THE PEOPLE, Plaintiff and Respondent,
v.
CORY QURAN ROBINSON et al., Defendants and Appellants.

B198592
Court of Appeals of California, Second Appellate District, Division Eight
August 19, 2009
Not to be Published in the Official Reports

Appeal from judgments of the Superior Court of Los Angeles County, No. GA044716, Curtis B. Rappe, Judge. Affirmed.

Neil Rosenbaum, under appointment by the Court of Appeal, for Defendant and Appellant Cory Quran Robinson.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant Brandale Robinson.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews, Shawn McGahey Webb and David Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

FLIER, J.

Brandale and Cory Quran Robinson, who are brothers, were charged with murder and second degree robbery. The information alleged as a special circumstance that the murder was committed in the course of a robbery. Cory was charged in both counts with personally and intentionally discharging a firearm.

Appellants' first trial resulted in a hung jury. At their second trial, they were convicted of all charges and sentenced to life imprisonment without parole, plus the firearms enhancement for Cory. They appealed. We reversed based on the erroneous exclusion of third party culpability evidence that had been introduced at the first trial. (People v. Robinson (Oct. 29, 2004, B163693) [nonpub. opn.].) That evidence concerned the possible culpability of three other men, Calvin Capers, Michael Reese, and Roland Bynum. The third party culpability evidence that was excluded from the second trial was presented at the third trial. Appellants were again convicted of all charges and sentenced to life imprisonment without parole, plus the firearms enhancement for Cory. This appeal followed.

Brandale contends that his robbery-murder special circumstance was not supported by substantial evidence because he did not act with reckless disregard for human life. Cory contends that the trial court should not have given CALCRIM No. 371, on suppression of evidence. Appellants also raise two issues regarding DNA evidence.

Having thoroughly reviewed the record and the issues, we find no error, and affirm the convictions.

FACTS

1. Prosecution Evidence

At 12:26 a.m. on November 23, 1998, Syed Hussain was killed by a gunshot wound in the face while he was working alone at a 7-Eleven store. His shift had begun at 10:00 p.m. A customer walked into the store at 12:30 a.m. and dialed 911 when he saw Hussain lying in a pool of blood behind the counter.

Los Angeles County Sheriff's deputies arrived immediately. They recovered a baseball cap (hereafter the hat) from the floor near Hussain's foot. They also took possession of a video of the shooting that was made by the store's surveillance camera. A slowed-down version of that video was released to the news media that same day and was played for the jury at the trial.

We too have watched the video. It does not include sound. The perpetrators are two young Black men whose faces are blurry. Due to the camera angle, the two men are sometimes out of view, and their backs sometimes face the camera. One of them, who is relatively large in size, wears a hip-length, black leather jacket. He appears first behind the counter with Hussain. The second man soon is also visible behind the counter. He is wearing the hat and a large, red and blue jacket with large letters on the back that read "DISS USA." The two men use their hands as they search for items on shelves. At various points, Hussain is standing up, lying down, and kneeling. The entire incident lasts several minutes. The gunman's hat falls off, revealing that his head is shaved. Toward the end, when Hussain struggles with the man in the leather jacket, the man in the "DISS USA" jacket points a gun at Hussain and shoots him. That is the first time the gun appears in the video. After the shooting, the two men ran out, taking currency and a binder containing prepaid telephone cards.

At the trial, James Broughton, appellants' longtime friend, described driving them to the vicinity of the 7-Eleven store. He sometimes took them places, as he had a car and they did not. Earlier that night, he drove with his girlfriend to appellants' home in Claremont. Appellants were both there, as was Cory's girlfriend, Ronda Corley. Brandale, who had a black leather jacket, was taller and heavier than Cory. Cory's head was shaved, and he had a jacket with large letters on it. Brandale asked Broughton to give him and Cory a ride. Broughton agreed. Brandale rode in the front passenger seat. Cory and Broughton's girlfriend sat in the back seat. Broughton did not see a gun that night, but Cory had previously shown him a revolver earlier that year, inside the room that appellants shared at their home.

Broughton took his girlfriend home and then drove appellants various places, at Brandale's request. Cory sat in the back seat. Brandale sat in the front seat, next to Broughton. Brandale eventually had Broughton drive along two freeways, exit at a particular off-ramp, and park at a post office in Duarte. Their parking spot was near the 7-Eleven store and across the street from an apartment complex. No one mentioned the store. Brandale said "something to do with maybe a family member or somebody living" in the apartments. Appellants left the car, crossed the street, and passed from Broughton's view. Broughton remained in the car, listening to the radio, with the windows rolled up. About 10 minutes later, appellants returned to the car and said, "Let's go." Broughton drove them away, without asking what they had done. He took Cory home, went with Brandale to get something to eat, dropped Brandale off at home, and then drove home by himself.

