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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

AAREN WILLIAM STRIPLIN,

Defendant and Appellant.

A104107

(Contra Costa County  
Super. Ct. No. 021372-8)

Aaren Striplin appeals a judgment sentencing him to nine years in prison following conviction for two counts of carjacking and two counts of second degree robbery. We reverse.

PROCEDURAL BACKGROUND

After a preliminary hearing, an information was filed on September 27, 2002, charging defendant with two counts of carjacking (Pen. Code, § 215, subd. (a)), and two counts of second degree robbery (Pen. Code, § 211 & 212.5, subd. (c)), with enhancements to each count for personally using a firearm in the offense (Pen. Code, former § 12022.5, subd. (a) & Pen. Code § 12022.53, subd. (b)). Appellant entered a plea of not guilty and the case came up for trial on January 6, 2003. After more than two days of deliberations, the jury announced that it could not agree on a verdict and the court declared a mistrial. The People then dismissed the enhancements under Penal Code section 12022.5.

The case came up for trial again on July 14, 2003. After approximately a day and a half of deliberations, the jury returned verdicts of guilty on all four counts but found the enhancements for personal use of a firearm not to be true. At a hearing on September 19, 2003, the trial court denied a motion for new trial and sentenced appellant to nine years in state prison, consisting of an upper term of nine years on the first count of carjacking and concurrent mid-term sentences on the other counts.

#### FACTUAL BACKGROUND

Defendant was convicted primarily on the basis of eyewitness identification by the two victims. The evidence at trial revealed that around 1:00 a.m. on August 16, 2002, Sarah Sherman (hereafter Sarah) stopped at a gas station on San Pablo Avenue in Richmond. She was driving a friend's car, a black Montero SUV, and had just picked up her boyfriend, Brian Smith (hereafter Brian), who was dozing in the passenger seat. She got out of the car to get gas but couldn't use her card and didn't want to use cash. As she returned to the car, two young African-American men approached and asked something about BART. Sarah testified that they approached the passenger side; Brian said they "came up to the driver's side window." Accepting her friendly response as an offer for a ride, the two men got into the back seat. The younger of the two men, whom they later identified as the defendant, sat immediately behind Sarah. Both Sarah and Brian remember that this man was about 18 years old and close to their own age. The men were talkative and appeared friendly, putting them at ease by conversing about music and other matters of common interest.

Apparently impelled by a feeling of teenage camaraderie, Sarah undertook to help out the two young men. She began driving to the Del Norte BART station, but the men said they needed to go to the Richmond station to catch a bus. She turned around and drove to this station, which was deserted at that hour, and was told to drive on further to the bus stop. When the men said they were going to Vallejo, she offered, over Brian's objection, to take them there and began to drive away. The men asked if they were interested in buying marijuana and showed them a few baggies. They declined the offer, but Sarah agreed to stop at another gas station, where one of the men got out to buy a

cigar, which could be used to roll marijuana cigarettes. She again stopped a couple blocks away so that the men could roll a cigarette. The men said they needed to drive to a place where they could stash the marijuana. The younger man got out of the car “some place by the train tracks” and ran across the street. He then asked Sarah to make one more stop at his girlfriend’s house and directed her to a section of B Street surrounded by warehouses, vacant lots, and abandoned buildings.

Brian testified that the gas station where they met the men was not “well lit” and he was “basically falling asleep” at that time, but when the men got in the car, he tried to be more aware and turned around to look at them. He saw the younger man “pretty clearly.” As they drove away he began “drifting off to sleep,” but he did protest Sarah’s offer to go to Vallejo. After that point he stopped paying attention and drifted off to sleep, though he remembers the stop at the second gas station. Sarah recalled that the interior of the car was not lighted and there was no moon. Their last stop on B Street was illuminated by street lights. During the drive she was watching the road and rear view mirror.

After stopping at B Street, Sarah turned around to speak to the men. At this point, the younger man then pointed a gun at her from a distance of about a foot and ordered her to get out of the car. At first she “was kind of in denial about the whole situation” and stayed for a moment in the driver’s seat. The younger man left the rear seat, opened the driver’s door, and “started going through” the left pocket of the overalls she was wearing. He took her cell phone and, taking hold of her arm, encouraged her to get out of the car. Brian also got out of the car and allowed the other man to stand behind him and search his pockets. He saw the gun only when he and Sarah were still in the car. He testified that it was “pretty dark” on B Street, without enough light to read by, but he looked over toward Sarah and saw the younger man relatively clearly.

