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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.

KONSTANTY MAKOWSKI,

Defendant and Appellant.

B257957

(Los Angeles County  
Super. Ct. No. BA402409)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald H. Rose, Judge. Reversed.

Barbara A. Smith, 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, Assistant Attorney General, Steven D. Matthews and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Konstanty Makowski appeals from a judgment of conviction entered after a jury found him guilty of driving under the influence causing injury (Veh. Code, § 23153, subd. (a); count 1) and driving under the influence causing injury with a blood alcohol level over .08 percent (*id.*, § 23153, subd. (b); count 2). The jury found true the allegations that he personally inflicted great bodily injury on his victims, causing one to become comatose due to brain injury or suffer permanent paralysis (Pen. Code, § 12022.7, subds. (a) & (b)). The trial court sentenced defendant to the upper term of three years on count 1, stayed sentence on count 2 (*id.*, § 654), and imposed eight years for the great bodily injury enhancements, for a total prison term of 11 years.

On appeal, defendant challenges the trial court's exclusion of expert and percipient witness testimony regarding the dangerousness of the intersection where he struck his victims. Because we find the trial court's exclusion of expert testimony deprived defendant of due process and cannot be deemed harmless error, we reverse defendant's convictions on both counts.

## FACTUAL BACKGROUND

### A. *Prosecution*

#### 1. *The Accident*

On the evening of September 7, 2012, Minh Tri Thile, known as Tracy Le (Le), walked from her house to the market with her 14-year-old daughter, Mylinh Chung (Mylinh), and her

7-year-old granddaughter, Myky Truong (Myky). Le lived in the Glassell Park area of Los Angeles. She remembered leaving her house at about 6:00 p.m.

On their return home, they began to cross San Fernando Road at Hallett Avenue in the crosswalk. They looked both ways before crossing and saw no cars coming from either direction. It was not yet dark. The three were wearing light colored clothing and carrying white shopping bags.

When they were almost across the intersection, a vehicle hit them. Le was knocked down. When she stood up, she did not see the two girls. Eventually she saw Mylinh lying in the street about 20 feet away, and Myky lying on the other side of the street about 40 feet away.

Mylinh could only remember hearing a “thunder sound” and feeling pain. She suffered fractured hips, broken bones around her eyes and nose, and bleeding in her brain. She was taken to the hospital in critical condition. She was released in stable condition eight days later. Two years later, at the time of trial, she still suffered from pain in her hips.

Myky had been thrown almost 80 feet by the impact. She suffered severe injuries to her head, spinal cord, and abdomen, as well as a broken leg. The head injuries caused strokes, and she was in a coma. As a result, she was permanently unable to walk, talk, see, or care for herself. She suffered seizures and was in pain.

San Fernando Road at Hallett Avenue is a heavily trafficked four-lane road. There is a crosswalk marked by wide white lines. There is no stop sign or traffic signal at the crosswalk. On the night of September 7, sunset was at 7:10 p.m., and “civil twilight” ended at 7:36 p.m.

A videotape of the accident, taken by a surveillance camera located about 200 feet from the intersection, showed other cars passing through the crosswalk without slowing as Le, Mylinh, and Myky crossed San Fernando Road. Neither Le nor Mylinh remembered cars passing them as they crossed the street.

## *2. Defendant's Arrest*

The Los Angeles Police Department was called to the scene at about 7:30 p.m. Officer Donald Jenkins arrived at the scene at about 7:43 p.m. The fire department was already at the scene.

Officer Jenkins found defendant sitting in the driver's seat of his minivan, smoking a cigarette. The minivan was in the middle of the street, just past the crosswalk. There were skid marks on the pavement behind the minivan that began at the crosswalk. Officer Jenkins asked defendant what happened, but he did not respond. The officer asked if defendant had been involved in an accident, and he said he had.

Officer Jenkins noticed that defendant looked disheveled, his eyes were bloodshot and watery, his speech was slurred and he was moving slowly. Officer Jenkins asked him to put out his cigarette and get out of the vehicle. Defendant complied. The officer could then smell the odor of alcohol coming from defendant's breath and person. Defendant was unsteady on his feet and was leaning against the minivan. Officer Jenkins asked if he had anything to drink that night, and he said he drank beer at home.

Officer Jenkins attempted to have defendant perform field sobriety tests. Defendant was disabled due to preexisting back and neck pain, and his disabilities affected his balance, so he was unable to complete the tests. The officer then gave defendant a

horizontal gaze nystagmus test, which indicated that defendant was under the influence. At about 8:40 p.m., Officer Jenkins had defendant blow two times into a portable alcohol screening device; the tests registered .21 and .18 blood alcohol levels. Officer Jenkins determined that defendant was under the influence of alcohol and placed him under arrest.

Defendant was taken to Men's Central Jail, where two additional breath tests were performed at about 9:55 p.m.; the tests registered blood alcohol levels of .21 and .19. Defendant was taken to 77th Jail for a blood test shortly after 12:00 a.m. The blood test registered a blood alcohol level of .19.