The next morning, someone told Broughton to turn on the television news. When he did so, he saw the surveillance video of the crime at the 7-Eleven store on the previous night. The perpetrators appeared to be appellants, who were wearing their distinctive jackets. Broughton thought that he might have been involved in the crime. He drove to appellants' home and asked Brandale about the news report. Brandale asked Broughton what he was talking about, and then told him to say he did not know anything. Brandale also told Broughton that he and Cory were going to Minnesota.

Broughton further testified that he was interviewed by detectives following his arrest in 2000. He was frightened when the detectives told him he was a murder suspect. He did not tell them the complete truth, but he insisted that he was telling the truth at the trial. He still cared for appellants and did not want them or himself to have a ruined life. He was never prosecuted for the crime. He testified with use immunity, and understood that his testimony could not be used as evidence against him, but he could be prosecuted if other evidence showed that he participated in the crime.

Cory's ex-girlfriend, Corley, testified that she was with Cory at his home until 11:00 on the night of the crime. He customarily wore a baseball cap and kept his head shaved "completely bald." They were in a separate house, like a studio, behind the main house. When Cory left at 11:00 p.m., he said a friend was going to drive him to the store. He returned around 2:00 or 3:00 a.m., "nervous and panicky." He was wearing the red and blue "DISS USA" jacket. He had a chrome revolver and "was trying to find a place to put it." He also had a stack of $1 bills. He told Corley "that they had robbed a liquor store and that he had shot somebody" two times, because "the guy was fighting with his brother." He told her "he needed to leave." He put the gun "[i]n some boxes in the shower." Then, they went to sleep.

Corley's testimony continued: Around 6:30 the following morning, Brandale came to the back house and told Cory that "they were on T.V." Appellants kept saying they had to leave. Brandale was holding a notebook that contained telephone calling cards. He wanted to use the cards, but Cory told him not to. Appellants' mother came to the back house and asked them about the television broadcast. Cory started packing. He said he was going to his brother in Minnesota. Corley went home. When she saw the video of the 7-Eleven incident on the television news, she recognized appellants. Cory left town the next day. Corley next saw him when he returned to town about two months later. They fought about her seeing another man and their relationship ended.

Corley further testified that, although Cory never threatened her, he told her, "Don't tell anybody." His mother told her that the family would find out if she talked with the police. She got into a fist fight with his sister, who made threatening telephone calls and was "telling people what they were going to do to [her]." Frightened by the threats, Corley did not initially tell law enforcement authorities what she knew. She finally came forward in July 2000 because her mother kept urging her to do that, and also because her family needed the reward money.[1]

Finally, Corley admitted that in June or July 2001, she pled guilty to two check forgery cases and one unspecified misdemeanor case. She received probation and paid restitution. There was an outstanding warrant for her arrest at the time of trial, as she violated probation by failing to pay for furniture she rented for her brother. She insisted, however, that she had not been promised leniency on her own cases and had not been told what to say about this case.

When Frank Gonzales, the homicide detective, interviewed Corley in July 2000, Corley gave him a complete description of what she knew, including the fact that Brandale told Cory, "Man people already calling, they already seen it, they know — everybody know it's us, we got to go." (Sic.) Corley told Gonzales that Cory had previously shown her the gun. Her description of appellants' admissions included facts that Gonzales had not previously known, such as that Hussain was shot twice. Based on her statement, the coroner's office re-evaluated the autopsy results, and concluded that Hussain was shot a second time, through the arm. An expended bullet found at the crime scene corresponded to the arm wound. That bullet and the bullet recovered from Hussain's head were fired by the same gun, but that weapon was never found.

About two weeks before the crime, Brandale was arrested and booked on a charge of possession of cocaine. In his booking photo, he is wearing a black leather jacket like the black leather jacket in the murder video. His jacket would have been returned to him when he was released from custody after his arrest. He appeared in court on the cocaine case on November 23, 1998, hours after Hussain was killed. He was released on his own recognizance that day. He failed to appear for his next court date, December 7, 1998.

An employee from Cory's former school testified that Cory kept his hair cut very close to his scalp and regularly wore hats and a jacket with writing on the back. In March 2001, when the employee was shown the video of the crime, she recognized Cory, based on his jacket, stance, movements, and profile. At the trial, she was not sure that Cory was the person in the video.