After being robbed, Sarah came over to Brian’s side of the car and sat on the curb. The younger man asked Sarah repeatedly for the keys but she was “just in such shock” that it took a moment before she could tell him that the keys were in the ignition. The men then drove off in the car.

Brian thought the entire incident “couldn’t have been more than 30 seconds.” He and Sarah ran down the street and soon succeeded in flagging down a van. They explained their situation to the driver, who let them board the vehicle and soon found a police car. A Richmond police officer, Darold Mussetter, testified that the two victims contacted him at 1:50 a.m., in a “really animated” state of mind. He obtained a description of the car and the two men that he put in an all-points bulletin.

At trial, Mussetter testified that the victims told him that the younger suspect who displayed the gun was five feet six inches tall, 175 pounds, 18 to 20 years old, light complected and with hair braided in cornrows that went straight back without a part. He wore a red shirt, dark blue jeans, and a light blue windbreaker. Sarah added that the windbreaker had a Fila emblem. Brian described the windbreaker as having a “light weight sort of plasticish [*sic*] material.” He told Mussetter that the assailant had “medium-sized braids” that went in straight rows from the front to the back of his head.

When the victims were interviewed three days later by another Richmond police officer, Detective Rodney Smith, they made one correction in the information given to Mussetter: they thought that the time period they were with the two men was no more than 20 to 30 minutes, less than they had told Mussetter.

The stolen Montero was stopped at 4:23 a.m. on August 17, 2002, on a Richmond exit of I-80. The defendant was a passenger in the car and the driver was one Aaron Brown. Defendant was wearing an athletic jogging outfit with a light blue velour jacket and matching pants.

A sheriff’s deputy, Robert Jimenez, searched defendant at the scene. He testified that he removed a Shell credit card belonging to Sarah from defendant’s right front pocket but found nothing else. The defense sought to impeach this testimony with evidence that the line in Jimenez’s report relating to the credit card had been erased and written over. Moreover, an inventory of defendant’s property taken when he was booked at the jail included items, such as cash, a wallet, and keys, that would likely have been found in the sort of search Jimenez described. Sarah testified that she kept the credit card

either in her wallet or loose in a flap-top purse. She thought it could have fallen out of the purse as other things had fallen out of the purse.

On August 19, 2002, Detective Smith told Sarah and Brian that the Montero had been found and that the two men occupying the vehicle had been arrested. He asked them to come to the Richmond police station to see if they could recognize anyone in a photo lineup. At the station, Smith told them that he would show them two photo lineups. The men who had robbed them on August 16, 2002, might not be in the photos and there was no reason to believe they were unless they recognized them. He asked them both to read and sign a form containing cautionary advice about eyewitness identifications. Then he took them individually into an adjacent room to view the lineups in private, beginning with Sarah.

Detective Smith testified that he constructed two sets of six photos, one with defendant's photo and the other with Aaron Brown's photo. He used a photo link system that allowed him to retrieve photos on file with Richmond and the county by specifying certain parameters, such as age, race, height, weight classification. He selected photos of African-American men having certain characteristics in common with the suspects. Nevertheless, defendant was the only person in his set of photos with cornrows or braids of any kind and with a light blue jacket.

Both victims were first shown the photo lineup containing defendant's photo. According to Detective Smith, Sarah took only two or three seconds to point to defendant's photo and said "That's him." At trial, she testified that she recognized the face and the blue jacket and she was "one hundred percent certain" he was the person who pulled a gun on her. Leaving the room, she said to Brian, "Go ahead. . . . I'm not supposed to say anything." Brian identified the defendant in three or four seconds. He was "absolutely certain" it was the person with a gun behind Sarah. He thought the blue jacket could be the one the robber wore but it didn't look quite the same. When questioned about the cornrows, he conceded that no one else in the lineup had braids but insisted that it was "the face" that enabled him to identify the defendant. Brian confidently repeated his identification of defendant at trial, saying he was "about as

certain as [he could] be.” Neither Sarah or Brian identified anyone in the second lineup containing Aaron Brown’s photo.

The defense sought to impeach the eyewitness identification through cross-examination and offered an expert witness on the psychology of eyewitness identification. As discussed in the first two assignments of error, the trial court restricted impeachment by prior testimony and excluded the expert witness’s testimony. The defense also presented testimony of defendant’s friend, Shamar Dunlap, and his sister, Ashley Lunnie, regarding defendant’s habits of dress. Both asserted that clothes were very important to him; he was conscious of current fashions and always selected matching items of clothing. They claimed that he would not wear a Fila jacket, a brand that was long out of fashion, and he would never wear a red shirt with a light blue jacket. In fact, he did not own a red shirt or a light blue windbreaker.