### 3. *Witness Testimony*

Angeline Perales (Perales), a neighbor of Le's, witnessed the accident. She left her house at dusk and was driving on Hallett Avenue toward San Fernando Road. She stopped at a stop sign at San Fernando Place, which runs parallel to San Fernando Road and is separated from it by a small median. Perales acknowledged that San Fernando Road has heavy traffic and some confusing stop signs. She said that although it was dusk, there was enough light to see Le, Mylinh, and Myky, especially since they were wearing light colored clothing and carrying white bags.

Perales saw defendant drive through the crosswalk and hit the victims. She testified he did not slow down and did not stop until cars coming from the other direction blocked his path, testimony later discounted by the video of the accident. He got out of his minivan, went over to Mylinh and Myky and looked at them, then returned to the minivan. He did not say anything, and he reeked of alcohol.

Perales viewed a videotape of the accident, taken by a surveillance camera located about 200 feet from the intersection. According to Perales, the scene in the videotape was darker than what she remembered.<sup>1</sup>

Anna Huynh, who worked nearby, left work at her usual time, between 7:20 and 7:25 p.m. It was dark enough that she and other drivers had their headlights turned on. When she turned onto San Fernando Road, she saw two girls step into the crosswalk and slowed down. She could see the girls clearly. She saw defendant's minivan coming from the opposite direction, not slowing down. Defendant "hit those two girls and then he put the fast brake." Huynh saw defendant get out of the van after he stopped.

#### 4. *Expert Testimony*

According to Melissa Kramer-Sarrett, a criminalist in the Los Angeles Police Department's Scientific Investigations Division, Toxicology Unit, Blood Alcohol Detail Section, alcohol is absorbed into the body quickly; about 80 percent is absorbed within five to ten minutes of consumption. Alcohol is a central nervous system depressant, impairing brain function and judgment, then memory and emotion, then balance and fine motor coordination. It affects information processing, impairing

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<sup>1</sup> Los Angeles Police Detective Michael Kaden, who retrieved the videotape, testified that he did not know what type of camera was used to shoot the footage and what type of sensitivity to light it had. In particular, he did not know if it was an infrared camera; he did acknowledge that an infrared camera has the ability to display images "brighter at night than they actually were."

a driver's ability to consider things happening around him and to drive safely. A driver is considered impaired at a .08 blood alcohol level.

Physical impairment due to alcohol follows mental impairment. Physical signs of impairment include red, watery eyes, flushing, unsteady gait, slurred speech, and jerky eye movements. Someone who has a high tolerance for alcohol may not display all the physical signs of impairment but still be mentally impaired.

A man just over six feet tall who weighed 160 pounds, defendant's height and weight, could reach a blood alcohol level of .19 by consuming seven and a half shots of liquor or cans of beer.

#### B. *Defense*

Marc A. Firestone (Firestone) is a physicist and forensic engineer. He has expertise in determining a vehicle's speed based on various factors, including stopping distance, damage to the vehicle, and the distance a pedestrian travels after being hit by the vehicle. He reviewed two videotapes of the accident, police reports and photographs of the scene of the accident, and he also visited the scene. He determined that defendant was probably driving 31 to 34 miles per hour at the time of the accident and could not have been driving more than 41 miles per hour; the speed limit at that location was 40 miles per hour. He was not allowed to present other testimony about perception and reaction times, how long it would take the vehicle to stop, and whether the key videotape, if taken with an infrared camera, would have made the scene appear lighter than the actual conditions at the time Le and her family members were struck.

## DISCUSSION

Defendant contends the trial court deprived him of his due process right to present a defense by excluding expert and lay testimony as to the dangerousness of the crosswalk where the accident occurred and whether he could have seen and slowed to avoid hitting the victims. As we discuss below, the trial court abused its discretion in excluding the evidence, and such exclusion cannot be deemed harmless error in this case.

### A. *Proceedings Below*

The prosecution filed a motion in limine to exclude expert testimony as to the speed at which defendant was traveling at the time the accident occurred and the dangerousness of the intersection on the grounds the prosecution was not alleging excessive speed and the dangerousness of the intersection was not a matter beyond the common experience of the jurors.

In a hearing outside the presence of the jury, the court discussed with counsel a possible stipulation that defendant was traveling 31 to 34 miles per hour at the time of the accident. The prosecutor was willing to stipulate unless Dr. Firestone was permitted to testify about night time perception and reaction times. Defense counsel stated that Dr. Firestone needed “to apply those values to the general principles of a driver’s reaction time at nighttime to stimuli . . . .” The court asked about Dr. Firestone’s qualifications, and counsel responded that he was an expert in accident reconstruction and forensic engineering. The court asked what expertise he had as to reaction time, and defense counsel responded that she would ask him.



The trial court looked at a copy of Dr. Firestone's report, which said "that his second conclusion is a nighttime perception/reaction time is approximately two seconds for the majority of the population" and asked if the prosecutor had any problem with this conclusion. The prosecutor said he did, because it was "complete speculation." The prosecutor stated that in the report Dr. Firestone "is giving an opinion as to what was the cause of this accident which is the ultimate question for the jury," and Dr. Firestone "completely speculates that [defendant] was hampered in his ability to see the pedestrians because of oncoming headlights."