Appellants were arrested in Minnesota in December 2000. Cory made a telephone call from jail to his girlfriend in Minnesota, in which he made a veiled request that she dispose of a gun at their home.

The evidence about the possible culpability of Capers, Reese, and Bynum (collectively, the trio) showed that Bynum and Capers lived in two units of the nearby apartment complex, and Reese lived "just west" of that building. Armando Sanchez Ramirez (Sanchez), who worked the shift before Hussain's shift, testified that the trio were daily customers of the store, before and after Hussain was killed. They "always came to the store drunk and drugged," but they were not violent. After Hussain's murder, a restraining order was obtained to keep them out of the store, as some employees felt uncomfortable with them.

Sanchez further testified that the trio came into the store while he was working there alone around 8:52 p.m., a few hours before Hussain was killed. The store's surveillance camera partly recorded what happened. Capers tried to steal a bottle of wine, but he handed the bottle to Sanchez when Sanchez twice told him to put it back. One of the three asked Sanchez what time Hussain would start work, and whether Hussain would be working alone. The questions worried Sanchez, so he answered that Hussain would not be working alone. The

trio then left. Hussain was killed later that night. The trio was arrested the following afternoon, and booking photos of them were taken at 4:30 p.m. They were soon released.[2]

During additional questioning, Sanchez also stated that he never identified the two men in the video of the shooting, which he watched on the television news the next day. He knew when he saw the video that the police had arrested the three men he saw in the store the previous night. He had formerly testified, in 2001, that when he saw the video of the shooting on television, he thought he was looking at the same men he had seen in the store. He further indicated that, when he testified in 2001, he was asked about the three men who were arrested, and not the two men in the murder footage. He insisted that he had never identified the two men in the murder footage and did not know who they were.

The People also presented dog scent evidence through Dennis Slavin, the human handler of a trained dog named "Tinkerbelle." The hat was likely to absorb odors from whoever wore it, from the store's regular customers, and from customers who had been in the store earlier that night, such as Capers. Tinkerbelle trailed the scent of the hat from the store to the nearby apartment complex. Once inside that building, Tinkerbelle showed interest in a number of the units, but not those of Bynum and Capers. Later, at the sheriff's station, Tinkerbelle stopped in front of Capers's cell, but not in front of the cells of Reese and Bynum.

Steve Renteria, a sheriff's department criminalist, sent various items to the Serological Research Institute (SERI) for DNA testing. Over time, the samples included the hat from the crime scene, a blood sample and fingernail scrapings from Hussain, and oral swab samples from Reese, Capers, Broughton, and appellants.

The prosecution's chief DNA witness was Brian Wraxall, the executive director of the SERI laboratory. Wraxall had worked in the area of forensic science since 1963. He conducted various DNA tests on the samples, including, in particular, the hat. The hat had multiple DNA donors, which is common, as people tend to "swap" baseball caps. From his DNA tests on the hat, Wraxall concluded that (1) Broughton, Brandale, Reese, and Capers could not be donors; (2) Cory could not be a donor if there were only two donors; (3) there were definitely at least three donors; (4) Cory could not be eliminated as a donor; and (5) one out of 9,500 people in the general population could be a possible donor, and Cory was a possible donor.

Wraxall also testified, over objection, that appellants could have had their own DNA analysis performed on the samples.

2. Defense Evidence

Appellants' fingerprints were not found at the store, but Bynum's fingerprints were on the store's front door.

Lori Long was a daily customer at the 7-Eleven store in November 1998. About a week and a half before Hussain was killed, Long was inside the store at the same time that two Black men and one Black woman were there. At the trial, based on photos, Long identified the Black men as Capers and Reese. Capers bought a hot dog and ate most of it. He and his companions then complained about the hot dog and demanded a refund. Hussain initially refused, but he refunded the money after Long asked him to do that, as the three people made her uncomfortable. As the three people departed, they said to Hussain that the neighborhood was in "Black territory," Hussain did not belong there, and they were "going to run [him] out." Hussain told Long that the people did this to him "all the time." He asked her to wait inside the store with him.

Sheriff's Deputy David Bly testified that when he interviewed Long, she told him about the problem with the hot dog and the threat to Hussain.[3]

Angel Robinson, appellants' sister, testified that she had two altercations with Corley after Hussain was killed, but she never threatened Corley, and Corley was the aggressor. Angel also testified that she had once been convicted of a theft-related misdemeanor.