The defense called as its witnesses a crime scene investigator and a fingerprint examiner working for the Contra Costa County Sheriff’s Department. The evidence revealed that 14 latent prints were taken from the Montero, but the only one that corresponded to defendant’s fingerprint was found on the exterior of the front passenger door, close to where he was sitting at the time of his arrest. There was no fingerprint identification on the driver’s side where the younger carjacker might have left a print during the crime.

The defense also sought to qualify Deputy Mussetter as an expert in stolen cars. While the court did not allow him to testify as an expert, it permitted him to testify on the basis of his extensive experience in the police department. Mussetter agreed with the statement that “very often” stolen cars “are either sold or given away or abandoned shortly after they are stolen.” He testified further that it is “not common” for car thieves or carjackers to hold on to the cars for more than a few hours.

## DISCUSSION

### A. Impeachment

As defense counsel began the cross-examination of Brian, the trial court sustained 11 objections to her offers to impeach the witness or refresh his recollection with

testimony from the prior trial or preliminary hearing. At this point, counsel ceased her attempt to impeach with prior testimony and offered it only to refresh the witness's recollection. Defendant now assigns error to the trial court's refusal to allow impeachment by prior inconsistent statements with respect to four matters.

First, defendant argues that the trial court erred in refusing to allow impeachment with respect to the number of times Brian looked back at the men during the drive. At the preliminary hearing Brian testified that he looked back on two occasions before they displayed the gun and, in context, his testimony appeared to imply that he looked back on only these two occasions.<sup>1</sup> At the prior trial, while being questioned about the drive to the BART station, he said he looked back when the men got into the car "but not really after that."<sup>2</sup> In context, the answer clearly referred to the drive to BART, but it was not clear whether the answer was intended to refer to the remainder of the drive.

In the present trial, Brian denied that he "only glanced back two times" during the ride and testified that he looked back "several times" before the robbery. Defense counsel asked if he recalled his preliminary hearing testimony that he looked back first when the men got into the car and again when they offered weed. He insisted, "As far as I know I didn't specifically say that it was only two times and no more than that."<sup>3</sup> When questioned further about his preliminary hearing testimony referring to these two

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<sup>1</sup> "Q. Did you – did you turn around and look at them for any period of time or at all? [¶] A. Yes. [¶] Q. When was that? [¶] A. When they first got into the car. [¶] Q. Uh-huh. [¶] A. Ummm, when I realized that they were getting into the car I turned around to see who was getting into the car. [¶] Q. Uh-huh. [¶] A. When they offered us the weed, I turned around and then looked at them again, you know, talked to – talked to them for a few seconds. [¶] Q. Uh-huh. [¶] A. And then again when we – when we stopped at the house and the gun was pulled out."

<sup>2</sup> "Q. Okay. Did you at any time up to this point turn around and talk to these people at all? [¶] A. Yes. When they first got into the car, I turned around and sort of, you know, said hello to both of them and asked where they were going and – I mean there was a little bit of time when they first got into the car that I turned around and, you know, looked at them and talked to them, but not really after that."

<sup>3</sup> "Q. And you only glanced back two times at the gentlemen behind; isn't that right? [¶] A. No. It was several times. [¶] Q. Do you remember testifying at [the] preliminary hearing that you glanced back at them when they first got in and when they offered weed to you and Sarah, and then didn't glance back really other than those two times? [¶] A. As far as I know that's not what I said, but – or at least as far as I know I didn't specifically say that it was only two times and no more than that."

occasions, he stated, “I’m sure it was more times than that.” Later, he repeated that it was “more than three times.”

The trial court sustained a series of objections to defense counsel’s offers of impeachment with prior testimony on this subject, ruling that the prior testimony was not inconsistent with the witness’s answers, and did not allow defense counsel to give the preliminary hearing transcript to the witness to refresh his memory.

Secondly, defendant objects that the trial court improperly prevented defense counsel from introducing a prior statement as to when Brian left the car. At the preliminary hearing, Brian testified that the assailant went through Sarah’s pockets as he opened the passenger door and left the car: “Q. Mr. Smith, when the assailant with the gun was going through your girlfriend’s pockets, that is when she is still sitting in the driver’s seat? [¶] A. Yes. [¶] Q. Were you still in the passenger seat at the time? [¶] A. I believe I was getting out at the time. [¶] Q. You were getting – you were opening the door and getting out? [¶] A. Getting out of the car, yes.”