The prosecutor added that Dr. Firestone "also says that there is no vehicle stopping in front of the crosswalk in either direction for visual cues which is something the jury will be able to see because it's, in fact, on the video itself and that he's saying that since there was the vehicle in front of him that also hampered his ability to observe the crosswalk, which is what the jury is gonna see on the video and they have just by living, people know that headlights are bright; that when you're traveling too close to somebody, if, in fact, that's what happened, your ability to see in front of them is hampered. So his entire opinion in regards to how this particular accident occurred I think is, one, outside of his expertise; two, doesn't lend anything to the jury because everything he's basing it on, they themselves have those facts and are in the best position to make that determination which is theirs to make."

The trial court noted "the basic rule of law is whether the subject of the inquiry is one of such common knowledge that jurors can come to their own conclusions and whether the expert's testimony would impinge on the function of a jury." As

to the speed at which defendant was traveling, the trial court stated it would allow counsel to decide whether or not to stipulate to that. Regarding “nighttime perception/reaction time, [the court would] have to hear from the expert as to his training and background to determine if he’s qualified to give that opinion.”

“As to his third conclusion, a nighttime scene inspection revealed that traveling westbound in the [number one] lane of San Fernando Road approaching Hallett Avenue, it’s very difficult, if not impossible, to see objects in the north-south crosswalk, that seems to be impinging on the function of a jury. The defense and the [P]eople may introduce photographs and other similar evidence to show the physical scene as long as it is similar to the incident in question.” As to Dr. Firestone’s conclusion that one had to be within 200 feet of the crosswalk to discern objects in it, the court stated it would have to hear how Dr. Firestone reached that conclusion.

The court would not allow Dr. Firestone to testify as to reduced visibility due to the vehicle in front of defendant’s, heavy traffic, or the lack of visual cues due to the fact that other cars passed through the crosswalk without stopping, because these were things for the jury to determine. Similarly, the court would not allow Dr. Firestone to testify that the intersection was dangerous, especially for a pedestrian trying to cross at night, because “the jury can make that determination from the video and any other evidence that’s introduced in the trial.”

The trial court also would not allow residents of the neighborhood to testify that the intersection was dangerous or that they had witnessed accidents or near-accidents at that intersection. There was no showing that it was under similar circumstances and “[i]t’s simply an opinion, in the same way that

. . . you may not speculate about the activities of other people. Here it's irrelevant. It's an undue consumption of time. We'd have to go into the facts of each of those separate incidents."

The court further explained, "[w]e all know that a pedestrian in a crosswalk has the right-of-way, but that also follows that somebody has to know that there's a pedestrian in the crosswalk." The issue was "not if on other occasions people were or were not able to see a pedestrian, but, rather, based upon the totality of the facts in this case, was this defendant able to see them. So I would rule that any other testimony having to do with a general characterization that the intersection is unsafe would be inadmissible under [Evidence Code section] 352. It may also be inadmissible because it is not the same set of facts that we have here." For the same reasons, the court excluded the testimony of a police officer who had "made it very known that this is a dangerous intersection."

Subsequently, an Evidence Code section 402 hearing was conducted outside the presence of the jury to further explore defendant's offer of Dr. Firestone's testimony. Defense counsel again sought to introduce the several opinions set forth in Dr. Firestone's written report, including the speed at which defendant's van was traveling and nighttime perception/reaction time. Dr. Firestone was also offered to estimate the amount of time it would have taken defendant to react given his rate of speed, the space between his car and the car he was following and the lighting conditions at the time of the accident. Further, defense counsel sought to have Dr. Firestone testify that the lighting depicted in the video did not accurately reflect the lighting conditions at the time, as it was taken by an infrared camera. Dr. Firestone indicated that he could determine that it

was infrared based on the quality of the images and the picture switching from color to black and white as the light fades.

The court excluded both areas of testimony under Evidence Code section 352: the court explained that it did not believe the expert could replicate the lighting conditions at the time of the accident and so he should not be able to testify to average reaction time at the time of the accident, or even to average reaction times in full daylight or at night. The court explained that “because there’s no testimony as to when . . . defendant was first able to see the people in the crosswalk and there are so many unknown factors of . . . defendant’s condition, the placement of his vehicle in regards to all the other vehicles on the street, the unknown factor of the lighting conditions, . . . the court is making its ruling under [Evidence Code section] 352 in regards to the lack of sufficient probative value of the testimony.” Further, the court noted that the jury could make its own determination about reaction times based on its own review of the video.