Appellants' mother testified that she never threatened Corley and did not recall asking appellants about a news story of the crime. She took Brandale to and from court on the morning of November 23, 1998, for a preliminary hearing, but he did not show up in court for his next appearance on December 7, 1998. She had

two other sons who were longtime residents of Minnesota. Appellants had visited their brothers in Minnesota prior to November 1998, and she took Brandale to the bus stop to go to that state in December 1998.

Under defense questioning, the sheriff's department criminalist, Renteria, testified that he concluded in 2001 that Hussain's fingernail scrapings had multiple donors in addition to Hussain; Broughton and appellants were completely eliminated; and if there were at least three donors, Reese and Capers could be included.[4]

Finally, the defense presented its own DNA expert, Dan Krane, who had a Ph.D. in biochemistry and had numerous published research papers on forensic DNA testing. Krane had reviewed Wraxall's DNA testing and conclusions, but did no testing himself. Like Wraxall, he believed that Capers and Reese were eliminated from being DNA donors on the hat, and Cory was eliminated if there were only two donors. Unlike Wraxall, he thought there was no conclusive evidence of a third donor, as he believed there were flaws in Wraxall's data. He also criticized Wraxall's statistical analysis.

DISCUSSION

1. Sufficiency of the Evidence for Brandale's Special Circumstance Finding

The evidence showed that Cory was the shooter. The special circumstance liability of Brandale, the nonshooter, was based on his being a major participant in the robbery who acted with reckless indifference to human life. He contends that there was insufficient evidence of the requisite mental state.

A. Legal Background

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (People v. Kraft (2000),23 Cal.4th 978.)

A defendant's intent may be inferred from evidence like "the circumstances attending the act, the manner in which it is done, and the means used, among other factors." (People v. Ferrell (1990),218 Cal.App.3d 828.)

"All murder . . . which is committed in the perpetration of . . . robbery . . . is murder of the first degree." (Pen. Code, § 189.)[5]

First degree murder is punished by "death, imprisonment in the state prison for life without the possibility of parole [LWOP], or imprisonment in the state prison for a term of 25 years to life." (§ 190.)

The penalties of death or LWOP require a finding of one of the special circumstances listed in section 190.2. Here, the jury found Brandale guilty of first degree murder, and then found true, as a special circumstance, that Hussain was murdered while Brandale was "engaged in the commission of and in immediate flight after having committed the crime of robbery, within the meaning of . . . section . . . 190.2(a)(17)."

Section 190.2 contains specific requirements for a special circumstance finding, for a defendant who aided and abetted a felony murder but was not the actual killer. The People must establish that such a defendant either (1) had the "intent to kill" (§ 190.2, subd. (c)), or (2) aided and abetted the underlying felony "with reckless indifference to human life and as a major participant." (§ 190.2, subd. (d) (section 190.2(d).) The jury here was correctly instructed on those requirements.

As explained in People v. Estrada (1995),11 Cal.4th 568 (Estrada), section 190.2(d) was added in 1990 through Proposition 115, to make California's capital sentencing scheme consistent with Tison v. Arizona (1987),481 U.S. 137 (Tison). Prior to that time, California had a judicially imposed requirement of intent to kill, for the felony-murder special circumstance of a defendant who was not the actual killer.

Estrada involved the special circumstance jury instruction for a defendant who participated in a felony murder, was not the actual killer, and received an LWOP sentence. Estrada held that the trial court had no sua sponte duty to define the statutory phrase "reckless indifference to human life," as the jury would have understood that phrase's common meaning, which was that "the defendant `knowingly engag[ed] in criminal activities known to carry a grave risk of death.'" (Estrada, supra, 11 Cal.4th at p. 577, quoting Tison, supra, 481 U.S. at p. 157.) If clarification of the statutory language was requested, Tison's language regarding "a grave risk of death" was appropriate. (Estrada, at p. 580.)

Tison, supra, 481 U.S. 137, concerned the requirements of the Eighth Amendment to the United States Constitution for the felony-murder defendant who was not the actual killer. The Supreme Court had previously addressed that issue in Enmund v. Florida (1982),458 U.S. 782 (Enmund). The facts of Enmund and Tison are pertinent here.

In Enmund, the defendant Enmund's accomplices killed two people during an armed robbery at a farmhouse, while Enmund waited nearby in the getaway car. Enmund was convicted of first degree murder and sentenced to death. The Enmund decision reversed that sentence. It held that the Eighth Amendment does not permit the death penalty for a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." (Enmund, supra, 458 U.S. at p. 797.) Enmund stressed that the critical issue under the Eighth Amendment is the individual culpability of the defendant. As the defendant neither killed nor intended to kill, his culpability could not be equated with that of the actual killers. (Enmund, at p. 798.) The goals of deterrence and retribution were not served by imposing the death penalty on a robber who neither killed nor intended to kill, as crime statistics showed that killing is very rare during a robbery, and unintentional killings rarely result in the death penalty.