At trial Brian testified that he and Sarah got out of the car at “about the same time.” Defense counsel asked if he remembered his preliminary hearing testimony. When he said he did not recall the testimony, she asked to refresh his recollection. The court interjected, “What recollection?” and engaged in a lengthy dialogue with defense counsel. The court questioned the relevance of the former testimony and defense counsel insisted that the timing of Brian’s exit was relevant to his opportunity to see the gunman. The court ultimately allowed defense counsel to show the preliminary hearing testimony to the witness, who replied that it did not refresh his recollection. The court then denied defense counsel’s request to read the testimony into the record.

Thirdly, defendant maintains that the trial court improperly denied impeachment with prior testimony on a period of time that Brian dozed during the drive. At the preliminary hearing, he testified that he began to doze off as they headed for the Richmond BART station but was awake when they arrived at the station and then dozed

from the time they left the BART station until the man pointed the gun at Sarah.<sup>4</sup> At trial he testified that he didn't recall when he was dozing during the drive.<sup>5</sup> When the prosecutor objected that the prior statement was not inconsistent, the court sustained the objection.

Fourthly, defendant argues that the trial court erred by barring impeachment on the question of whether the men asked to smoke marijuana in the car. At the prior trial, he testified that "they asked if they could smoke, and . . . Sarah said she didn't mind."<sup>6</sup> At trial he was unable to recall whether the men asked if they could smoke.<sup>7</sup> The court allowed defense counsel to show the witness his prior testimony and to ask if it refreshed

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<sup>4</sup> "Q. When the gentlemen got in the car did you wake up at all? [¶] A. I did – I did at first and saw – looked back to see, you know who was in the car, . . . when I thought that we were going to the BART station, I figured that we would just be driving to BART for a very short period of time so I started dozing off again. [¶] Q. That was going toward the Del Norte BART station? [¶] A. I believe it is after we turned around. I don't . . . know exactly at what point I started sleeping again. [¶] Q. Okay. But you were awake when you got to the Richmond BART station? [¶] A. Ummm, I believe so. . . . Originally they said BART station, and then they said to catch a bus from BART. And once we got to the BART station they said, no, the bus stop is a few blocks away from here. [¶] Q. Okay. And did you go back to sleep after that or did you start to wake up some? [¶] A. Ummm, I had started to go back to sleep at that point. [¶] Q. Right. What was the next thing you remember? [¶] A. I – I wasn't ever actually asleep, I was just sort of dozing off. And I don't remember exactly where we drove, but we were driving around for awhile and when we stopped, and the gentleman sitting behind the pass – behind the driver said, oh, I just need to stop at my girlfriend's house, which was I believe on B Street off of West Barrett where we were at the time. And I sort of woke up at that point and was looking around and didn't know where we had – had no idea where we were. And I believe my girlfriend said something like don't take . . . too long at your girlfriend's or something like that, and then the gentleman behind her pulled out the gun . . ."

<sup>5</sup> "Q. Sir, do you remember that you were sort of dozing after the second BART station? [¶] A. Yes. [¶] Q. Dozing between the two BART stations? Dozing on the way to the BART station? [¶] A. I suppose. I don't recall exactly when I – exactly what time I was and was not." Later, defense counsel pursued the point: "Q. Sir when you said you didn't remember when you fell asleep and when you woke up, were you talking about just between the two BART stations or the whole evening? [¶] A. The whole evening."

<sup>6</sup> "A. . . . [W]e stopped for a couple of minutes somewhere, and I think it was at their little gas station or mini mart or something. [¶] Q. Do you know why? [¶] A. I – yes. They had previously offered if we wanted to smoke some weed with them, and we said no. And they asked if they could smoke, and I think Sarah said she didn't mind. And so we were – they wanted to pick up a blunt, . . ."

<sup>7</sup> "Q. Okay. And at some point were you conscious that the two were smoking marijuana in the car? [¶] A. No. They were never smoking in the car as far as I remember. [¶] Q. But they asked Sarah, 'Do you mind if we smoke marijuana?' [¶] A. I don't recall. They asked us if we wanted to smoke, but I don't recall if they asked if they could smoke."

his recollection. He answered that it didn't "necessarily refresh [his] recollection." At this point the court effectively cut off the line of questioning by interjecting "That's it" and then calling a 10-minute recess.

