doubt." Defense counsel objected, and the trial court sustained the objection, explaining, "It is imaginary doubt." The prosecutor immediately apologized, stating, "Possible or imaginary doubt. I'm sorry. I wrote it correctly. I misspoke. My apologies." The prosecutor's inadvertent misstep, immediately corrected, was not egregious,

did not infect the trial with unfairness, and did not constitute a deceptive or reprehensible method of persuasion. (See *People v. Masters*, *supra*, 62 Cal.4th at p. 1052.) There is no possibility jurors applied an incorrect standard based on the prosecutor's quickly corrected statement.

4. *Allegation that the trial court appeared aligned with the prosecution*

Roberson contends the trial court impermissibly "created the appearance [it] was aligned with the prosecution" during trial by: (1) improperly telling victim Bui that the Buddha pendant would be returned to her after trial; (2) questioning Bui about the pendant in a fashion that appeared to favor the prosecution; and (3) pointing a finger at defense counsel and reprimanding him in front of the jury. The court's behavior, he avers, violated his state and federal due process rights to a fair trial, and his motion for a mistrial should have been granted.[12]

---

[12] Additionally, Roberson contends the trial court's handling of the eyeglasses issue, including its questioning of the bailiffs outside the jury's presence and its adverse rulings on Roberson's objections and motions for a mistrial, demonstrated the court was allied with the prosecution. We have already discussed the eyeglasses issue at length *ante* and have concluded no error occurred. Therefore, we necessarily reject appellant's contentions insofar as they pertain to the eyeglasses issue. Moreover, an erroneous evidentiary ruling does not demonstrate judicial bias. (*People v. Samuels* (2005) 36 Cal.4th 96, 115.) And, the jury could not have been influenced by some of the events Roberson cites, such as the Evidence Code section 402 hearing, that occurred outside the jury's presence. (*People v. Abel* (2012) 53 Cal.4th 891, 915 [court's comment, made at a pretrial conference, "could not have influenced the jury, as the jury did not hear it."].)

a. *Additional facts*

Bui testified at trial that she had received the Buddha pendant 11 years before, as a gift, and it was the "one item that I treasured the most." She explained, "I like Buddha, and I believe when I pray or something with that Buddha, I got something. Every time I lost something, I pray with that Buddha. I get it back." She had attached an 18-karat gold ring to the pendant's top and back.

During direct examination, the prosecutor showed Bui a photograph of the Buddha pendant found in Roberson's mother's apartment, and she was absolutely certain it was hers. She identified the gold ring as the one she had attached to the Buddha. On redirect, the prosecutor showed Bui the actual pendant, which she had not seen in person since the robbery. Bui immediately said, "Are you going to give me back that one?" When allowed to hold the pendant, Bui exclaimed, "Oh, my God. I pray right now. I wish everything bring better luck to me now. That's correct. This is mine." She had provided a description of the Buddha to officers before the search of Roberson's mother's apartment. During redirect, the court interposed several questions to Bui about the clip she had had made for the Buddha pendant.

When examination of Bui ceased, the court asked to see the Buddha pendant and said, "We'll try to give you the items back after the case is over." Bui thanked the court.

Roberson moved for a mistrial on the ground the court had lent credibility to Bui's testimony by stating it would try to return the Buddha to her after trial. Defense counsel advised that defense witnesses would testify that the Buddha was actually Roberson's and the court had vouched for Bui's credibility by implying the Buddha was hers. The court took the

issue under submission. When the jury returned to the courtroom, the court admonished: "You are the judges of the facts. You are to use your common sense and experience. I'm the judge of the law. You are the judge of the facts. [¶] It is not my duty, my role to tell you what your verdict should be. Do not take anything that I say or do as an indication of what I think about the facts, the witnesses or what your verdict should be. You alone are the judges of the facts in this case, period; no more, no less."

The trial court denied the mistrial motion, concluding it had not made a determination of any fact in the case, but simply said the court would "try" to return the items, and the court had repeatedly stressed to jurors that they were the judges of the facts.

b. *Discussion*

A trial court has the " ' " 'power, discretion and affirmative duty . . . [to] participate in the examination of witnesses whenever he believes that he may fairly aid in eliciting the truth, in preventing misunderstanding, in clarifying the testimony or covering omissions, in allowing a witness his right of explanation, and in eliciting facts material to a just determination of the cause.' " [Citations.]' " (*People v. Harris* (2005) 37 Cal.4th 310, 350; *People v. Cook* (2006) 39 Cal.4th 566, 597; Evid. Code, § 775.) "A court may control the mode of questioning of a witness and comment on the evidence and credibility of witnesses as necessary for the proper determination of the case. [Citations.] Within reasonable limits, the court has a duty to see that justice is done and to bring out facts relevant to the jury's determination. [Citation.]" (*People v. Santana* (2000) 80 Cal.App.4th 1194, 1206.) However, a trial court may not

" ' "officiously and unnecessarily usurp[ ] the duties of the prosecutor . . . and in so doing create[ ] the impression" ' " that he or she is allied with the prosecution. (*People v. Harris*, *supra*, 37 Cal.4th at p. 347; see *People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567.) The court's questioning must be temperate, non nonargumentative, and scrupulously fair, and must not convey to the jury the court's opinion of the witness's credibility. (*People v. Cook*, *supra*, 39 Cal.4th at p. 597.) A trial court also commits misconduct if it persistently makes discourteous and disparaging remarks so as to discredit the defense. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1233; *People v. Santana*, *supra*, 80 Cal.App.4th at pp. 1206–1207.)