Tison, supra, 481 U.S. 137, is an extension of Enmund. Tison held that the Eighth Amendment does not preclude imposition of the death penalty on a defendant who neither killed nor intended to kill during a felony murder, if the defendant was an active participant in the felony and had reckless disregard for human life. The defendants in Tison were therefore eligible for the death penalty, as they brought guns into a prison to help their father, a convicted murderer, escape; they assisted their father and his former cellmate in committing a carjacking that included kidnapping four victims; and they stood nearby while their father and the cellmate killed the four victims.

Like Enmund, Tison focused on the defendant's personal culpability. For death eligibility, it is not enough if a defendant simply intended to use lethal force during the underlying felony, as "[p]articipants in violent felonies like armed robberies" frequently anticipate the use of lethal force, and "Enmund himself may well have so anticipated." (Tison, supra, 481 U.S. at pp. 150-151.) Tison continued: "Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves." (Id. at p. 151.) The Supreme Court summarized the case's unusual and horrific facts, concluding that the defendants must have "subjectively appreciated that their acts were likely to result in the taking of innocent life." (Id. at p. 152.) Tison expressly held "that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." (Id. at pp. 157-158.) It then concluded that the Tison brothers were eligible for the death penalty, as "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement. (Tison, at p. 158, fn. omitted.)

B. Analysis

"[T]he culpable mental state of `reckless indifference to life' is one in which the defendant `knowingly engag[es] in criminal activities known to carry a grave risk of death.'" (Estrada, supra, 11 Cal.4th at p. 577, quoting Tison, supra, 481 U.S. at p. 157.)

During final argument, the prosecutor argued that Brandale knew that Cory brought a gun with him to the robbery, which established Brandale's reckless indifference to human life.[6]

Broughton testified that he frequently spent time with Brandale and Cory. On the evening of the crime, he "hung out" with them at their home for a while, before Brandale asked him to provide a ride for himself and Cory. After they made other stops, Brandale had Broughton drive a considerable distance to the parking spot near the 7-Eleven store. Broughton did not see a gun that night, but either Brandale or Cory had shown him a revolver, earlier in the year of the crime, inside the room that appellants shared at their home. In 2007, at the time of the trial, Broughton no longer remembered which brother showed him the gun, but he said he testified accurately in 2001 and 2002, when he identified Cory as that person.

Corley testified that she was with Cory in the back house until 11:00 on the night of the crime. Hours later, when he returned there, he described the crime and placed the gun with some boxes in the shower. When Corley was interviewed by Detective Gonzales, she said Cory had shown her that gun a "[c]ouple times before," and he had been keeping boxes in the shower since he moved from the front house to the back house.

We find that, from the combination of Broughton's testimony and Corley's testimony, the jury could reasonably infer that (1) Brandale knew Cory possessed a gun, and (2) appellants jointly planned to bring Cory's gun with them, to facilitate their commission of the robbery.

People v. Bustos (1994),23 Cal.App.4th 1747, contains important factual similarities to this case. In Bustos, the defendant planned with his accomplices to rob a woman in a bathroom at the beach. The defendant knew, when he confronted the woman in the bathroom, that his accomplices were outside with a knife. When the woman struggled and screamed, one of the accomplices ran in and stabbed her to death. The defendant ran off with his accomplices and some of the victim's property, without assisting her. (Id. at p. 1754.) Bustos held that the facts contained sufficient evidence to support a finding that the defendant was a major participant who acted with reckless indifference to life, for the purpose of the defendant's LWOP special circumstance liability. (Id. at p. 1755.) The facts here justify that same conclusion.

People v. Mora (1995),39 Cal.App.4th 607, is also pertinent. The defendant agreed with his accomplice, the actual killer, that they would use a rifle while robbing a drug dealer at his home. During the crime, the victim resisted, and the accomplice shot him. On the question of reckless indifference to life, Mora found that the defendant "had to be aware of the risk of resistance to such an armed invasion of the home and the extreme likelihood death could result." (Id. at p. 617.) The court went on to find that the trial court exceeded its authority when it made a finding of cruel or unusual punishment and refused to impose an LWOP sentence.