We begin with the principle of Evidence Code section 1235 that a statement by a witness that is inconsistent with the witness's trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions prescribed by Evidence Code section 770. "The 'fundamental requirement' of section 1235 is that the statement in fact be *inconsistent* with the witness's trial testimony." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219.) "Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement . . . ." (*People v. Green* (1971) 3 Cal.3d 981, 988.) It is error to admit prior statements that are not "materially inconsistent" with trial testimony. (*People v. Arias* (1996) 13 Cal.4th 92, 153.)

"Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. . . . When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper." (*People v. Johnson, supra*, 3 Cal.4th 1183, 1219-1220; *People v. Ervin* (2000) 22 Cal.4th 48, 84-85; *People v. Green, supra*, 3 Cal.3d 981, 988.) In such cases, the trial court has discretion to admit the prior statement. (*People v. O'Quinn* (1980) 109 Cal.App.3d 219, 226.)

We consider that the last two matters at issue – how long Brian dozed and whether the men asked permission to smoke marijuana – came within the rule that testimony of a witness that he does not remember an event is not inconsistent with a prior statement describing the event. The prior testimony was admissible in the trial court's discretion only upon a finding that the witness's lack of memory amounted to deliberate evasion. On the record before us, we are unable to conclude that the trial court abused its discretion, though the court's handling of these evidentiary issues has relevance to the

defendant's claim of judicial bias to the extent that it formed part of a pattern of judicial conduct during the entire trial.

We find, however, that Brian's prior statements on the first two issues – the number of times Brian looked back and his opportunity to observe the gunman as he searched Sarah's pockets – were inconsistent with his trial testimony. It is true that the earlier statements could possibly be interpreted in a manner consistent with the trial testimony, but we consider that the pertinent question relates to how the jury would likely have understood the earlier statements. Even if the statements were susceptible to an interpretation consistent with the trial testimony, they clearly carried an implication inconsistent with that testimony. In testifying that he looked back twice before the robbery, Brian appeared to imply that he looked back only twice. Again, by testifying that he opened the door and left the car as the assailant searched Sarah's pocket, Brian appeared to say that he left the car first.

We conclude that the trial court erred in excluding the prior statements, but we do not think that the error was prejudicial under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. The statements at issue were no more than apparently inconsistent with the witness's trial testimony and related to relatively minor aspects of the basic factual issue of Brian's opportunity to observe the assailant. Therefore, it is not reasonably probable that the error affected the verdict. (See *People v. Johnson, supra*, 3 Cal.4th 1183, 1220 [applying the *Watson* standard].)

#### B. Expert Testimony

As a second and dispositive assignment of error, defendant argues that the trial court erred in denying, on its own motion, his request to present the testimony of an expert witness on the psychology of memory and eyewitness identification. Defendant represented that the witness, Mitchell Eisen, Ph.D., would testify to matters that the California Supreme Court recognized as being appropriate subjects for expert testimony in *People v. McDonald* (1984) 37 Cal.3d 351, 361-377, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.

The *McDonald* decision concerned the murder of an Hispanic victim by an African-American gunman on a busy intersection in downtown Long Beach. Seven prosecution witnesses identified the defendant with varying degrees of certainty, but one of the prosecution's witnesses, an African-American woman, stated that the gunman at the scene was not the defendant. The defense offered the testimony of a psychologist, Robert Shomer, on various psychological factors that may affect the reliability of eyewitness identification. Holding that it was error to exclude the expert witness testimony, the court reviewed the proposed testimony concerning psychological factors affecting the accuracy of an eyewitness's perception, the process of memory, circumstances affecting recall, and widespread lay beliefs about the psychology of eyewitness identification.

With respect to the witness's perception, the court observed: "psychological factors may also influence the accuracy of the perception: Dr. Shomer intended to review for the jury the results of certain experimental studies showing that perception may be affected by such factors as the observer's state of mind, his expectations, his focus of attention at the time, the suddenness of the incident, the stressfulness of the situation, and differences in the race and/or age of the observer and the observed." (*People v. McDonald, supra*, 37 Cal.3d 351, 361.) The court noted that on the record of the case "there were elements that could have raised reasonable doubts as to the accuracy of the identification. These elements included the suddenness and unexpectedness of the event, discontinuity and other difficulty of observation, fear and other stress at the time of perception, . . ." (*Id.* at p. 375.)

