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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DONOVAN TROY JEFFERSON, Defendant and Appellant.	B240068 (Los Angeles County Super. Ct. No. BA376130)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis J. Landin, Judge. Affirmed.

Elizabeth Garfinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Zee Rodriguez and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Donovan Troy Jefferson appeals from the judgment entered on his conviction of first degree residential burglary. Before this court, appellant claims the trial court erred in admitting into evidence the preliminary hearing statements of a witness against him. More specifically, appellant claims the trial judge mistakenly applied Evidence Code section 791 in admitting Los Angeles Police Officer Thompson's prior consistent statements made at the preliminary hearing. Appellant also asserts that the trial court abused its discretion in limiting the testimony of the defense expert, Dr. Pezdek, to the issue of reliability of cross-racial identification. As we shall explain, appellant has failed to demonstrate prejudicial error as to either claim. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Robbery

On the afternoon of September 20, 2010, the home of Jesusa Aranas located on Bowesfield Street was burglarized. Delyse Humphries and Shannon Battistone, who rented rooms in Aranas's' house, also were victims of the crime.

Off-duty Los Angeles Police Officer Brian Thompson witnessed the crime. Although the record reveals a factual dispute as to how and when Thompson first made visual contact with appellant, at trial Thompson identified appellant as the person who broke into the home.[1] At the time of the crime, appellant was accompanied by a woman, Natrisha Robinson.[2]

On the day of the burglary, Officer Thompson was visiting his mother, who also lived on Bowesfield Street. Thompson's mother noticed appellant's car, which she did not recognize, back into the driveway of Aranas's house. Officer Thompson decided to investigate. He went to his car from where he could observe appellant's car in the

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[1] Thompson also identified appellant as the same man he saw on September 20 from a driver's license photo from the wallet inside a car parked in the driveway of the burglarized house.

[2] September 20 was not the first time appellant and Robinson had been to the Bowesfield Street home. After viewing a Craigslist posting, appellant and Robinson visited the house to inquire about renting a room in the home.

driveway. From there, Thompson noticed appellant exit the car from its driver's seat and climb through a window of the house.

Officer Thompson went back to his mother's house to get his gun and returned to Aranas's' house. When he returned outside, he observed Natrisha Robinson sitting in the driver's seat of the car and appellant in or near the window of the home. When Thompson and appellant made eye contact, appellant retreated back inside the house. Thompson decided to detain Robinson.

Shortly thereafter, Officers Negrete and Plascencia arrived at the scene and secured the premises. They found Aranas's house in disorder: bedroom doors were kicked in and the rooms were ransacked. In the trunk of appellant's car the officers found items belonging to the inhabitants of Bowesfield Street home—including televisions, a laptop computer, purses, and jewelry. Finally, in the front passenger area of appellant's car, the officers retrieved a wallet containing appellant's driver's license.

The Trial

Appellant was arrested and charged with first degree burglary.

The prosecution introduced Officer Thompson's testimony, the testimony of the responding police officers on the scene, and the testimony of the victims of the burglarized home.

Officer Thompson testified that he saw appellant enter and exit through the same window, with one or two television sets in his hands. During cross-examination, the defense counsel asked Officer Thompson whether he reported everything he had observed to the police officers on the day of the burglary. The defense counsel sought to show that certain information Thompson recounted during his trial testimony had been omitted from his statements to the investigating officers on the day of the crime. Thompson stated, "I told the investigating officer what I saw. What he wrote down is what he wrote down."

On redirect examination, the prosecutor sought to counter the defense's attacks on Thompson's credibility. To do so, the prosecutor instructed Officer Thompson to read statements from the preliminary hearing transcript, where Thompson testified about the

events of September 20. The defense counsel objected. During a side bar conference appellant's lawyer complained that the prosecutor was improperly "trying to bolster the credibility" of the witness with prior consistent statements from the preliminary hearing made *after* the statements he made to police at the scene of the crime. The trial court rejected appellant's argument, responding: "since you attacked the credibility of the witness, I think she's entitled to bring forth that he's made these statements previously and he's just not making them up right now."