Dr. Firestone was ultimately called as a witness. He testified that he had expertise as a physicist and a forensic engineer, with specialized training in light and optics. He was permitted to testify as to defendant’s likely driving speed, 31 to 34 miles per hour, which was below the posted speed limit. Defense counsel then attempted to examine Dr. Firestone as to whether glare may affect a driver’s ability to see. Dr. Firestone started to explain about “a veiling luminance or what we call disability glare.” The prosecutor objected on the grounds of relevance, speculation and lack of foundation. The trial court sustained the objection, noting that the eyewitnesses testified they were able to see the victims, and there was “no foundation

laid as to the videos as to whether they are accurate or inaccurate in regards to any glare that is reflected in the videos.” The court added that “[i]f the defendant testifie[d] and if he says that there was a glare, then you can re-call this witness and you can go into this area. But as of right now, there’s no testimony at all of any glare from any lighting.” Defense counsel also sought to ask Dr. Firestone “how streets are to be designed,” to which the trial court also sustained an objection, finding the “jury has the video of what took place. It is up to the jury to determine if there was anything obstructing defendant’s view.”

During trial, defense counsel asked to inquire of one witness whether she had been narrowly missed by a car on a prior occasion when using the same crosswalk. The court sustained an objection to this line of inquiry.

#### B. *Applicable Law*

Several principles came into play in the trial court’s rulings at issue here. First, only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is that which has “any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (*Id.*, § 210.) The trial court has the duty to determine the relevance and thus the admissibility of evidence before it can be admitted. (*Id.*, §§ 400, 402.) Evidence Code section 352 gives the trial court the discretion to exclude relevant evidence if the probative value of the evidence is substantially outweighed by the probability its admission will create a substantial danger of undue prejudice, confusing the issues or misleading the jury. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) “In general, the trial court is vested with wide discretion in determining

relevance and in weighing the prejudicial effect of proffered evidence against its probative value.” (*People v. Valencia* (2008) 43 Cal.4th 268, 286.) We review the trial court’s determinations as to relevancy and prejudice for abuse of discretion. (*People v. Hamilton* (2009) 45 Cal.4th 863, 945.)

Second, under Evidence Code section 801, a matter may be the subject of expert testimony “if it is ‘sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.’ That is not to say, however, that the jury need be wholly ignorant of the subject matter of the expert opinion in order for it to be admissible. [Citation.] Rather, expert opinion testimony “will be excluded only when it would add *nothing at all* to the jury’s common fund of information, i.e., when ‘the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness” [citation].’ [Citation.]” (*People v. Jones* (2012) 54 Cal.4th 1, 60.) “The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion.’ [Citation.]” (*People v. Jones* (2013) 57 Cal.4th 899, 946.)

Finally, a defendant has the right to have the trier of fact consider pertinent evidence on his behalf. “Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of *significant* probative value to his defense.” (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553; accord, *People v. Cunningham* (2001) 25 Cal.4th 926, 998-999.) However, this does not mean “a defendant has a constitutional right to present all relevant evidence in his favor, no matter how limited in probative value

such evidence will be so as to preclude the trial court from using Evidence Code section 352.” (*Reeder, supra*, at p. 553; accord, *People v. Milner* (1988) 45 Cal.3d 227, 240, fn. 11, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) A defendant’s constitutional rights will “override the application of ordinary rules of evidence” only where the proffered evidence has more than slight or marginal relevancy to the issues presented. (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1019; see also *People v. Homick* (2012) 55 Cal.4th 816, 865.) That is, the proffered evidence must have ““some competent, substantial and significant value.”” (*People v. Anderson* (2012) 208 Cal.App.4th 851, 880; accord, *Guillen, supra*, at p. 1019.)

C. *Exclusion of Dr. Firestone’s Testimony Denied Defendant Due Process of Law*

Defendant claims he was denied due process when the trial court prevented his expert from testifying that average nighttime reaction time is two seconds, during which time a person traveling at defendant’s rate of speed would travel 94 feet before he could even apply the brakes; that the expert’s own inspection of the intersection showed that glare from oncoming cars would prevent defendant from seeing the crosswalk until he was within 200 feet of it; defendant’s view was further blocked by the car in front of him; and that the primary video was taken with an infrared camera, which would make the scene seem brighter than it actually was. Defendant also objected to the trial court’s decision to exclude evidence of other near accidents at the same site and testimony from a police officer that it was a dangerous intersection.

Turning first to the exclusion of expert testimony, defendant argues that “the trial court’s ruling effectively eviscerated any defense defendant had,” (*People v. Cortes* (2011) 192 Cal.App.4th 873, 912 (*Cortes*)) by preventing him from offering evidence “that the accident occurred at a dangerous intersection with limited visibility, where drivers with normal reaction times might not be able to see pedestrians in the crosswalk, in time to avoid hitting them.” While “[f]rom completely different vantage points, [witnesses] Perales and Huynh could see the victims just fine, . . . what [defendant] could see in a flow of traffic going up to 40 miles per hour, with direct oncoming headlights, and a car in front of him, was something his expert could establish for the jury. The capacity of a driver to observe [objects] at a certain speed has been held to be a proper subject of expert opinion, and a matter outside jurors’ common experience.”

Defendant correctly observes that expert testimony about a driver’s reaction times, ability to perceive and the effect of specific road conditions has routinely been found to exceed the normal experience and knowledge of a lay person. While the cases relied upon by defendant considered the use of expert testimony on these issues in civil cases, the principle that such testimony is outside the knowledge of the lay person applies as well in the criminal context.