Emphasizing the cross-racial factor, the court commented, "[M]any jurors are likely to have some awareness of the fact that an eyewitness is more accurate in identifying a person of his own race than one of another race. [Citation.] But it appears that few jurors realize the pervasive and even paradoxical nature of this 'own-race effect,' information that has emerged from numerous empirical studies of the question. These studies establish that the effect is strongest when white witnesses attempt to recognize black subjects; in such circumstances 'The impairment in ability to recognize black faces

is substantial.’ [Citation.] In laboratory experiments, for example, it is common for own-race/other-race recognition rates to differ by as much as 30 percent.” (*People v. McDonald, supra*, 37 Cal.3d 351, 368, fn. omitted.)

The expert witness also intended to testify on the process of memory, “in which old elements fade and are lost while new elements – subsequent information or suggestions – are unconsciously interwoven into the overall recollection until the subject cannot distinguish one from the other.” (*People v. McDonald, supra*, 37 Cal.3d 351, 361, fn. omitted.)

As a further element in the psychology of memory, the expert witness “proposed to review the studies establishing that recall may be affected by such factors as the subject’s expectations, his suggestibility, the phrasing of the questions asked of him, and even the size and type of the photographs he is shown.” (*People v. McDonald, supra*, 37 Cal.3d 351, 361-362.) He would have testified to “the effects on memory of the witness’ exposure to subsequent information or suggestions [citation], and the effects on recall of bias or cues in identification procedures . . . .” (*Id.* at p. 368.) For example, witnesses may experience self-induced pressure to identify the offender that encourages them to “find the face in the lineup that is the ‘most similar’ to the offender; that alternative appears more legitimate to them than admitting they cannot identify anyone at all.” (*Id.* at p. 362.)

Finally, the expert witness “intended to explain to the jury that empirical research has undermined a number of widespread lay beliefs about the psychology of eyewitness identification, e.g., that the accuracy of a witness’s recollection increases with his certainty, that accuracy is also improved by stress, . . . that the reliability of an identification is unaffected by the presence of a weapon or violence at the scene.” (*People v. McDonald, supra*, 37 Cal.3d 351, 362.)

The *McDonald* court noted that empirical findings on the eyewitness’s confidence in making an identification “contradict the expectations of the average juror. . . . [T]he majority of recent studies have found no statistically significant correlation between confidence and accuracy, and in a number of instances the correlation is negative – i.e.,

the more certain the witness, the more likely he is mistaken. . . . The average juror, however, remains unaware of these findings: . . . ‘people intuitively believe that eyewitness confidence is a valid predictor of eyewitness accuracy.’ [Citation.]” (*People v. McDonald, supra*, 37 Cal.3d 351, 369.)

Holding the exclusion of the expert testimony to be reversible error, the *McDonald* court made clear that, under the facts of the case, the eyewitness identification was a “key” element in the prosecution’s case and was not “substantially corroborated” by other evidence: “When an eyewitness identification of the defendant is a key element of the prosecution’s case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.” (*People v. McDonald, supra*, 37 Cal.3d 351, 377.)

We consider that the present case comes within the factual precedent and guidelines of *McDonald*. The eyewitnesses here also made a cross-racial identification, a factor stressed by *McDonald*. During the drive preceding the robbery, the witnesses’ opportunity to observe the assailants was limited and discontinuous. Brian was dozing in the passenger seat most of this time. He roused himself to look at the men when they entered the car and, according to his preliminary hearing testimony, when they offered to sell marijuana. The gunman, who was later identified as the defendant, sat on the driver’s side behind Sarah while her attention was occupied by driving through the Richmond streets. When the eyewitnesses saw the assailants face-to-face during the robbery, it was during a brief period of great emotional stress when their attention was distracted by the threat of the gun and the robbery of their personal belongings and vehicle.

Defense counsel represented that the expert witness would testify that a memory becomes less reliable when the witnesses glance at the offender in brief, discontinuous intervals and there are “a lot of other things going on” that draw the witnesses’ attention. In particular, the presence of a weapon can have the effect of “distract[ing] the person from focusing solely on the way somebody looked.”

As in *McDonald*, defense counsel offered to present expert testimony that memory evolves and changes over time. This testimony would have challenged the prosecution's argument that people know when they are able to recognize someone,<sup>8</sup> and it would have provided a possible explanation for the eyewitnesses' confidence in making the identification at trial and for the discrepancies between their descriptions of the blue jacket at the scene and later in the investigation.

