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ORDER

Cite as 96 Daily Journal D.A.R. 8023

THE PEOPLE,
Plaintiff and Respondent,
v.
DAMIAN MONROE WILLIAMS,
Defendant and Appellant.

No. B082141
(Super. Ct. No. BA058116)
California Court of Appeal
Second Appellate District
Division One
Filed July 2, 1996

HASTINGS, J.

THE COURT:

The unpublished opinion in this case having been filed on June 4, 1996, and request for certification for publication having been made,

IT IS HEREBY CERTIFIED that the opinion meets the standards for publication specified in subdivision (b) of rule 976 of the California Rules of Court; and

ORDERED that the words "NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS" appearing on page 1 and "NOT TO BE PUBLISHED" appearing on page 15 of said opinion be deleted and the opinion herein be published in the Official Reports.

ORTEGA, Acting P. J.
VOGEL (Miriam A.), J.

CRIMINAL LAW AND PROCEDURE

*Imaging Process of 'Segmentation' Is
Reliable Despite Lack of Documented Uses
In Previous Court Cases.*

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THE PEOPLE,
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v.
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APPEAL from a judgment of the Superior Court of Los Angeles County, John W. Ouder Kirk, Judge. Affirmed.

Edi M. O. Faal, under appointment by the Court of Appeal, and Wilma R. Shanks for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, John R. Gorey, Supervising Deputy Attorney General, and Kenneth C. Byrne, Deputy Attorney General, for Plaintiff and Respondent.

Damian Monroe Williams appeals from the judgment entered following a jury trial that resulted in his conviction of mayhem and four counts of misdemeanor assault. (Pen. Code, §§ 203, 240, 241.)¹ We affirm.

BACKGROUND

Since appellant does not dispute the sufficiency of the evidence, a short summary will suffice. On the evening of April 29, 1992, after the not guilty verdicts were made public on the case against the Los Angeles Police officers who beat Rodney King, appellant engaged in a series of criminal acts. He hurled a brick at Reginald Denny, hitting him in the head, after Denny had been dragged out of his truck and beaten by several other individuals. Appellant also shattered the windshields of Alicia Maldonado Doby's car and Takao Hirata's Bronco while each was still inside, struck Jorge Gonzales, and spray painted Fidel Lopez's face.

Appellant's defenses were mistaken identity, that he lacked the specific intent to injure or kill due to "group contagion behavior," and that Denny was not permanently disfigured.

ISSUES

Appellant contends that the trial court erred when it (1) denied his expert an opportunity to conduct a physical examination of Denny, (2) denied his discovery request, (3) limited cross-examination of certain witnesses, (4) admitted certain scientific evidence, (5) refused to admit certain impeachment evidence, (6) gave an instruction on consciousness of guilt (CALJIC No. 2.06), and (7) dismissed Juror No. 373. Appellant also contends that (8) the prosecutor engaged in prejudicial misconduct and (9) that he should not have received a consecutive term for the mayhem offense.

DISCUSSION

1. Denial of a physical examination of victim Denny

Appellant contends that the trial court erred in denying his request for a physical examination of Denny. We disagree. Appellant's expert, Dr. Leonid Prutsok, was given full access to Denny's medical records and X-rays and testified at trial that Denny's injuries, "if [left] untreated, would be permanent."

The record reflects that appellant desired that Dr. Prutsok conduct a physical examination of Denny in

¹ All statutory references are to the Penal Code unless otherwise indicated.

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Municipal Court, supra, 15 Cal.3d at pp. 300-301.) Appellant informed the court that he would call several witnesses to testify at the hearing, including former Los Angeles County District Attorney Ira Reiner and Deputy District Attorney Terry White, the lead prosecutor in the state's case against the police officers who beat Rodney King. The trial court ordered that both parties produce offers of proof concerning the relevancy of any witness's testimony, making exceptions for witnesses Reiner and White after appellant represented that they would testify to circumstances surrounding the beating of King. At the same time, the court required that appellant demonstrate why the instant case was similar to the King beating case or any other case to which appellant sought comparison. The court specifically stated that it did not want the motion to dismiss to turn into a "re-trial" of the King beating case.