For example, in *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, on which defendant relies, the expert was “a traffic safety engineer, with expertise on the subject of driver reaction to highway warning signs. The essence of his testimony was that drivers, including motorcyclists, driving 25 miles an hour or more, would not be able to read more than three



words on a sign, and that if [the] defendant's 'No Trespassing' sign had been in place, motorcyclists would not have read beyond the word 'Quarry.'" (*Id.* at pp. 686-687.) The court held that the testimony was admissible, in that it was not "within the ken of a lay juror insofar as it pertained to the capacity of an operator of a vehicle traveling at a speed of 25 miles an hour or more to perceive various posted warnings on signs containing more than three words." (*Id.* at p. 692.)

In *Box v. California Date Growers Assn.* (1976) 57 Cal.App.3d 266, the court approved the admission of testimony by an accident reconstruction expert on the question whether a motorcycle was traveling straight ahead or turning at the time of impact. The expert was allowed to testify over objection regarding "the course the motorcycle traversed after impact" to prove the direction and speed at which it was traveling at the time of the accident, in order to challenge the defendant's evidence as to how the accident occurred. (*Id.* at p. 275.) The court found no error in admitting the testimony as relevant to the issue of what caused the accident and "sufficiently beyond common experience that the opinion . . . would assist the trier of fact. [Citations.]' [Citation.]" (*Id.* at p. 274.) The court rejected arguments challenging the foundation of the expert's testimony, finding such objections went to the weight and not the admissibility of the evidence. The court explained, "[t]he object of accident reconstruction is to reach satisfactory—not infallible—conclusions as to the operational factors and dynamic situation contributing to the collision. It is as impossible to reconstruct an accident with absolute accuracy as for a witness to relate precisely what occurred. Nevertheless, expert reconstruction often is more accurate than statements of witnesses." (*Ibid.*)

We agree with defendant that several of the factors which may have affected his ability to perceive Le and the children were beyond the common knowledge of a jury. It is not common knowledge how long it takes an average person to react to an object in the roadway, or how far a car will travel going at a particular speed once the driver begins to react but before the brakes are applied. Nor is it common knowledge that a video taken with an infrared camera would appear lighter than the actual conditions at the time of the video's creation. It is also not common knowledge what effect oncoming headlights, when combined with twilight conditions, would have on a driver's ability to perceive, traveling at a given speed, while following another car at a known distance. It is also well outside of the ordinary lay person's knowledge to be able to quantify the amount of time it would take a driver in defendant's situation to perceive, react and stop given the information available to him as he drove toward the crosswalk, even if the jurors generally know that it is harder to perceive objects at dusk or with glare in one's eyes.

It is well established that "experts may testify even when jurors are not 'wholly ignorant' about the subject of the testimony. [Citation.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1222.) "[I]f that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would 'assist' the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness'

[citation].” (*People v. McDonald* (1984) 37 Cal.3d 351, 367 (*McDonald*), overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.)

Given that at least some of the expert testimony defendant sought to introduce was beyond the common knowledge of the jury, the question remains whether it was an abuse of discretion for the court to disallow it. Defendant relies on *People v. Cortes, supra*, 192 Cal.App.4th 873, which held it to be prejudicial error to exclude a criminal defense expert’s testimony that the defendant’s traumatic experiences as an abused adolescent caused him to suffer several DSM-IV diagnosable conditions which were likely to have colored his perceptions of the situation, and impaired his consciousness in specific ways. Admittedly, *Cortes* addressed a very different type of expert testimony than the testimony offered in this case. But the *Cortes* court’s caution against disallowing expert testimony in a criminal case, where such evidence elucidates the defendant’s perception and actions, is equally applicable here. While acknowledging the Penal Code’s restrictions on expert testimony that goes to a defendant’s mental state, the court nonetheless concluded that it was prejudicial error to exclude expert testimony about the defendant’s psychological background, his diagnosis, the general qualities of a dissociative state and how the defendant’s perception might have been distorted at the time of the murder. Further, the court found the exclusion of such expert testimony was prejudicial in that it robbed the defendant of the ability to present relevant evidence from which a jury could infer his mental state, the core issue in the charge faced by the defendant—premeditated murder. (*Cortes, supra*, at p. 912.)

