

SUPREME COURT COPY

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

RUBEN P. GOMEZ,

Defendant and Appellant.

CAPITAL CASE

Case No. S087773

Los Angeles County Superior Court Case No.
BA156930
The Honorable William R. Pounders, Judge

SUPREME COURT
FILED

RESPONDENT'S SUPPLEMENTAL BRIEF

MAY 05 2015

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DEATH PENALTY

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ARGUMENT

APPELLANT FORFEITED PARTS OF HIS CLAIM BY FAILING TO OBJECT DURING TRIAL; THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO STRIKE DEPUTY GANARIAL'S TESTIMONY; IN DOING SO THE COURT PRESERVED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS; IN ANY EVENT, THE ALLEGED ERROR BY THE TRIAL COURT WAS HARMLESS

In his opening brief, appellant claims that the trial court erroneously required the presentation of evidence of his refusal to come to court one morning, erroneously instructed the jurors that they could consider the refusal as evidence of a consciousness of guilt, and failed to perform the role of a neutral arbiter. Appellant further asserts that these errors violated his rights under California law, the California Constitution, and the federal Constitution. (AOB 185-225.) Respondent maintains that these claims are forfeited, lack merit, and did not result in prejudice warranting relief. (RB 108-122.)

In his supplemental opening brief, appellant claims that the trial court abused its discretion and violated his constitutional rights when it denied his motion to strike as irrelevant all of Deputy Ganarial's testimony regarding appellant's refusal to attend court. (SAOB 1-7.)

This claim should be rejected. Appellant forfeited his federal constitutional claim by failing to object on that basis. Appellant also failed to describe his state-law objection with sufficient particularity at the time he moved to strike Deputy Ganarial's testimony. Appellant's claim lacks merit because the trial court acted within its discretion under state law and the federal Constitution by refusing to strike any of Deputy Ganarial's testimony. In any event, even if the trial court erred by failing to strike all of Deputy Ganarial's testimony, or the particular parts regarding security

measures at the jail, those errors were harmless under both the *Watson*¹ and *Chapman*² standards of review.

A. Relevant Proceedings

On December 14, 1999, during the morning session, the court was informed that appellant had refused to leave his cell and come to court, so the court issued an extraction order to remove appellant from his cell, with or without his consent. (3CT 701-702.) Later that morning, the court was informed that appellant had decided to come to court, but only after he was told of the extraction order. (9RT 1473.)

The trial court heard testimony regarding appellant's refusal to come to court. (10RT 1631-1650.) Afterward, appellant's counsel argued that appellant's behavior was "defiant" and appellant "was being an ass," but that this did not show a consciousness of guilt. (10RT 1652-1660.) The court stated:

Okay. My decision is as before. I do believe that it shows consciousness of guilt, and the jury may draw that conclusion from the evidence.

The only reluctance I have is that shows the defendant is in custody; However, I think the jury will assume since they've not seen the defendant in the hallway that he's probably in custody, and especially facing the death penalty, that somebody who is charged with the maximum sentence, offense is going to be in custody.

I don't think under 352 I should preclude it either.

(10RT 1660.)

Defense counsel told the court that in addition to his relevance objection, he was also objecting under Evidence Code section 352.

¹ *People v. Watson* (1956) 46 Cal.2d 818.

² *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].

Assuming for argument's sake that the trial court's relevance ruling was proper, defense counsel stated: "I think this type of consciousness of guilt as you perceive it is of little probative value on all these crimes that go back to three years ago, two years ago, and it's prejudicial because it's another form of the court or the prosecution putting on character evidence when you really can't do that unless he testifies." (10RT 1663.)

The court disagreed, and stated:

[Evidence Code section] 352 again talks about evidence that evokes a unique emotional bias. It's an emotional bias, and that would come from the fact they might know he's in custody.

But as I said, in a case involving the maximum sentence and where the jury is not getting to see him out in the hallway for two months, they come to that conclusion on their own, and I don't see anything aside from that in the way of bias.

(10RT 1664-1665.)

Before the jury, Deputy Ganarial testified that he worked at the Central Men's Jail. Deputy Ganarial was responsible for module 3301, which housed "K-10 inmates for discipline." This module had single-man cells. Deputy Ganarial's duties included getting inmates ready to go to court. Normally, inmates were fed breakfast before going to court. (12RT 1841-1843.) When it was time to go to court, inmates were taken out of their cells one at a time and placed in waist chains. Afterward, Deputy Ganarial walked them downstairs, where the "movement team" took over the responsibility for transporting the inmates to court. (12RT 1843-1844.)