We review the propriety of judicial comments on a case-by-case basis in light of the content and circumstances. (*People v. Abel*, *supra*, 53 Cal.4th at p. 914; *People v. Cash* (2002) 28 Cal.4th 703, 730.) A defendant seeking relief on such a theory must establish prejudice. (*People v. Abel*, at p. 914.) " ' "[O]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." [Citations.]' " (*People v. McWhorter* (2009) 47 Cal.4th 318, 373; *People v. Snow* (2003) 30 Cal.4th 43, 78.)

Roberson objected and moved for a mistrial regarding the court's comment about return of the Buddha, but he did not object to the court's questioning of Bui. He has therefore forfeited his challenge on this point. (*People v. Abel*, *supra*, 53 Cal.4th at p. 914; *People v. Harris*, *supra*, 37 Cal.4th at p. 350.) Considering the merits nonetheless, Roberson's contention fails.

We have reviewed the entire record, and find no evidence of prejudicial judicial misconduct. Jurors would not have interpreted any of the court's comments or behavior as evidence of hostility toward the defense or alliance with the prosecution. The court did " 'not become an advocate merely by asking questions.' [Citation.]" (*People v. Raviart* (2001) 93 Cal.App.4th 258, 272.) The court's queries to Bui were limited, neutral, and did nothing more than " 'bring out facts relevant to the jury's determination.' " (See *People v. Abel*, *supra*, 53 Cal.4th at p. 917.) Nothing about the questions' form, tone, or number demonstrated judicial bias. " 'Numerous courts . . . have recognized that it is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact and to assure that ambiguities and conflicts in the evidence are resolved insofar as possible.' [Citation.] ' "[I]t has been repeatedly held that if a judge desires to be further informed on certain points mentioned in the testimony it is entirely proper for him to ask proper questions for the purpose of developing all the facts in regard to them." ' " (*People v. Raviart*, *supra*, 93 Cal.App.4th at p. 270; *People v. Abel*, at p. 917.) The court did nothing to disparage defense witnesses.

We doubt that jurors would have understood the trial court's statement about returning the Buddha as an indication it had placed its imprimatur on Bui's assertion the Buddha was hers. Bui had asked, immediately upon seeing the Buddha removed from its evidence envelope, whether she could have it back. At the time, neither Roberson nor his mother had testified that the Buddha was actually Roberson's, so the jury cannot have understood the court's comment as a rejection of the defense case. The court's comment was somewhat ambiguous – "We'll try to

give you the items back after the case is over" – and the jury was likely to have understood that the court was simply attempting a polite, comforting reply to Bui's earlier query.

To the extent the court's statement was ill-advised because it potentially indicated a conclusion the Buddha was the one stolen in the robbery, any error was harmless under any standard. The court instructed the jury, very shortly after it made the comment and again before deliberations, that the jurors were the sole judges of the facts and should not take anything the court said as an indication of what it thought about the facts or witnesses. We must assume that jurors followed this instruction. (*People v. Harris*, *supra*, 37 Cal.4th at p. 350.) Bui was absolutely certain the Buddha was hers. She testified – before the court's comment – that she had modified it to attach the gold ring at the top and back. In light of her testimony and the unique modifications to the pendant, the court's comment was unlikely to have made much of a difference. And, as we have discussed, the evidence indicating Roberson's guilt was overwhelming.

Roberson also argues that the trial court's action of pointing at him (discussed in section 2(a)(ii), *ante*) indicated alignment with the prosecution. But the court's action occurred at a sidebar conference; there is no indication jurors heard the accompanying conversation or thought the judge was pointing because he was reprimanding counsel. Thus, this could not have influenced the jury. (*People v. Abel*, *supra*, 53 Cal.4th at p. 918 [court's remark, made at the bench, could not have influenced the jury].) Nor does anything in the record suggest the trial court's comments had a "chilling effect" on the defense efforts, as Roberson suggests. (See generally *id.*)

People v. Santana, *supra*, 80 Cal.App.4th 1194 and *People v. Sturm*, *supra*, 37 Cal.4th 1218, cited by Roberson, do not compel a different result. In *Santana*, this court concluded that the trial court had intervened as an adversary to such an extent as to require reversal of the judgment. (*People v. Santana*, *supra*, at p. 1207.) It "repetitiously, disparagingly and prejudicially questioned" three defense witnesses at length, belaboring points that clearly were adverse to the defense and creating the unmistakable impression it had allied itself with the prosecution in the effort to convict. (*Ibid.*) In *Sturm*, the court made inaccurate statements that prejudiced the defendant, "poked fun" at the foundational theory of the defense, and engaged in a pattern of disparaging defense counsel and belittling defense witnesses. (*People v. Sturm*, at pp. 1230, 1238, 1240–1241.) Nothing akin to the misconduct in those cases occurred here.

Finally, as we have set forth *ante*, the evidence against Roberson was overwhelming. Even assuming the challenged aspects of the trial court's conduct amounted to misconduct, we discern no prejudice under any standard for the reasons we have discussed. (*Chapman v. California*, *supra*, 386 U.S. 18.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.*

---

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