We are also guided by the Supreme Court’s decision in *People v. McDonald*, *supra*, 37 Cal.3d 351. In *McDonald*, the court considered whether it was an abuse of discretion for the trial court to exclude testimony of an expert witness on the psychological factors that may affect the accuracy of eyewitness identification. The court held that it was prejudicial error to exclude such testimony, rejecting the prosecution’s claim that it would usurp the juror’s function for the expert to point out various psychological issues that could have influenced identification in that case. While acknowledging that certain aspects of witness identification might be common knowledge, e.g., “lighting, distance, and duration,”<sup>2</sup> (*id.* at p. 261) the Supreme Court held the defendant was entitled to present expert testimony about other factors influencing a witness’s ability to

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<sup>2</sup> Even with respect to these factors—“lighting, distance and duration”—the court in *McDonald* observed that expert testimony might be helpful. “For example, the length of time that an eyewitness observes the person he later identifies is often given significant weight by the jury. But in virtually every such case the only evidence of that duration is the witness’s own estimate. Studies show that witnesses consistently overestimate the length of brief periods of time, especially in the presence of stressful stimuli: ‘during sudden, action-packed events such as crimes, people almost always overestimate the length of time involved because the flurry of activity leads them to conclude that a significant amount of time has passed.’ [Citation].” (*McDonald*, *supra*, 37 Cal.3d at p. 367, fn. 13.) In *McDonald*, as here, the eyewitnesses’ account of the accident varied wildly: in *McDonald*, the witnesses’ testimony as to the duration of the crime ranged widely from two minutes to 25 minutes; here, the witnesses gave conflicting testimony about the time of day when the accident occurred, lighting and visibility.

perceive, including the unexpected nature of the event, the effect of passing cars, and empirical research about one's ability to perceive and recall. The court also found it important that the expert be allowed to provide empirical evidence which would test or contradict common assumptions about witness identification within and across racial groups and other "expectations of the average juror." (*Id.* at p. 369.)

The court rejected the oft-repeated criticism that allowing such testimony would usurp the function of the jury, explaining: "The expert testimony in question does *not* seek to take over the jury's task of judging credibility: as explained above, it does not tell the jury that any particular witness is or is not truthful or accurate in his identification of the defendant. Rather, it informs the jury of certain factors that may affect such an identification in a typical case; and to the extent that it may refer to the particular circumstances of the identification before the jury, such testimony is limited to explaining the potential effects of those circumstances on the powers of observation and recollection of a typical eyewitness. The jurors retain both the power and the duty to judge the credibility and weight of all testimony in the case, as they are told by a standard instruction." (*McDonald*, *supra*, 37 Cal.3d at pp. 370-371, fn. omitted.) The court in *McDonald* reminded the trial courts: "Nor could such testimony in fact usurp the jury's function. As is true of all expert testimony, the jury remains free to reject it entirely after considering the expert's opinion, reasons, qualifications, and credibility. Indeed, the Penal Code commands (§ 1127b) that an instruction so informing the jury be given in any criminal trial in which expert opinion evidence is received." (*McDonald*, *supra*, at p. 371, fn. omitted.)

*Cortes* and *McDonald* recognize that a criminal defendant's perception of and reaction to events under certain circumstances may be influenced by factors outside of common experience, and expert testimony should be allowed as to these factors. Guided by these authorities, we agree with defendant that the trial court improperly excluded relevant expert testimony as to defendant's ability to perceive people in the crosswalk, the time it would take him to react and stop the vehicle, and the headlight glare and other visual cues which may have impaired his ability to see the victims.

The cases relied upon by the People do not undermine our conclusion. In *People v. Cromwell* (2005) 37 Cal.4th 50, 82, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, footnote 22, the court held that it was not an abuse of discretion for the trial court to exclude one minor aspect of a witness identification expert's testimony: "unconscious transference" evidence. However, the trial court there had allowed expert testimony on "duration, distance, attention, weapon focus, stress, cross-racial identification, retention intervals, effect of prior trial and photo bias, statistical versus chance identification, and the relationship between confidence and accuracy . . . ." (*Cromwell, supra*, at p. 80.) The court's exclusion of one line of testimony on grounds that it was cumulative and already covered by other theories is a far cry from the instant case, where Dr. Firestone was only allowed to testify as to the speed of the vehicle and none of the other factors bearing on perception and reaction time.

*People v. Curl* (2009) 46 Cal.4th 339, 360 also is factually distinguishable. There, the court held that it was within the trial court's discretion to exclude a private investigator's proffered

expert testimony as to the “validity” of an inmate informant’s testimony. The trial court viewed the evidence as invading the province of the jury to assess a witness’s credibility and without foundation as to the specific informant in the case. *Curl* has no application here, given the clear record in that case that the expert was attempting to attack the credibility of the informant and the expert could not provide any foundation for his assertion that certain information would have been passed to this particular jailhouse informant. By contrast, Dr. Firestone’s proffered testimony did not go to the credibility of any witness or other piece of evidence, nor did it lack foundation, at least as to the categories of testimony described above.

D. *Exclusion of Dr. Firestone’s Testimony Was Not Harmless Beyond a Reasonable Doubt*

As a general rule, the erroneous exclusion of evidence requires reversal only where it results in a miscarriage of justice. (Evid. Code, § 354; *People v. Richardson* (2008) 43 Cal.4th 959, 1001.) Under *People v. Watson* (1956) 46 Cal.2d 818, 836, a miscarriage of justice occurs “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.”