On the question of recall, the defense offered expert testimony on the effect of suggestion that was within the scope of the proposed testimony in *McDonald* but in some respects stronger on the facts. Eisen would have testified that eyewitnesses retain a vivid memory of certain salient features of the offenders, such as race, hair, clothing, and sometimes physique. Consequently, "if there's a lineup shown to the witness and there's only one person in the lineup with those particular core features or some of those particular core features, that creates suggestion, very strong suggestion, in the mind of the eyewitness." In the case at bar, this principle found its most apparent application in the fact that the defendant was the only person in the photo lineup with cornrows and a blue jacket.

Similarly, Eisen would have testified that when witnesses are told that a person has been arrested in the case they may develop expectations that lead them to make a false identification. As defense counsel explained, "if somebody is told when they're shown a lineup that the suspect is going to be there . . . , they are much more likely to want to pick somebody out and make a false identification, . . ." The record discloses that Deputy Smith told the eyewitnesses that their car had been found and two persons had been arrested. They were then shown two sets of photos.

Going beyond the precedent of *McDonald*, Eisen would also have testified that the possibility of error increases when the photos are displayed together in a single set. Defense counsel explained "that's because the victim tends to compare the photographs

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<sup>8</sup> For example, the prosecutor argued, "There's nothing I can say to tell you to convince anybody that people can recognize. It's just a basic human fact. We're animals. Animals can recognize other animals, faces mainly, clothing, size. It's just a simple fact of nature."

to each other and determine which is most like the subject.” Eisen would have testified that this misleading effect can be avoided by showing photos sequentially.

On the subject of mistaken popular assumptions, defendant’s expert witness, like the witness in *McDonald*, would have testified that empirical research has undermined the “widespread lay belief[]” that “the accuracy of a witness’s recollection increases with his certainty.” (*People v. McDonald, supra*, 37 Cal.3d 351, 362.) Defense counsel represented to the court that Eisen would have testified that the witness’s “level of confidence . . . is not a strong indicator of whether or not it’s a reliable identification. Confidence does not signify reliability, and that’s an extremely big issue here. And that confidence increases when people receive feedback from a law enforcement officer like, ‘You’re right. You got the person.’ ”

Finally, as in *McDonald*, the eyewitness identification here was “not substantially corroborated by evidence giving it independent reliability . . . .” (*People v. McDonald, supra*, 37 Cal.3d 351, 377.) It cannot be argued that the two eyewitnesses corroborated each other’s testimony since the *McDonald* decision itself involved multiple eyewitnesses. (*People v. Jackson* (1985) 164 Cal.App.3d 224, 242.) Moreover, any incriminating inference to be drawn from defendant’s presence in the stolen car a day later was weakened by the undisputed testimony of Officer Mussetter that it was “not common” for car thieves or carjackers to hold on to cars for more than a few hours. Indeed, this testimony on its face would support an inference that defendant was not the assailant. The prosecution argued that the credit card discovered in defendant’s pocket provided the necessary corroboration. But the evidence at trial could support doubts as to the circumstances in which the card was found.

We do not think the circumstances of the arrest and the discovery of the credit card provide sufficient evidence of identity to constitute substantial corroboration within the meaning of *McDonald*. Where the California Supreme Court has found the requisite corroboration, the independent evidence was far stronger than in the present case. In *People v. Jones* (2003) 30 Cal.4th 1084, 1112, the defendant was identified through the testimony of five accomplices. In *People v. Sanders* (1995) 11 Cal.4th 475, 509, there

was testimony concerning the conspiracy that led up to the crime, the firearms and ammunition found in defendant's apartment were consistent with those used in the shooting, defendant was seen at the home of a codefendant a few hours before the robbery, and rolled coins and bills consistent with money seized in the robbery were later found at the home of the codefendant. In *People v. Walker* (1988) 47 Cal.3d 605, 628, the defendant admitted possession of the gun used in the crimes, his car was identified as a possible getaway vehicle, a victim's stolen car was found close to where the defendant's sister lived, and defendant made numerous incriminating statements to friends and police.