Brandale relies on cases from other jurisdictions that found insufficient evidence of reckless disregard for human life, as to felony murder defendants who were not the actual killers. One such case is Jackson v. State (1991),575 So.2d 181, in which the court observed that the defendant was not "any more culpable than any other armed robber whose murder conviction rests solely upon the theory of felony murder." In another of appellant's cases, State v. Rodriguez (1993),656 A.2d 262, it was not clear whether the defendant or his accomplice fired the fatal shots during a robbery, the shooting was a sudden response to the victim's unanticipated resistance, and there was no evidence that the defendant or his accomplice anticipated violence.

Ultimately, every case must be decided on its own facts. Tison requires more than participation in an armed robbery, to establish the reckless indifference to human life that is required for the defendant who was not the actual killer. (Tison, supra, 481 U.S. at pp. 150-151.) Brandale did more than merely participate in an armed robbery. He asked Broughton to give him and Cory a ride, he had Broughton drive a considerable distance to a parking spot near the store, and he fought with Hussain, knowing that Cory had a gun. Those facts justify a finding that Brandale was a major participant in the crime and acted with reckless indifference to human life. We therefore find sufficient evidence for his special circumstance finding.

2. CALCRIM No. 371

Cory argued below that there was no evidentiary support for CALCRIM No. 371. He renews that argument on appeal, citing People v. Hannon (1977),19 Cal.3d 588.

CALCRIM No. 371 stated: "If the defendant Cory Robinson tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant Cory Robinson made such an attempt, it is up to you to decide its meaning and importance.

However, evidence of such an attempt cannot prove guilt by itself. [¶] If you conclude that . . . defendant Cory Robinson tried to hide evidence or discourage someone from testifying against him, you may consider that conduct only against that defendant. You may not consider that conduct in deciding whether defendant Brandale Robinson is guilty or not guilty."

The prosecutor argued below that the "tried to hide evidence" portion of the instruction was supported by the combination of (a) testimony from one of the police officers from Minnesota, who said that when Cory was arrested, none of the officers told Cory they found a gun in the trunk of his car; and (b) statements that Cory made when he telephoned Shaletta Rembert, his girlfriend in Minnesota, following his arrest there. The recording of that telephone call included this discussion of what the arresting officers told Cory after they searched his car:

"Q [Cory] . . . And then they found them two — they found some — some shit in my trunk. They was like — oh, yeah, clean that house up — but they, uhm, found some shit in my trunk, and it was like, `Where'd this gun come from? Where'd this gun come from?'

"A [Cory's girlfriend] Oh, my —

"Q And I'm like, `I ain't got no gun in my car.' I know for a fact, baby, but —

"A What?

"Q It's under your head.

"A Mmm, mmm, mmm. (Throat clearing sound).

"Q You see what I'm saying?

"A Yeah.

"Q It's under your head. But they was like, `It's in your trunk, woop, woop, woop.' I'm like, `What?' I'm knowing that's five years on top." (Sic.) (Italics added.)

The trial court ruled that CALCRIM No. 371 was appropriate because the evidence supported a finding that Cory "was trying to get her to hide something . . . [¶] . . . [¶] Because he was being arrested on this case." We agree that Cory's statements supported a reasonable inference that he was telling Rembert to remove the gun from their home. We therefore find no error regarding CALCRIM No. 371.

3. Issues Regarding the DNA Evidence

The DNA issues are that (a) evidence of Wraxall's use of "STR" and "YSTR" tests for DNA should have been excluded pursuant to Evidence Code section 352, and (b) the trial court improperly permitted evidence and prosecutorial argument about defense DNA testing. The first issue is raised by Cory, and the second by Brandale. We consider the issues for both appellants, as they adopt each other's issues to the extent applicable.

A. The Evidence Code Section 352 Issue[7]

Appellants argue that a jury of laypersons lacked the technical knowledge to evaluate whether it was Wraxall or Krane who correctly interpreted the data from Wraxall's DNA tests. They maintain that the trial court should have excluded the evidence pursuant to Evidence Code section 352, as it was so difficult to understand that its probative value was outweighed by the risk the jury would be misled.

An objection below was made on the basis of People v. Kelly (1976),17 Cal.3d 24, and not on the basis of Evidence Code section 352. Appellants argue that if the section 352 issue was waived, trial counsel were ineffective, within the meaning of Strickland v. Washington (1984),466 U.S. 668.

Assuming arguendo that an Evidence Code section 352 objection was made, appellants have not established an abuse of discretion.

