

COPY

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)	
)	Case. No. S118775
Plaintiff and Respondent,)	Automatic Appeal
)	(Capital Case)
vs.)	
)	San Bernardino
JAVANCE WILSON,)	County
)	Superior Court
Defendant and Appellant.)	No. FVA 12968
)	

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of San Bernardino

Honorable James A. Edwards, Superior Court Judge

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**SUPREME COURT
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DEATH PENALTY

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)	San Bernardino
JAVANCE WILSON,)	County
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_____)		

INTRODUCTION

In this reply, appellant addresses specific contentions made by respondent, but does not reply to arguments that are adequately addressed in his Opening Brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in Appellant's Opening Brief, does not constitute a concession, abandonment, or waiver of the point by appellant. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3). It merely reflects appellant's view that the issue has been adequately presented.

Before replying to respondent's arguments, appellant must point out a significant factual error in respondent's statement of facts. Respondent wrote: "Wilson's fingerprints were discovered inside [Andres] Dominguez's cab." (RB 7, citing 15 RT 4001-4002.) The record shows otherwise. Randolph Beasley, a forensic specialist with the San Bernardino County Sheriff's Department, testified that none of the latent fingerprints found in either Andrew Dominguez's and Victor Henderson's taxicabs matched appellant's fingerprints. (15 RT 3997, 4002.) Indeed, no physical evidence tied appellant to any crime scene in this case.

I

APPELLANT WAS DEPRIVED OF A FAIR TRIAL AND A RELIABLE GUILT DETERMINATION BY THE ERRONEOUS ADMISSION OF UNRELIABLE IDENTIFICATION EVIDENCE

Appellant maintains that the trial court erred by allowing the prosecution to present evidence about James Richards's out-of-court and in-court identifications of appellant as the man who had robbed and tried to shoot him on the night of January 7, 2000. (AOB 29-109.) More specifically, appellant argues that: (1) the procedures employed to obtain Richards's identifications of appellant were unduly suggestive and unnecessarily so (AOB 36-72); (2) the prosecution failed to meet its burden to prove that Richards's identifications were based on a reliable memory of the night of the crime, rather than the product of subsequent suggestion by the police and the prosecutor (AOB 72-82); and (3) the trial court applied the wrong test in determining the admissibility of the identification evidence, the erroneous admission of which cannot be deemed harmless beyond a reasonable doubt (AOB 46-47, 82-86, 103-113).

Appellant also requests that this Court update the legal test that California courts use to determine the admissibility of eyewitness identification evidence. (AOB 86-103.) This is necessary because the current test for admissibility is premised on inaccurate assumptions about memory formation and retention, and fails to take into account nearly 40 years of scientific research and development that have altered our understanding about how the brain functions. Updating how state judges perform their gatekeeping role in considering threshold questions regarding the admissibility of this highly persuasive yet unreliable evidence will bring California's practice into alignment with the overwhelming scientific

consensus on best practices when dealing with eyewitness identification evidence.

Respondent argues that the identification procedures used in this case were not unduly suggestive (RB 18-35); that, in any event, Richards's identification of appellant was reliable under the totality of the circumstances (RB 35-39); and that any error in the admission of this evidence was harmless beyond a reasonable doubt (RB 39-41). Respondent further contends — without acknowledging, much less addressing, the current scientific consensus on key issues related to the reliability of eyewitness identification — that this Court need not revise the standard for the admissibility of this type of evidence. (RB 24.)

For the reasons discussed below, and in Appellant's Opening Brief, each of respondent's positions lacks merit.

A. The Eyewitness Identification Evidence Failed to Meet the Required Threshold Showing of "Constitutional Reliability," and Was Erroneously Presented to Appellant's Jury.

Prior to his first trial, appellant moved to exclude Richards's identification on both federal constitutional and state-law grounds. (3 CT 705-824.) The prosecutor opposed the motion (4CT 1065-1077), and the trial court conducted an evidentiary hearing (4 RT 904-1045). At that hearing, appellant presented the testimony of Dr. Kathy Pezdek, an expert on eyewitness identification procedures and memory formation and recall. (4 RT 905-945.) Appellant also called the Deputy District Attorney who had handled the case at the preliminary hearing. Both parties also called law enforcement officers who described the out-of-court identification procedures used during the investigation. The prosecution did not present expert testimony.

The trial court denied appellant's motion. It found no due process violation. In making that ruling, the court concluded that appellant had failed to make "a sufficient showing that [Richards's] identification is worthless, and therefore should be excluded. So I would deny the motion." (4 RT 1082.)¹

Concerning appellate review, appellant and respondent agree that this Court defers to the trial court's findings of historical fact and determinations of witness credibility, but it independently reviews the record of the evidentiary hearing to determine whether the identification evidence at issue was admissible, notwithstanding a challenge to the evidence on due process grounds. (See AOB 46; RB 22.) The parties also agree that issues of admissibility have been historically resolved by state and federal court judges under the United States Supreme Court's two-part *Manson*² test.