Jesusa Aranas, the owner of the house, also testified during the trial. Aranas testified that she saw her and her roommates' items in the trunk of appellant's car. Aranas testified that the officers showed her a driver's license with a photo of the man "very similar" to the man who came in response to the Craigslist listing for the vacant room in her house. Aranas also identified Natrisha Robinson as "very similar" to the female that came with appellant to view the house. Aranas also testified that the man asked her when she and her roommates usually left the house in the morning. Aranas identified appellant in court as the man who had come to see her house before. She conceded that, at the preliminary hearing, she had not identified appellant because she was scared; she said that on two occasions she felt that someone had watched her from a car parked outside her home.

Next, the prosecution called Shannon Battistone. She testified that she retrieved her laptop computer from the trunk of appellant's car. Battistone also testified that the police officers on the scene showed her two identification cards: one belonging to appellant and one belonging to Robinson. While she did not recognize appellant's photo, [3] she recognized Natrisha Robinson's photo as the photo of the woman who came in response to the Craigslist posting.

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[3] The prosecution also called Delyse Humphries to testify. She told the jury that Battistone told the police officers after seeing appellant's driver's license: "that's the guy that came to look at the room."

Officer Plascencia testified that he interviewed Officer Thompson "two or three times during the investigation." At first, Plascencia and Thompson spoke for "about two minutes." Then, "probably 20 minutes" later Officer Plascencia and Officer Thompson spoke for "approximately 10 minutes." Officer Plascencia testified that Officer Thompson did not hesitate to identify the photo on the appellant's driver's license as the photo of the man that he saw committing the burglary. Officer Plascencia further testified that when he showed appellant's driver's license to Aranas, she "recognized him because he was there a week earlier or the time frame inquiring about renting a room."

Appellant sought to introduce expert testimony from Kathy Pezdek, a professor of psychology, on memory and eyewitness identifications. The prosecutor objected to Pezdek's testimony because she "was told that [Pezdek] wasn't testifying," and she felt "disadvantage[d]" for learning of the information late. The court inquired whether the defense anticipated the need to call Pezdek prior to trial. Appellant's counsel claimed that he did not anticipate that he would need Pezdek to testify because counsel believed that Aranas would not make an in-court identification of appellant.[4]

The prosecutor stated that if Pezdek were allowed to testify to issues other than cross-racial identification, she would need until the following week to prepare for cross-examination. However, the court expressed a concern that some jurors could not continue the trial into the following week, and thus the court stated that it was inclined to proceed with the case to avoid a mistrial. Ultimately, the trial court allowed Pezdek to testify. However, the court stated that her testimony should be limited to the issue of cross-racial identifications.[5]

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[4] The defense did not believe that Aranas would make the identification because she had failed to identify appellant on two prior occasions.

[5] Appellant and Officer Thompson are both African-American, while Jesusa Aranas is not. The discussion of Dr. Pezdek's testimony focused only on Aranas's identification of appellant.

Nevertheless, Pezdek's testimony did describe the effect of passage of time on witness identifications. Pezdek testified that "people have more accurate identification of individuals of their own race or ethnicity then [sic] a different race or ethnicity." In addition, she also testified that:

> "Cross race identification is even worse then [sic] same race identification. *When an eyewitness has seen a person for a brief period of time and their memory is not being tested for a long delay afterwards.* So in other words, the cross race effect gets worse when we have a brief exposure time then a brief [d]elay when the memory is tested." (Italics added.)

The prosecutor objected to this part of Pezdek's testimony, but the trial court overruled the objection and allowed the statements into evidence. Similarly, during the prosecutor's cross-examination, Pezdek stated that cross-racial identifications are "even worse in cases with a brief exposure time and a long time delay." Additionally, over the prosecutor's objection, the trial judge allowed the following testimony: "stress is associated with the release of adrenalin and cortisone. And those are two hormones that activate the body, but stifle memory. When people are under high levels of stress, their memory is less reliable."[6]

The jury found appellant guilty of first degree residential burglary. This appeal followed.

DISCUSSION

I. Admission of Officer Thompson's Preliminary Hearing Statements.

On appeal, Jefferson argues that trial court erred when it admitted Officer Thompson's preliminary hearing statements into evidence as prior consistent statements to rehabilitate Thompson's credibility. Specifically, appellant points out that Officer

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[6] The jury instructions directed the jurors to consider the following questions: "was the witness under stress when he or she made the observation? . . . How much time passed between the event and the time when the witness identified the defendant?"

Thompson's trial testimony was inconsistent with his initial statement to police.[7] Appellant maintains that although Officer Thompson's preliminary hearing testimony was consistent with his trial testimony, because the preliminary hearing testimony was given *after* his statement to police and *after* his motive to fabricate his story arose,[8] it could not be used at trial as a prior consistent statement to bolster or rehabilitate his trial testimony.