During their opening statements, counsel for both sides explained that the evidence would show that there was a mixture of DNA on the hat, all the possible suspects except Cory were excluded as possible donors of that DNA, Cory was excluded if there were only two donors, he was included if there were three donors, and there would be a dispute between expert witnesses about whether there were two donors or three donors. The jury also knew from the beginning of the trial that the prosecution's expert would testify that one person out of about 9,000 people had the DNA on the hat, and Cory could be that person.

Wraxall's testimony for the prosecution and Krane's testimony for the defense tracked the opening statements, adding many details.

Wraxall explained that, over time, more sensitive tests for DNA have evolved, which show more genetic traits or "alleles." In 2001, he used the "HLA DQ Alpha" and "Polymarker" tests, as well as the "Profiler Plus" system for "STR's" (short tandem repeats). He concluded in 2001 that Cory could not be excluded if there were at least three donors, and it was more likely that there were three rather than two. He also did statistical analysis in 2001, based on Cory's genetic profile and databases that showed the frequency of certain genetic markers. He concluded at that time that "[o]ne in fifteen-hundred people could be a donor to the hat," and Cory could be that one person.

Wraxall further testified that he retested the hat and Cory's sample in 2005, using the "Identifiler" system for STR's and another, more sensitive test called "YSTR," which is used solely for males. Based on the greater number of alleles that were shown, the 2005 testing proved that the hat contained DNA from at least three people, so Cory could not be eliminated. When he performed statistical analysis in 2005 based on the new test results, he concluded that one out of every 9,500 people in the general population could be a potential donor, and Cory could be that potential donor.

Krane testified, on the other hand, that Wraxall's test results did not contain conclusive evidence of a third donor. Krane could not exclude Cory as a donor, as he was not sure if there were two donors or three. In his opinion, the "(12)" allele shown in Wraxall's data could result from a technical problem called "stutter," as the SERI laboratory's stutter filter was not set at a level that would have prevented that problem. Krane also believed there was an indication that the samples were contaminated, as a control called the "extraction blank" was not blank.[8] Krane also criticized Wraxall's statistical analysis, as a phenomenon called "allelic dropout" might cause a person's DNA not to appear in the data even though that person actually contributed DNA. He discussed a recent international study that criticized use of that type of statistical analysis if allelic dropout might have occurred. He recognized, however, that other laboratories besides SERI used that type of statistical analysis.

During final argument, the prosecutor indicated that the DNA evidence was just "one part" of the puzzle and "not the main part." He told the jury the important thing from the DNA evidence was that Cory could not be excluded as a donor on the hat, while all the other possible suspects were excluded.

During their final arguments, defense counsel said the main dispute between Wraxall and Krane was whether there was conclusive evidence of a third donor, which depended on the presence of the "(12)" allele. They argued that Krane had shown reasons to doubt the existence of that allele.

As a guide for evaluating the conflicting expert opinions, the jury received CALCRIM No. 332. That instruction indicated that the jury was not required to accept an expert's opinion as true, and it should consider issues like the qualifications of the expert, the reasons for the opinion, and the accuracy of the information on which the expert relied was accurate.

On August 31, 2009, Cory filed a petition for rehearing, complaining that this court did not address a contention that the trial court failed to protect his federal and state constitutional rights to due process of law when it admitted the DNA evidence. That argument was not raised below. Moreover, it was raised before this court in an episodic manner, without a separate caption to separate it from the abuse of discretion argument. In any event, we find that the admission of the DNA evidence in this case did not violate Cory's or Brandale's rights to due process of law under the federal and state constitutions.

In arguing that the STR and YSTR evidence should have been excluded, appellants rely heavily on Huber, Hunt & Nichols, Inc. v. Moore (1977),67 Cal.App.3d 278, which held that the trial court properly excluded an unintelligible and misleading computer printout. The situation here was entirely different. We find that, aided by the arguments of counsel and the court's instruction, the jury could properly weigh the experts' conflicting opinions, so the trial court did not abuse its discretion in allowing the jury to consider the evidence of Wraxall's STR and YSTR testing.

B. Evidence and Argument Regarding DNA Testing by Appellants

The subject of defense DNA testing recurred several times at the trial.

After Renteria, the sheriff's department criminalist, testified that he sent various samples to the SERI laboratory, Brandale's counsel objected that, as the defense would not present evidence of its own laboratory test, Renteria should not be questioned about his turning over samples for defense testing. The trial court overruled the objection, finding that the situation was like the prosecution's pointing out the lack of defense alibi witnesses. Renteria then testified that he split the samples and gave a portion to the courier of a defense laboratory. Cory's counsel stipulated that the hat was also released to that laboratory for testing.