More specifically, in *People v. Gordon* (1990) 50 Cal.3d 1223, 1242, this Court explained that, under *Manson*, the eyewitness identification evidence must meet a threshold showing of "constitutional reliability" before it can be presented to the jury. Such reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessarily so; and if it was, (2) whether the identification itself was

¹Prior to the start of the retrial, the court indicated that its rulings on motions from the first trial would remain in effect for the second trial. (14 RT 3559-3560.)

²*Manson v. Brathwaite* [hereinafter "*Manson*"] (1977) 432 U.S. 98, formally adopting the analysis of *Neil v. Biggers* [hereinafter *Biggers*] (1972) 409 U.S. 188; see *People v. Cunningham* (2001) 25 Cal.4th 926, 989.

nevertheless reliable under the totality of the circumstances. (*Ibid.*, citing *Manson, supra*, 432 U.S. at pp. 104-107.)

1. The Identification Procedures Were Unduly Suggestive, and Unnecessarily So

Turning to the first prong of the *Manson* test, appellant has demonstrated that the evidence offered at the evidentiary hearing showed that the procedures used to obtain Richards's identification of appellant were unduly suggestive, and unnecessarily so. Respondent disagrees, arguing in essence that there was nothing suggestive about the procedures used in this case. It is wrong.

The suggestive procedures at issue include the following: (1) the photo array was not administered using known best practices (double-blind, sequential photo displays), but instead was administered using a non-blind, simultaneous photo array, a technique scientifically proven to result in misidentifications; (2) the administrator of the non-blind photo array either intentionally or inadvertently gave Richards cues as to appellant's picture before Richards identified appellant, and then used techniques that reinforced Richards's selection of appellant, thereby tainting subsequent identifications; (3) law enforcement reused the same photograph of appellant in successive photo arrays, a technique known to adversely affect the accuracy of an identification; (4) the administrator of the photo array improperly gave Richards post-lineup feedback, which falsely inflated the witness's confidence in the identification when he testified; (5) after Richards expressed doubt that he would be able to identify the perpetrator if he were in the courtroom, the prosecutor further tainted the identification by immediately showing appellant's photo to Richards; and (6) both six-pack

photo arrays were put together in a manner that caused appellant's photo to "stand out."

First, appellant presented uncontroverted expert testimony that use of non-blind identification procedures causes "experimenter expectancy effect," which can skew the results of a lineup. (AOB 48-54.) Study after study shows that non-blind procedures risk tainting the identification in this way. (See AOB pp. 30, 49 fn. 26, 51 fn. 27.) Such non-blind procedures were used in this case: The investigating officer — Detective Scott Franks — administered the six-pack photo array to Richards even though he knew appellant's identity and was tasked with building a case against him. (10 RT 2471; 16 RT 4202.)

In addition to the non-blind administration of the photo array, Detective Franks also failed to use a sequential procedure. (AOB 53-55.) Again, uncontradicted expert testimony established that eyewitnesses are less likely to misidentify innocent suspects when photos are presented to the witness sequentially, rather than simultaneously in a single photo array. That is because a sequential display requires the subject to make an absolute choice about each photograph, while a simultaneous array results in a comparative choice. In other words, the simultaneous array results in a relative judgment, in essence asking the question: "Of these six individuals, which is the closest match?" (4 RT 914.)

Respondent does not contest the fact that the identification procedures used in this case were non-blind and simultaneous. It also does not claim that it was at all necessary for Franks, rather than an officer unfamiliar with appellant, to administer a simultaneous photo array to Richards. Nor does respondent take issue with the fact that these procedures are more likely to result in administrator bias and produce errors. Instead,

respondent contends that while sequential double-blind procedures may be “preferable methods for administering a pretrial lineup,” no “legal authority” requires their use. (RB 28.) This argument misses the point.

In the application of the first step of the *Manson* test, the issue is not whether double-blind sequential identification procedures were legally mandated, even if they should be. Rather, the issue is whether appellant met his burden of “demonstrating the existence of an unreliable identification procedure.” (*People v. Cunningham, supra*, 25 Cal.4th at p. 989.) As to that question, appellant proved that the procedures used in this case were known at the time to skew the results of the lineup and any subsequent in-court identification, and were more likely to result in errors. Respondent does not attempt to explain why or how procedures that are scientifically known to produce skewed results and an increase in errors can be viewed as anything but “unreliable.” On this evidence alone appellant has met his burden under *Manson*’s first prong.

Second, appellant did not simply present evidence that the procedures employed were methodologically prone to result in unacceptable rates of error. Rather, appellant has shown that Detective Franks administered the non-blind photo array in a manner that was actually suggestive. (AOB 50-54.) Respondent disagrees, and in doing so it makes the stunning assertion that there is “simply no evidence, and nothing to suggest” that Detective Franks “even remotely” gave Richards a clue as to which photo was that of appellant. (RB 29.) Even a cursory review of the testimony at the evidentiary hearing puts the lie to respondent’s claim.

Eyewitness identification expert Dr. Pezdek reviewed the tape recording and transcript of the photo array (see Exhibit 221), and concluded that Detective Franks had made several unnecessary and suggestive