Courts have recognized, however, that ““completely excluding evidence of an accused’s defense theoretically could rise to [the level of a constitutional violation] . . . .”” (*People v. Lucas* (2014) 60 Cal.4th 153, 279, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19; cf. *People v. Franklin* (1994) 25 Cal.App.4th 328, 336-337; see *People*

*v. Cowan* (2010) 50 Cal.4th 401, 473-474.) In such a case, the test for federal constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] applies. (*People v. Grimes* (2016) 1 Cal.5th 698, 721.) That is, the error requires reversal unless it is harmless beyond a reasonable doubt. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1117.) While an error in excluding expert testimony may be found harmless (e.g., *Majetich v. Westin* (1969) 276 Cal.App.2d 216, 218-219), “[a]n error that impairs the jury’s determination of an issue that is both critical and closely balanced will rarely be harmless.” (*McDonald, supra*, 37 Cal.3d at p. 726.)

In the instant case, defendant exercised his right not to testify and the prosecution was able to replay a highly disturbing video repeatedly for the jury. The only witnesses to the accident, Ms. Le and two neighbors, gave conflicting testimony about the time of the incident and light available, but all stressing the clear visibility of the family as they entered the crosswalk. Thus, Dr. Firestone’s testimony was critical to the defense theory that it was difficult for defendant to see the people in the crosswalk, that reaction times are longer than one assumes and that the videotape does not fully capture the visibility issues facing defendant that evening. Because the excluded testimony was critical to the defense, its exclusion must be viewed under *Chapman’s* “beyond a reasonable doubt” harmless error test.

The People argue that defendant’s only purpose in offering the expert testimony “was to deflect blame for the collision.” They contend that Dr. Firestone’s testimony would add nothing because the jurors already had photographs and videos of the accident which would allow them to conclude it was a dangerous intersection, and any testimony about average



perception/reaction times would have added nothing to their analysis. Further, the People argue that testimony about what defendant would have been able to see and how quickly he could have reacted given his following time was irrelevant and the jury could decide, based on the video and witnesses' testimony, whether it was light enough to see the victims.

It is true that in this case the jury had an unusual piece of evidence, two videotapes, from slightly different angles, of the tragic incident as it occurred. The problem with the People's analysis, however, is that it presupposes that once there is videotape evidence, there is no room for additional explanation or analysis by an expert. The trial court made this same error by excluding Dr. Firestone's testimony based on the belief that the jury could draw all the conclusions it needed to from its own common sense review of the videos.

Dr. Firestone's testimony with respect to perception/reaction times, stopping times and distances, and the capabilities of infrared photography, however, is outside the common knowledge of the jury. Having reviewed the entirety of the record, we cannot say that exclusion of this testimony was harmless error beyond a reasonable doubt.

The evidence as to the amount of light at the time of the incident was highly contested. While the jury was instructed that twilight was at 7:36 p.m. and official sunset was 7:10 p.m. in Los Angeles County, the witnesses gave varying descriptions of how light it was at the time of the accident. Two of the percipient witnesses testified it was earlier in the evening, even though the People conceded that the accident took place around 7:30 p.m. Those witnesses said they had no difficulty seeing the family as they entered the crosswalk and testified that it was in fact lighter

than what appeared in the videotapes. Given this conflicting testimony, the videotapes' depiction of the amount of ambient light and street lighting took on greater importance. The significance of the videotapes to the jury was further magnified by the emotional impact of viewing the tapes, which were played again and again, capturing the two young girls as they were hit by defendant's van and thrown into the air. We have no doubt that the videotapes were by far the most influential piece of evidence the jury reviewed in determining whether defendant was able to see the family as they crossed the street. By preventing the defense from presenting evidence that the video was taken with an infrared camera and therefore appeared lighter than the actual conditions, the defense was foreclosed from testing this critical piece of evidence.<sup>3</sup>

The exclusion of Dr. Firestone's testimony about perception/reaction times also was not harmless error. Dr. Firestone sought to explain the time it takes an ordinary person to react after perceiving something in the road. His testimony that it would take two seconds under ordinary conditions to apply the brakes after first seeing an object and additional time to bring the car to a stop was outside of the ordinary scope of

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<sup>3</sup> The People objected that no proper foundation was laid to establish the video was taken with an infrared camera. We agree that a proper foundation was not laid. While an expert may explain the qualities of an infrared camera, it is a provable fact whether this video was indeed taken with such a camera. Upon retrial, a proper foundation would need to be laid about the type of camera prior to the admission of expert testimony about how such a camera might enhance the amount of light captured in the video display.

knowledge for a layperson. While jurors would have general knowledge of these principles based on their own experiences, an expert could quantify how long it would actually take the car to come to a stop and where defendant would have to have first seen the family in order to stop within a safe distance. Similarly, Dr. Firestone's testimony about when defendant could have first seen the victims, given the speed he was traveling and how closely he was following the car in front of him, was outside the ken of the average juror. Again, while the jurors might have a generalized understanding of these principles, an expert with Dr. Firestone's qualifications could have quantified when the family was first discernible and whether there was sufficient distance for defendant to have stopped. Defendant was prejudiced by his inability to counter the emotional impact of the video's depiction of his vehicle's path with expert scientific evidence of whether any ordinary person, impaired or not, would have been able to avoid this accident given the speed of travel, other vehicles and reaction times.