We begin our analysis with the standards of review. First, "an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence." (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) Second, under Evidence Code section 353, an erroneous ruling shall be set aside only when the error complained of resulted in a "miscarriage of justice." And a "'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Evidence Code section 1236 states that "evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791."[9]

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[7] Appellant argues that there were three inconsistencies between his statements to the police and his later testimony at trial: "(1) Thompson had told police that he was walking down the street when he observed an already in progress burglary, whereas he testified at trial that he was playing with his dog on his mother's lawn when he saw a strange car pull into the neighbor's driveway; (2) Thompson told the police that the first time he saw the suspect was when he poked his head out of the window of the house, holding a television, whereas at trial, he testified he first saw the suspect exit from the car, which had just pulled up, and enter through the window of the house; and (3) Thompson told the police that the suspect exited the rear of the house, whereas at trial, Thompson denied knowing how the suspect exited and denied that he had told the officers that information as to that issue."

[8] Appellant asserts that Officer Thompson's motivate to fabricate his testimony arose sometime after his statement to police and before the preliminary hearing.

"'To be admissible as an exception to the hearsay rule, a prior consistent statement must be offered (1) after an inconsistent statement is admitted to attack the testifying witness's credibility, where the consistent statement was made before the inconsistent statement or (2) where there is an express or implied charge that the witness's testimony recently was fabricated or influenced by bias or improper motive, and the statement was made prior to the fabrication, bias, or improper motive. (Evid.Code, §§ 791, 1236.)'" (*People v. Lopez* (2013) 56 Cal.4th 1028, ___, 157 Cal.Rptr.2d 570, 604, quoting *People v. Riccardi* (2012) 54 Cal.4th 758, 802.)

Here the prior consistent statement—the preliminary hearing testimony—was made after the inconsistent statement—the initial statement to police. Thus, Evidence Code section 791, subdivision (a) is inapplicable.

Likewise, the consistent statement was also made *after* the motive to fabricate arose. As appellant argues to this court, he did not imply or argue that the motive to fabricate arose at trial. Rather, appellant maintains that any bias, fabrication or improper motive arose prior to or at the preliminary hearing—that Officer Thompson sought to improve his version of events when he testified at the preliminary hearing, and therefore, the prior consistent statement is not admissible under Evidence Code section 791, subdivision (b).

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[9] Section 791 provides a detailed description of the exception to the general rule against hearsay: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

"(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or

"(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Evid. Code, § 791.)

The Attorney General does not seek to defend the admission of the statement on the basis of either Evidence Code section 791, subdivisions (a) or (b). Instead, the Attorney General defends the admission of this evidence based on the "negative evidence" exception to Evidence Code section 791, subdivision (b) first recognized in *People v. Gentry* (1969) 270 Cal.App.2d 462.

In *Gentry* the defendant was accused of inflicting cruel or inhuman corporal punishment upon a child. (*People v. Gentry, supra*, 270 Cal.App.2d at p. 464.) A prosecution witness, Turner, testified at trial to certain facts suggesting defendant's guilt. (*Id.* at p. 472.) On cross-examination of Turner, defense counsel brought out that when the witness was initially questioned by a deputy sheriff about the alleged child beating, Turner did not say "anything inculpating" the defendant. (*Ibid.)* The purpose of the cross-examination was to imply that Turner's trial testimony was fabricated. (*Ibid*.) The prosecution in *Gentry* then introduced evidence that on the morning after the alleged beating, but after the initial interview with the deputy sheriff, Turner told other sheriff's deputies statements that "were in substance the same as Turner's testimony." (*Id*. at p. 473.) The Court of Appeal held that the evidence was properly admitted.