At the hearing on the motion to dismiss, appellant submitted detailed offers of proof describing various abusive instances involving law enforcement officers. The court found that appellant failed to establish a "prima facie" showing of similarity between the instant case and law enforcement misconduct cases. Consequently, the court disallowed any testimony concerning the latter situations. After hearing testimony from witness Reiner in which he denied that appellant's race played any role in his decision to prosecute, the trial court denied appellant's motion to dismiss, finding that appellant presented no evidence of discriminatory prosecution.

The trial court correctly precluded the evidence concerning attacks by law enforcement officers. As noted, ordinary citizens such as appellant are not similarly situated to law enforcement officers. Accordingly, any comparison of the prosecutorial decisions concerning the two groups would not have assisted the court in determining whether appellant was the victim of intentional and purposeful discrimination. (*Robinson v. Superior Court, supra*, 76 Cal.App.3d at p. 983.)

Appellant argues that the trial court's decision interfered with his constitutional rights to confront and cross-examine witnesses. It is true that a trial court's authority to exclude relevant evidence must yield to a defendant's right to a fair trial. (*Chambers v. Mississippi* (1972) 410 U.S. 284, 302.) However, since the evidence in question here was not relevant, its exclusion did not render appellant's trial unfair. (*People v. Jennings* (1991) 53 Cal.3d 334, 372; *People v. Babbitt* (1988) 45 Cal.3d 660, 684-685.)

Appellant also appears to challenge the trial court's requirement of an offer of proof. Whether or not the trial court erred in so requiring (see, e.g., *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 103; *People v. Singletary* (1969) 276 Cal.App.2d 601, 604), appellant has failed to establish prejudice. Even assuming that the offers of proof were true, they primarily pertained to incidents in which the suspects were law enforcement officers. Since appellant was not a law enforcement officer (cf. *Griffin v. Municipal Court* (1977) 20 Cal.3d 300, 307), such incidents were irrelevant as to him. Accordingly, there was no need

for the trial court to further explore the subject.⁵ (See *People v. Hoiland* (1971) 22 Cal.App.3d 530, 538.)

4. Kelly hearing (*People v. Kelly* (1976) 17 Cal.3d 24, 30)

A newspaper photographer took a picture from a helicopter of a man as he threw a brick at Denny's head. This man appeared to have an undefined mark on his left arm. At trial, it was established that appellant had a rose tattoo on his left arm.

The photograph was taken to Cognitech, Incorporated, a Santa Monica image processing and devices laboratory, for the purpose of undergoing a procedure known as segmentation.⁶ In a hearing out of the presence of the jury to determine the reliability and acceptance of segmentation, Dr. Leonid Rudin, Cognitech's director of research and development, testified that segmentation is a technique involving computers and mathematical formulas wherein the boundaries and regions of a photographic image are extracted based upon their color or luminance. The image is then "mapped" through a mathematical formula to create a more discernible image. Dr. Rudin stated that segmentation had primarily been used in the medical field, e.g., locating the precise boundaries of brain tumors and tracking their development, and the environmental field, e.g., locating pollution or hazardous waste sites. He cited several articles and books on segmentation and stated that it was commonly accepted and used in the image processing field. He further stated that he was not aware of any other court case in which segmentation was used for identification purposes. The trial court overruled appellant's objection to Dr. Rudin's testimony, stating that it was "firmly convinced" of Dr. Rudin's expertise. The court further found that, based on the evidence of its use in the medical field, the process of segmentation met "the threshold requirement for reliability[.]"

Appellant contends that the admission of the segmentation evidence was error because the prosecution failed to demonstrate that the process was accepted or reliable, or that the correct segmentation procedures were conducted in the process. Appellant's latter contention concerning the correctness of the procedure used has been waived, as defense counsel expressly agreed that hearing was "limited to the reliability and the acceptance" of segmentation. (See *People v. Diaz* (1992) 3 Cal.4th 495, 528.)