In determining whether the exclusion was harmless, we observe, as did the court in *Cortes*, that “[t]he prosecutor took full advantage of the court’s ruling in . . . argument.” (*Cortes, supra*, 192 Cal.App.4th at p. 912.) The prosecutor, in opening argument, argued that “we have three drivers”—Huynh, Perales and defendant—“and we know that all three drove under the same exact conditions. The only condition that was different between all three of the drivers, ladies and gentlemen, was the defendant. He was driving under the influence of alcohol.” Defense counsel objected that this misstated the evidence, but the trial court overruled the objection, stating that “[t]he jury will determine what the evidence is.”

The prosecutor then explained that there was light, “visibility was good,” and Huynh and Perales could see Le and the two girls. He implied that defendant could have seen them and stopped as well, because “defendant got to the intersection before [Huynh] did.”

In closing argument, the prosecutor again pointed to the lighting and signage at the crosswalk. He reiterated that visibility was good, but defendant still hit the girls.

*Cortes* expressed concern that the prosecutor’s decision to highlight the area of testimony where expert testimony had been disallowed magnified any error. In *Cortes*, the court concluded that it was not harmless error to exclude the expert’s testimony, which would have offered the jury a basis to infer an alternative explanation for the number of wounds inflicted on the victim. (*Cortes, supra*, 192 Cal.App.4th at p. 912.) So too here, Dr. Firestone’s excluded testimony could have offered the jury a basis to conclude that the incident was unavoidable even for a person driving without any impairment. On this record, we cannot say the error was harmless and must reverse.

Mindful that this case may be retried and defendant may again seek to introduce the testimony of Dr. Firestone or another similar expert, we must clarify the scope of our ruling with respect to the expert testimony actually proffered. We find defendant established adequate foundation, relevance and significant probative value to require admission of Dr. Firestone’s testimony on the following issues: (1) perception and reaction times for an average person; (2) the distance defendant’s car would travel given its speed, from time of perception to stopping; (3) the effect of glare on a person’s ability to react; (4) whether other vehicles, including the vehicle defendant was following,

obstructed his view and how that would have affected perception/reaction time; and (5) how an infrared camera affects the brightness of images taken in low light conditions.

However, we do not find error in the court's decision to exclude that portion of Dr. Firestone's testimony about his visit to the scene of the accident and his own difficulty seeing as he drove toward the intersection. As explained by the court in *Solis v. Southern Cal. Rapid Transit Dist.* (1980) 105 Cal.App.3d 382, 390, a court is well within its discretion to exclude an accident reconstruction "which lacked adequate foundation and was not conducted under conditions substantially similar to those on the date of the accident." In *Solis*, the court excluded a reenactment because it was conducted more than two years after the accident, on a day with different weather and where there were other notable differences between the conditions at the time of the accident and reenactment. The trial court here expressed similar concerns about Dr. Firestone's visit to the scene. We agree that without satisfactory evidence that the reenactment was conducted at the same time of year, at the same time of day and under similar weather conditions, at a minimum, the experiment lacks sufficient similarity and hence foundation for its admission.

We also do not intend to limit the court's ability, upon retrial, to control the expert's testimony should it seek to invade the proper role of the jury. As explained by the court in *Cortes*, the expert may not present an opinion about certain ultimate facts, such as when defendant actually saw the pedestrians in the crosswalk and whether defendant exercised reasonable care. The court retains the ability upon retrial to determine whether any of the testimony offered by the expert crosses from proper opinion testimony into testimony about guilt or innocence.

As to the court's expressed concern that some of the offered testimony assumed evidence which was not part of the record or lacked foundation, the proper method for exposing any such inadequacies is through cross-examination. The prosecution has at its disposal multiple means to test an adverse expert's assumptions and opinions: "issues of test reliability and validity may be thoroughly explored on cross-examination at trial. [Citation.] The prosecution also may call, in rebuttal, another expert of comparable background to challenge defense expert methods.' [Citation.]" (*People v. Townsel* (2016) 63 Cal.4th 25, 46, fn. 3, italics omitted.)

Because we reverse on the ground the trial court improperly excluded expert testimony, we need only briefly address defendant's alternative argument that the trial court erred in excluding testimony from two neighbors that they had nearly been hit at that same intersection, and from an Los Angeles Police Department traffic control sergeant that the intersection was known to be dangerous. With respect to the testimony by the neighbors, we agree with the trial court that the testimony was highly speculative and lacked sufficient foundation to establish that the circumstances they described were sufficiently similar to make their testimony probative as to the hazards presented on the date of the incident. The officer's testimony is even less probative, is based on hearsay and had little probative value as to the actual conditions facing defendant. While it may be relevant to the question of notice to the city of a hazardous road condition, that issue is not germane to the question of criminal culpability presented here. We find it was not an abuse of discretion for the trial court to exclude the

testimony from these three witnesses, at least on the foundational record presented to the trial court.

## DISPOSITION

The judgment is reversed.

KEENY, J.\*

We concur:

ZELON, Acting P. J.

SEGAL, J.

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