On December 14, 1999, at about 5:50 a.m., Deputy Ganarial informed appellant that he had about 30 minutes to get ready for court. Deputy Ganarial did not hear appellant respond. Deputy Ganarial returned five to ten minutes later and found that appellant was sleeping. Deputy Ganarial tried to wake appellant up, but was unsuccessful. Deputy Ganarial proceeded to feed other inmates, and returned to appellant's cell about 10 to

15 minutes later. Deputy Ganarial explained that breakfast was delivered through a slot in the cell door and the inmates ate inside their cells. (12RT 1844-1847.)

Deputy Ganarial woke appellant up by yelling into his cell that he needed to be ready for court. Appellant responded by saying: "Fuck court." Deputy Ganarial reminded appellant that he needed to be ready at 6:30 a.m. on the days he was scheduled to go to court. Deputy Ganarial returned to appellant's cell a few minutes later, and appellant again said "fuck court." (12RT 1847-1848.) At around 8:30 a.m., appellant refused to leave his cell to go to court. Deputy Ganarial informed his superior officer and the court bailiff. Appellant refused to leave his cell until about 10:00 a.m. Deputy Ganarial received information that an extraction order had been issued regarding appellant's failure to go to court. The extraction order required that appellant be taken to court, by force if necessary. Deputy Ganarial informed appellant of the extraction order. About 15 to 20 minutes later, appellant informed Deputy Ganarial that he was going to go to court. (12RT 1848-1850.) The parties stipulated that on December 14, 1999, the parties were instructed trial would begin at 10:30 a.m. (12RT 1850-1851.)

After the defense completed cross-examination, and the prosecutor had no further questions, appellant made "a motion to strike [Deputy Ganarial's] testimony as being irrelevant to the charges for what [appellant] is presently on trial." The trial court replied, "Based on the earlier discussions we had about the relevance of the testimony, the motion is denied." (12RT 1853-1854.)

Before beginning deliberations, the jury was instructed:

If you find that [appellant] voluntarily absented himself from this trial by refusing to come to court, you may consider that as a circumstance tending to prove a consciousness of guilt.

That conduct, however, is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(3CT 876.)

B. Appellant Forfeited Parts of His Claim

For the same reasons argued in the respondent's brief (RB 111-112), appellant failed to preserve a distinct claim of constitutional error. In short, relevance and Evidence Code section 352 objections do not preserve distinct federal constitutional claims. (*People v. Bryant* (2014) 60 Cal.4th 335, 413, fn. 34 ["when no specific federal constitutional challenge to the evidence was raised below, such appellate claims are preserved only to the extent that the federal aspect is a gloss on the claim of error actually raised], citing *People v. Cudjo* (1993) 6 Cal.4th 585, 611 [generally an abuse of discretion regarding the "normal rules [of evidence] does not implicate the federal Constitution"]; *People v. Partida* (2005) 37 Cal.4th 428, 438, fn. 3 ["We reiterate that a defendant may not argue that the court committed error for a reason not included in the trial objection"].) Also, when appellant moved to strike Deputy Ganarial's testimony, he did not specifically point to his concerns that the jury heard that appellant was in a discipline module, fed through a slot in the cell door, waist chained, and transported by a movement team. (See, e.g., *People v. Riggs* (2008) 44 Cal.4th 248, 324 [appellate claim forfeited by defendant's failure to object to a chart used at trial on specific ground advanced on appeal].) Accordingly, appellant has forfeited any distinct federal constitutional claim by failing to raise it in the trial court, and any claim that the trial court erred by failing to strike certain portions of Deputy Ganarial's testimony.

C. No Error Occurred

A trial court's ruling on a motion to strike a witness's testimony is reviewed for abuse of discretion. (*People v. Thompson* (2010) 49 Cal.4th 79, 130.) Under this deferential standard, the ruling will be disturbed on appeal only if the court acted in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Tucker* (2011) 196 Cal.App.4th 1313, 1317.)

For the same reasons argued in the respondent's brief regarding admissibility, the trial court acted within its discretion, and preserved appellant's federal constitutional rights, when it refused to strike Deputy Ganarial's testimony. In short, appellant's refusal to attend court, in order to delay the proceeding, was akin to other actions showing consciousness of guilt such as the fabrication of evidence, the concealment of evidence, willful falsehoods, flight, escape, the refusal to provide a writing exemplar or voice, hair, and blood samples, out-of-custody defendants who refuse to attend court, and defendants accused of murder who display the number "187" (the Penal Code section for murder). (RB 113-118.)

