

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TOMMY COLE,

Defendant and Appellant.

B251500

(Los Angeles County
Super. Ct. No. BA354746)

APPEAL from an order of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed.

Jeralyn Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

On March 29, 2009, appellant Tommy Cole shot and killed Antwine Brown in a nightclub parking lot. A security camera recorded the shooting, but the VHS footage was at first indecipherable because it sequentially scrolled still-frame images from five separate cameras, only one of which covered the parking lot. However, a forensic video analyst digitized the video, electronically isolated the parking lot images, and created a new video scrolling only those images, which was played for the jury. On appeal from his murder conviction, Cole argues the process by which the security stills were reformatted is new and untested, and therefore should have been evaluated for reliability pursuant to *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly* analysis). He also argues a testifying police officer was unqualified to opine that the footage, which was neither dated nor time stamped, corresponded in time with the shooting. We reject both contentions, and therefore affirm.

BACKGROUND

In the early morning hours of March 29, 2009, Brown was eating and conversing with an unidentified woman in the parking lot of the Black Silk Club, an after-hours nightclub in Los Angeles, when he was approached by Melvin Falley, a longtime acquaintance. Moments later, Cole also approached and began to argue with Falley. Falley then left, entering the club, and Cole continued the argument with Brown, shouting angry insults at him. Cole then took a few steps back, and 20 or 30 seconds later fired several shots at Brown, killing him.

The events were witnessed by Marcus Whitaker-Jackson, an employee of the club, who saw Cole argue with Brown and step away, and then heard the gunshots. Whitaker-Jackson saw the hand that held the gun but could not definitively state it was Cole who fired the shots because his view was partially blocked.

Someone inside the club called 911 at 3:43 a.m., and paramedics arrived at 3:53 a.m.

Cole was wearing a GPS monitor that showed he was near the club at the time of the shooting, and Whitaker-Jackson identified him from a photo array.

Police recovered VHS security footage from a business next door to the club that depicted a series of still images from five cameras scrolling in sequence. Only one of the cameras captured events occurring in the club parking lot. A forensic video analyst working for the scientific investigation division of the Los Angeles Police Department (LAPD) digitized the video, extracted the parking lot images, enlarged the images and made contrast and color adjustments to improve their quality, and transferred them onto a DVD in a time lapse scrolling format. The resulting video was of such poor quality that individuals depicted in the images could not be identified from the video alone. The images were neither date- nor time-stamped, but showed the shooter's arrival, the shooting, and the arrival of paramedics approximately 10 minutes later.

Cole was charged with murder (Pen. Code, § 187, subd. (a)) and it was alleged in various forms that he personally used a handgun in commission of the murder (*id.*, § 12022.53, subds. (b), (c) & (d)). He was convicted and the firearm allegations were found to be true, but we overturned his conviction on the ground that a testifying detective was improperly permitted to testify Cole had made incriminating statements while in custody. (*People v. Cole*, Feb. 16, 2012, B228436 [nonpub. opn.].) Cole was then retried twice, each time resulting in a mistrial.

At the fourth trial, defense counsel objected to admission of the modified security footage, arguing “[t]he video is not in realtime. There are pieces of time from that night that are not captured on the video. There is no date or time stamp on the video.” The trial court overruled the objection, explaining that the weaknesses and strengths of the video could be argued to the jury.

The modified security video was played for the jury and for Jackson-Whitaker and Falley, both of whom testified it depicted events surrounding the shooting.

LAPD Detective Lyman Doster testified he compared the known time interval between the shooting and arrival of paramedics, approximately 10 minutes, with the number of still images taken during that interval, and concluded the real time between each frame was about five seconds. Then by counting back the number of frames between the shooting and the shooter's first approach to Brown, he determined the

shooter first arrived at the scene at approximately 3:23 a.m. Data generated by Cole's GPS monitor showed he, like the shooter, arrived at the club at 3:23 a.m. and left at 3:43 a.m.

A jury found Cole guilty of second degree murder and found true the allegation that he personally and intentionally discharged a firearm, resulting in Brown's death. He was sentenced to a term of 40 years to life in prison. He timely appealed.

DISCUSSION

Cole contends the trial court erred in admitting the modified security footage without first evaluating the reliability of the method by which it was created, and further erred when it permitted Detective Doster to testify about the time frame of events depicted in the footage. In the alternative, he argues that to the extent his arguments on appeal are forfeited for lack of pertinent evidentiary objections below, his trial counsel provided ineffective assistance.

As Cole anticipates, the People preliminarily argue he forfeited his arguments by failing at trial to object to the modified footage on the grounds he now raises, or to Doster's testimony on any pertinent ground. We agree.