The test for determining the reliability of a new scientific technique is whether the technique is "... sufficiently established to have gained general acceptance in the particular field in which it belongs." (Italics added.)" (*People v. Kelly, supra*, 17 Cal.3d at p. 30.) The People have met that test. Dr. Rudin testified to the general acceptance of segmentation for identification purposes and cited several supporting texts authored by image processing experts. No evidence was presented in opposition. Moreover, we do not find the lack of documented uses of the

5. Appellant presented no evidence at the hearing with respect to the two instances involving Caucasian civilian suspects.

6. Cognitech was also hired by the prosecutor to "digitize" other photographs and video tapes. Appellant did not object to the digitized evidence.

procedure in court cases to be fatal to the court's determination of reliability.

Appellant claims that Dr. Rudin's own testimony revealed that the process was unreliable because he was unable to state with precision whether the processed image was a rose or flower tattoo. Appellant misses the point. The question before the court was whether the technique of segmentation was reliable, i.e., whether the process would create a discernible picture of the mark on the arm of the photographed perpetrator. Whether the mark matched appellant's tattoo was for the parties to argue.⁷

Appellant also argues that Dr. Rudin was not qualified to testify on the use of segmentation in the medical field because he lacked a medical background. This claim is absurd. The process of segmentation in the medical field was limited to determining the dimension and growth patterns of the tumors from X-rays provided by medical doctors. It was not used to diagnose tumors.

5. Inadmissibility of a letter impeaching witness Robert Tur

Appellant contends that the trial court erred when it refused to admit certain impeachment evidence concerning prosecution witness Robert Tur. We disagree.

In relevant part, Tur testified that that he was able to identify appellant through binoculars while hovering above the attack in a helicopter. Out of the presence of the jury, the trial court conducted a hearing to determine the admissibility of a letter from Assistant City Attorney Timothy Hogan to the prosecution team. (Evid. Code, § 402.) The letter indicated that Hogan was in the midst of an investigation on another matter and had received reports that Tur had given false testimony under oath and had suborned perjury.

Appellant sought admission of the letter to impeach Tur. However, the conduct attributed to Tur was not based on the personal knowledge of Hogan, but instead reflected what he had been told by others. Accordingly, the contents of the letter were hearsay and could not be admitted under either the business or official records exceptions to the hearsay rule. (*People v. Wheeler* (1992) 4 Cal.4th 284, 300, fn. 13; see *In re Jacqueline H.* (1979) 94 Cal.App.3d 808, 815.)

We also find no abuse of discretion in the trial court's decision to preclude appellant from cross-examining Tur on this subject. This decision was based on the court's finding that the subject was a collateral matter and would require extensive litigation as to the truth of the allegations. (Evid. Code, § 352.) "In general, a misdemeanor—or any other conduct not amounting to a felony—is a less forceful indicator of immoral character or dishonesty than is a felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its

7. Moreover, if the match was poor, it would in fact have strengthened appellant's mistaken identification defense.

probative value." (*People v. Wheeler, supra*, 4 Cal.4th at pp. 296-297, fn. omitted.)

6. CALJIC No. 2.06

Appellant contends that the trial court erred in giving CALJIC No. 2.06 on efforts to suppress evidence as a circumstance tending to show a consciousness of guilt.⁸ Appellant argues that there was no evidence that he destroyed or concealed evidence. We disagree. The police searched appellant's residence and found certain items of clothing worn by appellant during the attacks (e.g., a splotted T-shirt, a blue bandanna, and a pair of sunglasses). However, they were unable to locate the black and white tennis shoes and dark-colored shorts worn by appellant that day. Thus, it was entirely reasonable to assume that appellant hid certain items of clothing that he wore in order to thwart efforts to establish his identification. Accordingly, the trial court did not err in giving CALJIC No. 2.06. (See *People v. Hannon* (1977) 19 Cal.3d 588, 597-598.)