In his supplemental brief, appellant asserts that introducing Deputy Ganarial's testimony about the security conditions under which appellant was held in a disciplinary unit was the equivalent of forcing appellant to appear before the jury in shackles or prison clothing. (SAOB 3-4.) Appellant relies on *Deck v. Missouri* (2005) 544 U.S. 622, 624 [125 S.Ct. 2007, 161 L.Ed.2d 953] ("*Deck*"), abrogated on other grounds in *Fry v. Pliler* (2007) 551 U.S. 112 [127 S.Ct. 2321, 168 L.Ed.2d 16], which involved shackling a defendant with leg irons, handcuffs, and a belly chain *without* legal justification. (SAOB 4.) In *Deck*, the Supreme Court held that: "the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is

‘justified by an essential state interest’—such as the interest in courtroom security—specific to the defendant on trial.” (*Deck, supra*, 544 U.S. at p. 624, citing *Holbrook v. Flynn* (1986) 475 U.S. 560, 568-569 [106 S.Ct. 1340, 89 L.Ed.2d 525].) In the past, shackling was considered in light of concerns about “‘tortures and ‘torments’” because shackles could be “‘very painful’” for defendants at trial. (*Id.* at p. 630.) Obviously, this concern was not present in appellant’s case.

In *Deck*, the Supreme Court discussed three modern underlying principles that make shackling a constitutional violation where there is no legal basis to order shackling. The first principle is that “the criminal process presumes that the defendant is innocent until proved guilty” and “[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process.” (*Deck, supra*, 544 U.S. at p. 630.) This was not a real concern in the instant case because being shackled during trial is clearly distinct from presenting evidence that, while in jail, appellant refused to come to court, was fed through a slot in his cell, was held in a disciplinary unit, or was waist chained for transportation purposes. Shackles suggest that the defendant is viewed as so dangerous by the trial court that he must be physically separated from everyone in the courtroom, including the jurors. Here, the evidence presented did not suggest that appellant was a danger to those present in court. Instead, the jury only heard that appellant was being disciplined for some unknown infraction at the jail. These security measures did not signal that appellant was dangerous to “‘the community at large,’” as the feeding procedure or the use of a chain for transportation purposes were part of the routine jail procedures, as far as the jury was concerned. (*Id.* at p. 630.) Rather, the jail security measures were like other routine security measures such as the placement of deputies inside the courtroom, or a clear plastic shield separating the audience.

Second, unjustified shackling interferes with a defendant's constitutional right to counsel because it diminishes his ability to communicate with his counsel during trial. There was no such concern in appellant's case. Shackles can also "interfere with a defendant's ability to participate in his own defense, say, by freely choosing whether to take the stand on his own behalf." (*Deck, supra*, 544 U.S. at p. 630.) Again, this concern does not apply to the instant case. Appellant was not physically restrained in any manner inside the courtroom, so the potential physical, mental, and emotional concerns related to shackling did not exist. (See *People v. Stevens* (2009) 47 Cal.4th 625, 633 ["In addition to their prejudicial effect on the jury, shackles may distract or embarrass a defendant, potentially impairing his ability to participate in his defense or serve as a competent witness on his own behalf."].) In fact, appellant was voluntarily refusing to participate in his own defense.

"Third, judges must seek to maintain a judicial process that is a dignified process." This involves:

The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve.

(*Deck, supra*, 544 U.S. at p. 630.)

Again, here, this was not a real concern. Forcing a defendant to wear shackles in front of the jury uniquely undermines the notion of respectful treatment to all in the courtroom. Here, the trial court simply did not treat appellant disrespectfully by forcing him to wear shackles without legal justification. Rather, the trial court's ruling helped maintain the

dignity of the judicial process. Appellant intentionally interfered with the judicial process by refusing to come to court until after forcible extraction was imminent. Appellant's decision wasted important resources and time affecting the jail staff, the court, and the jurors. The trial court was obviously concerned with this unacceptable behavior when it stated, "I'm not going to let defendants control the court." (10RT 1608.) Later, the trial court stated that its decision was based primarily on the issue of consciousness of guilt, but that "[i]f nothing else, this prevents a defendant who is charged with a capital case from constantly holding up the trial." (10RT 1665-1666.) Moreover, the jury simply learned the conditions under which appellant refused to come to court. There was nothing misleading about the evidence because it was true and accurate. (*People v. Farnam* (2002) 28 Cal.4th 107, 154 ["Because the testimony was neither inflammatory nor misleading, its admission was proper under Evidence Code section 352."].) Certainly, the courtroom's formal dignity and appellant's dignity were both maintained by the trial court, considering appellant's demonstrated intent to delay his trial. (See *Illinois v. Allen* (1970) 397 U.S. 337, 343 [90 S.Ct. 1057, 25 L.Ed.2d 353] ["We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case."].)