No verdict or finding shall be set aside nor judgment reversed because of an erroneous admission of evidence unless there appears on the record a timely objection to the evidence "so stated as to make clear the specific ground of the objection." (Evid. Code, § 353; *People v. Partida* (2005) 37 Cal.4th 428, 433-434.) No particular form is required, but "the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility." (*People v. Partida*, at p. 435.) The purpose is to fairly inform the trial court and the party offering the evidence of the specific reason the objecting party believes the evidence should be excluded, so the proponent can respond appropriately and the court can make a fully informed ruling. (*Ibid.*) If the court overrules the objection, the objecting party may appeal on the basis that the evidence should have been excluded for the reason asserted at trial, but may not argue on appeal that the court should have excluded the evidence for a reason different

from the one stated at trial. (*Ibid.*) An objecting party will not be heard to argue on appeal that the trial court erred in failing to conduct an analysis it was not asked to conduct. (*Ibid.*)

Here, Cole argues the modified security footage was extracted by new forensic videography procedures that have not yet gained common acceptance in the scientific community. But that was not the objection he made at trial, where he argued only that the images were discontinuous and were unaccompanied by a date or time stamp. And he made no pertinent objection to Doster's testimony. Accordingly, he may not argue for the first time on appeal that the footage should have been subjected to analysis pursuant to *People v. Kelly* or that Doster's testimony was improper.

But even if the objections were deemed to have been preserved, we would reject them.

A. The Modified Security Footage Required no Kelly Analysis

In *People v. Kelly*, our Supreme Court held that evidence obtained through a new scientific technique may be admitted only after its reliability has been established under a three-pronged test: The technique must be generally accepted as reliable in the relevant scientific community; the witness testifying about it must be a properly qualified expert; and the person performing the test in the particular case must have used correct scientific procedures. (*People v. Kelly, supra*, 17 Cal.3d at p. 30.)

But *People v. Kelly* applies only to “unproven techniques or procedures” (*People v. Therrian* (2003) 113 Cal.App.4th 609, 614), i.e., to “that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is new to science and, even more so, the law.” (*People v. Stoll* (1989) 49 Cal.3d 1136, 1156.) “[A]bsent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to [*Kelly*].” (*Id.* at p. 1157.) In most such instances, “the jurors are permitted to rely on their own common sense and good judgment in evaluating the weight of the evidence presented to them.” (*People v. Venegas* (1998) 18 Cal.4th 47, 80.)

Here, Cole makes no showing—and nothing in the record indicates—that the LAPD used a new scientific technique to capture images from a VHS videotape and transfer them to a DVD. It would hardly need to do so, as the practice is a common one taught in high school visual arts classes.

Cole appears to misunderstand the nature of the original footage. Before trial, the prosecution described the footage as containing images from five cameras “all laid on top of one another,” forming “a bunch of gibberish.” From this statement, Cole appears to infer the images were originally superimposed on one another. The record fails to support such an inference. The LAPD’s video analyst testified the original footage comprised a “video” that depicted “a series of still images.” From this testimony, and from the common nature and purpose of security footage, we infer the original video depicted a series of still images in sequence, not hundreds of still images superimposed on one another. The isolation and transfer of selected images from a series is not a new scientific technique requiring *Kelly* analysis.

It follows that Cole’s trial counsel did not render ineffective assistance by failing to call for a *Kelly* analysis.

B. Detective Doster’s Lay Opinion was Proper

Detective Doster testified that going by the timing of the 911 call from the club, he estimated the shooting occurred at 3:43 a.m. He stated paramedics arrived at 3:53 a.m. Both events were captured in the security footage. By counting the number of frames taken between those events, Doster opined that five seconds elapsed between each frame. Counting frames backward, he extrapolated that the shooter, whose arrival was also captured in the footage, approached Brown at 3:23 a.m. Finally, Doster correlated these results with Cole’s GPS data, found they matched, and concluded Cole was the shooter.

Cole argues Doster should not have been permitted to testify that the still images were taken five seconds apart because he had no experience, training or education in videography, much less forensic videography, and “no experience in calculating the time between still photographs.” The argument has been forfeited for lack of an objection at trial, and is meritless in any event.

“Lay opinion testimony is admissible where no particular scientific knowledge is required, or as ‘a matter of practical necessity when the matters . . . observed are too complex or too subtle to enable [the witness] accurately to convey them to court or jury in any other manner.’” (*People v. Williams* (1988) 44 Cal.3d 883, 915.) A lay witness may proffer an opinion that is “(a) [r]ationally based on the perception of the witness; and (b) [h]elpful to a clear understanding of his testimony.” (Evid. Code, § 800; *People v. Lucero* (1998) 64 Cal.App.4th 1107, 1110-1111.)

Here, no particular scientific knowledge was required to conclude the still frames in the security footage were taken five seconds apart. It was known how much time elapsed between when the shooting occurred and paramedics arrived, and it was known how many frames were taken during that time. The determination of the rate at which the frames were taken was therefore a matter of simple arithmetic.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANNEY, Acting P. J.

We concur:

JOHNSON, J.

MOOR, J.*

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