The *Gentry* court explained that the rationale for limiting prior consistent statements to only those statements made before a motive for fabrication arises does not apply when the evidence arguably in conflict with the witness's trial testimony is the witness's prior silence. The court stated: "The reason for this limitation is that when there is a contradiction between the testimony of two witnesses it cannot help the trier of fact in deciding between them merely to show that one of the witnesses has asserted the same thing previously. 'If that were an argument, then the witness who had repeated his story to the greatest number of people would be the most credible.' [Citation]." (*People v. Gentry, supra,* 270 Cal.App.2d at p. 473.) But, the court explained, "there is an exception to the limitation. Different considerations come into play when a charge of recent fabrication is made by 'negative evidence' that the witness did not speak of the matter before when it would have been natural to speak. His silence then is urged as inconsistent with his utterances at the trial. The evidence of consistent statements at that

point becomes proper because 'the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story.' [Citation.]" (*Ibid.*) *Gentry* was followed and cited with approval on this point by the Supreme Court in *People v. Edelbacher* (1989) 47 Cal.3d 983, where the Court stated: "Where cross-examination concerning failure to report an incident implies a later fabrication, evidence that the incident was reported shortly after its occurrence is admissible." (*Id.* at p. 1013; see also *People v. Williams* (2002) 102 Cal.App.4th 995, 1011-1012.)

The "negative evidence" exception does not apply here. This case does not involve a situation where Officer Thompson was silent. Here, Officer Thompson provided a detailed statement to police and Officer Thompson's testimony conflicted with his original statements to the police. Appellant showed that Officer Thompson was inconsistent a number of times—as opposed to merely failed to provide details to the investigating officers. Neither *Edelbacher* nor *Gentry* allow a prior consistent statement, made after the motive to fabricate arose, to be admitted into evidence since "the witness who had repeated his story to the greatest number of people would be the most credible." (*People v. Gentry, supra*, 270 Cal.App.2d at p. 473.) For the trier of fact to consider hearsay under the statutory exception, the statement must be made before the motive to fabricate arose. Thus, the trial court improperly admitted the preliminary hearing statements into evidence.

Nonetheless, the trial court's error was harmless. The prosecution and the defense agreed that a burglary had taken place at Aranas's house. Appellant presented a mistaken identity defense. The prosecution presented evidence that appellant was the perpetrator. Appellant was identified before the crime, he was identified during the crime, and he was identified after the crime when his wallet was found in the car with the stolen items. All of the identifying witnesses testified and the defense cross-examined them. Moreover, the alleged inconsistencies in Officer Thompson's testimony related only to minor details, unrelated to the issue of identity. Thompson made an in-court identification of appellant, in front of a jury, as the man who committed the crime. Consequently, even if Officer

Thompson's preliminary hearing statements were admitted erroneously, the error was harmless.

II. The Limits Placed on Dr. Pezdek's Testimony.

Appellant claims the court erred when it prevented Dr. Pezdek from testifying as to identification issues except the issue of cross-racial identification. Appellant claims the trial court "sanctioned" him because he did not disclose the identity of Dr. Pezdek before trial. Furthermore, appellant maintains that under Penal Code section 1054.5, subdivision (c) the court can prohibit witness testimony only if the court has exhausted all other sanctions. Because no other sanctions were considered by the trial court, appellant argues the court erred in limiting Pezdek's testimony. Appellant asserts "the jury never had the opportunity to hear Dr. Pezdek's explanations, and how a late-changed identification should be viewed with caution," and "the jury never got the complete explanation of the weaknesses of [Aranas's] identification of appellant." Appellant claims the trial court's ruling on the scope of Pezdek's testimony resulted in a violation of his right to present a defense.

The Attorney General asserts appellant's portrayal of the trial court's ruling as a "sanction" is incorrect because the testimony was not excluded, that it was only limited, and that the court properly considered that the prosecution would suffer prejudice by either not having the opportunity to prepare a cross examination or risking a mistrial because of the unavailability of jurors. The Attorney General also argues that even if the trial court abused its discretion, the error was harmless because of the wealth of identification evidence against appellant.

Any error in limiting Dr. Pezdek's testimony was harmless. Not only did Dr. Pezdek testify about the effect of cross-racial identification, she also testify on other issues relating to the reliability of and weaknesses in Aranas's identification. Dr. Pezdek explained that "the cross race effect gets worse when we have a brief exposure time then a brief [d]elay when the memory is tested." She also opined that "brief exposure and a long time delay" make identifications even less reliable. She further testified that stress impacts memory negatively. Even though the trial judge seemingly limited Pezdek's

testimony, Pezdek nonetheless testified about the effect of the passage of time on witness identifications.

Furthermore, other identification evidence implicated appellant. Dr. Pezdek's expert opinion had no impact on Thompson's testimony, which strongly tied appellant to the robbery. In short, appellant has not convinced us that any additional testimony on these matters would likely have resulted in a different outcome in the trial.

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**