Later in the trial, the prosecutor asked Krane if the best way to challenge Wraxall's analysis would be to have another laboratory look at the samples. Brandale's counsel objected. The court again ruled that the question could be asked, as the situation resembled the failure of the defense to present logical evidence. Wraxall then testified that, if people wanted to challenge the results of his analysis, they could "take these samples and conduct their own analysis." The next day, when the objection was renewed, the trial court ruled that the prosecutor was not to argue about any "actual testing" that the defense performed, but the prosecutor could argue that the samples had been made available and could have been tested by the defense.

During final argument, the prosecutor stated, "The defense could have tested those samples. They could have done their own testing and see what they come up with. [¶] But instead what do we get? [¶] Instead we get Krane, someone that just interprets the data." Defense counsel responded by arguing that it was "quite fair for the defense to present an expert that would critique Wraxall's analysis." They also told the jury that the People introduced DNA evidence, and the defense had no burden to produce evidence on that subject, but the defense "went and looked again at that evidence" and found there were two reasonable conclusions from Wraxall's data. In rebuttal, the prosecutor argued that the problem was like getting a second opinion on the need for a car repair. He said that if the defense wanted to challenge Wraxall's test results, the defense should have had another laboratory retest the samples, instead of having Krane criticize Wraxall's test results.

Appellants maintain that the evidence and argument about defense testing of the samples were irrelevant and violated their United States Constitution Sixth Amendment right to have experts assist their counsel in the presentation of the defense. They further contend that the prosecutor committed misconduct by discussing what the defense should have done.

The arguments lack merit. The lack of evidence of defense DNA testing was relevant, as it tended to support the testimony of Wraxall, who tested the evidence, and to undermine the testimony of Krane, who questioned Wraxall's data but did not test the DNA himself. (See, e.g., People v. Lewis (2004),117 Cal.App.4th 246.) There was no violation of the Sixth Amendment and no prosecutorial misconduct, as a prosecutor may comment on the failure of the defense to call logical witnesses or develop exculpatory evidence. (People v. Cook (2006),39 Cal.4th 566; see also People v. Kaurish (1990),52 Cal.3d 648.)

Moreover, the DNA evidence was actually a small part of the People's case. At most, it showed that Cory might have contributed to the mixture of DNA on the hat. The other evidence of appellants' guilt was far

stronger. That evidence included the video of the crime, appellants' distinctive jackets, Cory's shaved head, Brandale's directing Broughton to drive them near the store, appellants' statements and possession of stolen property after the crime, their flight to Minnesota, and the numerous reasons why neither Capers, Bynum, nor Reese could have been the perpetrators. Given the strength of the other evidence, any error regarding the DNA evidence caused no prejudice.

DISPOSITION

The judgments are affirmed.

We concur:

RUBIN, Acting P. J.

BENDIX, J.*

Notes:

1. A $25,000 reward was offered for information about the crime.

2. In final argument, the prosecutor asked the jury to compare the booking photos of the trio with the appearance of the perpetrators in the video of the crime. We have also made that comparison. The trio does not look like the perpetrators.

3. Our reversal of the second trial in People v. Robinson, supra, B163693 was based on the exclusion of (1) Sanchez's testimony about the problems he had with the trio on the night Hussain was shot; (2) Sanchez's testimony that, when he watched the video of the shooting the next morning, he thought he was looking at the same people he had seen inside the store on the previous night; and (3) Long's and Bly's testimony about the hot dog incident and the threat to Hussain.

4. Wraxall testified, however, that, more advanced tests in 2006 showed that only Hussain's DNA was on Hussain's fingernail clippings.

5. Further code citations are to the Penal Code unless otherwise stated.

6. The prosecutor's exact words were: "What does that mean, acting with reckless indifference[?] [¶] That means you have seen your brother with a gun. Everyone has seen that gun, that revolver, that chrome revolver. You're about to go in and do this robbery and you bring a weapon to this robbery, a deadly weapon. This is a gun that they brought to this robbery. [¶] Can someone be killed with a gun when you commit an act like this? [¶] Is it reasonable to believe that a victim may resist and your brother may have to use a gun and do you know these — do you know this and do you just say I don't care. I don't care. What I care about is the money. What I care about is what we steal."

Later, during the closing portion of the argument, the prosecutor added: "And as far as Brandale Robinson[,] he acted with reckless indifference and, as I said, that means that he must have known — he did know that his brother had a gun prior to going in there before they went in and did the robbery, that they had something to take an advantage over that victim."

7. Evidence Code section 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

8. In contrast, Wraxall thought the small amounts of DNA in the extraction blank could result either from "electronic noise" or contamination.

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