Appellant's argument regarding prison garb also lacks merit. (SAOB 4.) Making a defendant appear in prison garb poses such a threat to the "fairness of the factfinding process" that it must be justified by an "essential state policy." (*Estelle v. Williams* (1976) 425 U.S. 501, 503, 505 [96 S.Ct. 1691, 48 L.Ed.2d 126].) This Court held that "refusal to allow defendant to wear civilian clothing at trial constituted a violation of due process and equal protection" where the defendant made a timely request to do so. (*People v. Taylor* (1982) 31 Cal.3d 488, 493)

However, appellant did not appear before the jury in prison garb, so there was no such threat to the fairness of the fact-finding process on that basis. And the challenged evidence was not akin to wearing prison garb. As the trial court noted, the fact that appellant was in jail would hardly surprise the jurors because of the nature of the charges and that fact that appellant never entered the courtroom through the regular entrance. (10RT 1660.) Thus, the jurors merely learned what they had presumably surmised from the circumstances of the proceedings. The details of appellant's incarceration were merely circumstances surrounding his refusal to attend trial and therefore were properly admitted.³ While the jury learned that appellant was housed in a module for "K-10 inmates for discipline," the prosecution did not explore the reasons for any disciplinary action against appellant or the types of inmates subject to this unit. The fact that appellant's breakfast was delivered through a slot in the cell door was not particularly damaging to him. There was no evidence presented that appellant was fed in this manner because he was dangerous. Further, it would hardly surprise the jury that when inmates are transported to court in large groups, with a limited number of deputies available to do so, that simple and basic security measures would be employed for all inmates. In other words, the evidence did not tell the jury that appellant was subjected to heightened security measures in jail because he was particularly dangerous.

Thus, this was simply not a case where appellant was paraded before the jury in prison garb. Nor was it a case where appellant might have been embarrassed to testify because he was wearing prison garb in the

³ As the court noted, "[Appellant] did this. This is his own action. He's responsible for his own actions, and I have no doubt but what it shows a consciousness of guilt." (10RT 1665.)

courtroom. For these reasons, there was no concern associated with the *symbolic* nature of a defendant appearing *before* the jury in jail garb during his trial. Of course, the trial court instructed the jury that it could not base a decision on bias against appellant because he was arrested, charged, and brought to trial, it could not be influenced by conjecture or prejudice, and it could not consider any evidence other than that received at trial. (CT 871.) It is assumed the jury followed the trial court's instructions. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) Based on the foregoing, appellant has failed to establish that the trial court abused its discretion, or violated his constitutional rights, when it denied appellant's motion to strike Deputy Ganarial's testimony.

D. Any Error Was Harmless

Any state-law error was clearly harmless under the "reasonable probability" test of *Watson*, and any federal constitutional error was harmless under the "beyond a reasonable doubt" test of *Chapman*. For the same reasons argued in the respondent's brief (RB 56-75, 121-122), and those argued above, any error in admitting the evidence regarding appellant's refusal to come to court and the surrounding circumstances was harmless beyond a reasonable doubt. As explained above, evidence about the conditions of appellant's incarceration at the time he refused to attend trial did not portray him as particularly dangerous and were hardly inflammatory when compared to the charged crimes. As noted above, jurors could reasonably infer that the feeding procedures or the use of chains for transportation purposes were fairly routine measures at the jail.

CONCLUSION

For the foregoing reasons, and those set forth in the respondent's brief, respondent respectfully requests that the judgment be affirmed.

Dated: May 4, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 3,261 words.

Dated: May 4, 2015

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Attorney General of California

A handwritten signature in black ink, appearing to read 'DA', with a long horizontal stroke extending to the right.

DAVID A. VOET
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DECLARATION OF SERVICE

Case Name: **People v. Gomez**

No.: **S087773**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On May 4, 2015, I served the attached **Respondent's Supplemental Brief** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On May 4, 2015, I caused original and eight copies of the **Respondent's Supplemental Brief** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **OnTrac, Tracking # B10305767343**.

On May 4, 2015, I caused one electronic copy of the **Respondent's Supplemental Brief** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 4, 2015, at Los Angeles, California.

Lily Hood

Declarant



Signature

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**THE PEOPLE OF THE STATE OF
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RUBEN P. GOMEZ,

Defendant and Appellant.

CAPITAL CASE

Case No. S087773

**SUPPLEMENTAL
DECLARATION OF
SERVICE**

Supplemental Declaration of Service regarding Supplemental
Respondent's Brief to reflect service to California Appellate Project (SF),
Attorney Daniel Nardoni and the Governor's Office of Legal Affairs.

SUPPLEMENTAL DECLARATION OF SERVICE

Case Name: **People v. Gomez**

No.: **S087773**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On May 7, 2015, I served the attached **Supplemental Declaration of Service** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 7, 2015, at Los Angeles, California.

Lily Hood
Declarant


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