7. Removal of Juror No. 373

We reject appellant's contention that the trial court erred when it dismissed Juror No. 373 during deliberations.

After several jurors complained of Juror No. 373's inability to deliberate, the court conducted a hearing on the matter. At the hearing, several jurors testified that Juror No. 373 was inattentive, constantly requested that the jurors take time to organize their notes, forgot previous votes or discussions, and even attempted to alter the jury instructions. For her part, Juror No. 373 stated that she thought the other members of the jury were not deliberating properly and that she had changed her vote on certain preliminary issues after listening to deliberations. The court found that Juror No. 373 was unable to comprehend simple concepts, was unable to remember events during deliberations such as recent discussions or votes, and was not following the law.

The trial court's decision to dismiss Juror No. 373 was not an abuse of discretion given that Juror No. 373's conduct apparently transformed the deliberation process into an exercise in futility. (§ 1089; see *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1333 [juror removal supported by good cause where juror refused to deliberate, disobeyed court orders and was inattentive].) Appellant argues that there was no substantial evidence to support the court's findings. We disagree, as the court's findings were supported by the testimony of several jurors.

Appellant suggests that the dismissal of Juror No. 373, an African-American woman, was particularly unfair in view of the fact that the court permitted Juror No. 104, a Caucasian woman, to remain on the jury. However, appellant never sought the dismissal of Juror

8. The instruction given, CALJIC No. 2.06, reads as follows: "If you find that a defendant attempted to suppress evidence against himself in any manner, such as by destroying evidence or by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration."

Criminal Law and Procedure

■ Imaging process of 'segmentation' is reliable despite lack of documented uses in previous court cases.

The *C.A. 2nd* has ruled that an imaging process used to enhance a long-distance photograph of a defendant's tattoo was "reliable" although the process had only been used in the medical and environmental fields, and had not been used in court cases.

Damien Williams was involved in a series of criminal acts during the rioting following the not-guilty verdicts in the case against police officers who beat Rodney King. Williams hit Reginald Denny in the head with a brick after Denny had been dragged from his truck and beaten by several others. A photographer took a picture of a man as he threw a brick at Denny's head, and the man appeared to have an undefined mark on his left arm. Williams had a tattoo on his left arm. Williams also shattered the windshields of several cars while the occupants were still inside, struck another person, and spray painted another person's face. Williams was convicted of mayhem and four counts of misdemeanor assault.

The *C.A. 2nd* affirmed. The photograph of the man throwing the brick was taken to a laboratory for "segmentation" in order to create a more discernible image. Although the process had been used primarily in the medical field, the trial court found that the segmentation met the threshold requirement for reliability. Under *People v. Kelly*, in order for a new scientific technique to be found reliable it must be sufficiently established to have gained general acceptance in the particular field in which it belongs. A witness with expertise in the area, Leonid Rudin, testified that the process had been used to locate the precise boundaries of brain tumors, and had also been used in the environmental field to locate pollution or hazardous waste sites. Rudin also cited several articles and books on the process and stated that it was commonly accepted and used in the image processing field. This testimony established the "general acceptance of segmentation for identification purposes." No evidence was presented in opposition, and the lack of documented uses of the procedure in court cases was not fatal to the trial court's determination of reliability. The question before the trial court was whether segmentation was reliable —

whether it would create a discernible picture of the mark on the arm of the photographed perpetrator. The trial court correctly found that the process was reliable. To support his discriminatory prosecution allegation, Williams sought discovery of a statistical summary regarding arrests and prosecutions for mayhem. That request was properly denied since Williams produced "meager" relevant evidence that he was singled out for prosecution because of his race. The government produced a declaration from two prosecutors that "prosecutorial decisions were not made on the basis of a defendant's race or ethnicity."

People v. Williams, C.A. 2nd, No. B082141, July 2, 1996, by Masterson, J.
The full text of this case appears in the *Daily Appellate Report* on page 8023.
— Thornton Reese