The People cite authority that possession of recently stolen property, accompanied by no explanation, “ ‘will justify an inference that the goods were received with knowledge that they had been stolen. . . .’ [Citation.]” (*People v. McFarland* (1962) 58 Cal.2d 748, 754; *People v. Barker* (2001) 91 Cal.App.4th 1166, 1173; *People v. Anderson* (1989) 210 Cal.App.3d 414, 421.) They point out that, in addition to the credit card found on defendant's person, a victim's cell phone and other items were later found in the car that defendant was riding in as a passenger. This legitimate inference, however, extends only to knowledge of the tainted nature of property. The inference connecting the possession of stolen items to commission of the robbery and carjacking in which the items were stolen is more conjectural.

We consider that the present case closely resembles *People v. Walker* (1986) 185 Cal.App.3d 155. The defendant there admitted a robbery similar to that with which he was charged. The court held that the inference drawn from defendant's commission of similar “other crimes” was not strong enough to satisfy *McDonald's* substantial corroboration requirement. “Where the inference is merely suggestive – as it is here – and reasonable persons could still disagree on the defendant's identity, a defendant cannot be denied the opportunity to present evidence on an issue crucial to his defense.” (*Id.* at p. 165.) In the case at bar, the circumstances of the arrest may also suggest the defendant's possible identity as the assailant but the inference is too weak to constitute substantial corroboration under *McDonald*.

*McDonald* clearly precludes the People’s argument that Evidence Code section 352 allows the exclusion of the expert testimony to avoid confusion of the issues and undue consumption of time. Addressing this issue, *McDonald* states: “Evidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it. . . . [A]ny excess in the quantity or complexity of such testimony can be controlled by the court’s power to limit the presentation of evidence.” (*People v. McDonald, supra*, 37 Cal.3d 351, 372.) *McDonald* thus “eliminates trial court discretion to exclude the expert’s testimony because it might tend to confuse the issues.” (*People v. Walker, supra*, 185 Cal.App.3d 155, 163.)

We recognize that an error in excluding expert testimony on eyewitness identification may be found harmless under the standard of *People v. Watson, supra*, 46 Cal.2d 818, 836. (*People v. McDonald, supra*, 37 Cal.3d 351, 376; see also *People v. Plasencia* (1985) 168 Cal.App.3d 546, 556; *People v. Jackson, supra*, 164 Cal.App.3d 224, 247.) However, our discussion of the appropriate use of such expert testimony under *McDonald* reveals the pervasive relevance of the testimony to the facts of the case. The testimony was particularly crucial to the defense in countering the eyewitnesses’ confidence in their identification and challenging the procedures of the photo lineup. It is no answer to say that defense counsel could argue the defects in the identification procedure to the jury. “[A] lawyer’s argument standing alone is not an adequate substitute for a similar argument based on factual testimony by an established expert explaining to the jury the results of professional research.” (*People v. Vu* (1991) 227 Cal.App.3d 810, 814.)

We note that the ability of the eyewitnesses to observe the assailants was also limited by physical circumstances. The incident occurred at night under conditions of poor lighting, one eyewitness was dozing most of the time, the defendant sat behind the other eyewitness in the driver’s seat, and the eyewitnesses were only able to directly observe the assailants for brief intervals. Since the psychological factors affecting identification existed in combination with other circumstances limiting the eyewitnesses’

perception, they had critical importance to the defense as a means of impugning the reliability of the identification.

The effect of the error, moreover, was aggravated by the prosecution's examination of the deputy sheriff who conducted the photo lineup. In direct examination of the deputy sheriff, the court allowed the prosecution to pursue questions on matters within the scope of the proposed expert testimony; and in cross-examination, the court sustained the prosecution's objections to defense counsel's questions challenging the lineup procedures. Moreover, in final arguments, the prosecutor offered his own assumptions about the psychology of eyewitness identification that conflicted with the evidence that the expert witness could have offered. In the absence of expert testimony, the defense was restricted in its ability to challenge the prosecution's arguments.

On the present record we see no need to invoke the principle of cumulative error. On an examination of the whole record, we find it reasonably probable that a result more favorable to defendant would have been reached in the absence of the error in excluding the expert testimony. (*People v. Watson, supra*, 46 Cal.2d 818, 836.) We note nevertheless that the relatively minor error in restricting impeachment by prior inconsistent statements also related to the witnesses' opportunity to observe the assailants and therefore strengthens the case for reversal.

In this appeal, defendant argues that the court's errors in excluding prior inconsistent statements and expert testimony formed part of a larger pattern of hostility

and bias toward defense counsel, but since these errors themselves call for reversal of the judgment, we find it unnecessary to reach this further assignment of error.

The judgment is reversed.

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Swager, J.

We concur:

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Stein, Acting P. J.

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Margulies, J.