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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SHONDEL LAMAR LARKIN,

Defendant and Appellant.

2d Crim. No. B193832
(Super. Ct. No. LA048009)
(Los Angeles County)

Shondel Lamar Larkin appeals the judgment entered after a jury convicted him of attempted forcible rape (Pen. Code,[1] §§ 664/261, subd. (a)(2)), first degree burglary (§ 459), criminal threats (§ 422), and assault with intent to commit a felony (§ 220). Larkin pled no contest to one count of prowling (§ 647, subd. (h)). In a bifurcated proceeding, the trial court found true the allegations that Larkin had a prior serious or violent felony conviction (§§ 667, subds. (a)(1), (b)-(i), 1170.12, subds. (a)-(d)) and had served a prior prison term (§ 667.5, subd. (b)). Larkin was sentenced to a total of 17 years in state prison, consisting of the upper term of six years on the assault count doubled to 12 years under the three strikes law, plus five years pursuant to section 667, subdivision (a)(1). Sentencing on the remaining counts was stayed pursuant to section

[1] Further statutory references are to the Penal Code, unless otherwise noted.

654, and the court dismissed the prior prison term allegation. Larkin contends (1) the trial court abused its discretion in admitting evidence of other crimes pursuant to Evidence Code section 1101, subdivision (b); (2) his confrontation rights were violated by the admission of DNA expert testimony; (3) the court abused its discretion in denying his motion for mistrial based on late discovery, and in thereafter refusing to instruct the jury with CALCRIM No. 306; (4) his trial attorney provided constitutionally ineffective assistance of counsel by failing to present a surrebuttal witness; and (5) he was sentenced to the upper term in violation of *Cunningham v. California* (2007) 549 U.S. ___ [127 S. Ct. 856]. We affirm.

FACTS AND PROCEDURAL HISTORY

The Prosecution's Case

A.

The Charged Offenses

At approximately 6:00 a.m. on September 2, 2004, Robyn R. was opening the living room window in her downstairs apartment in Studio City when she saw Larkin walking up her driveway. After Larkin passed out of sight, Robyn heard him walking upstairs. When Robyn returned to the open window, she saw Larkin crouching outside of it as he tried to pull off the screen. Robyn left to call the police. When she returned, Larkin was gone.

At about 2:00 a.m. the following morning, Robyn's neighbor, Lori C., was asleep in her bedroom when she awakened and saw Larkin standing in the doorway.[2] Larkin's pants were undone and he had an erection. Larkin told Lori to "shush" and said "I'll kill you." Lori pleaded with Larkin, who responded, "I want you." Lori told him "no" and tried to slide across her bed toward the window. As she stood up from the bed, Larkin came up to her and said, "If you scream, I'll kill you." When Lori attempted to scream, Larkin grabbed her face and dislocated her jaw with his hands. After she

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[2] Lori lived in an upstairs apartment in a four-plex building next door to the four-plex building where Robyn lived.

dropped to her knees, Larkin kneed her in the hip, grabbed her around the waist, and tried to pull her toward him. Lori fought with him and screamed "rape" and "help." Larkin eventually let go and ran out of the bedroom. As Lori ran down the hall toward her front door, she saw that her kitchen window was open. Lori testified that the window had a defective lock and could be accessed from the walkway adjacent to her apartment. The back and front doors were locked. Lori unlocked the front door, ran into the street naked, and screamed for help. Robyn heard Lori and called the police. In addition to a dislocated jaw, Lori's mouth was bloody and she had bruises on her hip and calf. During the subsequent investigation, the police recovered a man's watch with a broken strap from the floor of Lori's bedroom.

On October 12, 2004, Robyn identified Larkin from a six-pack photographic lineup as the man who had tried to enter her apartment on September 2. Robyn also believed she may have seen the suspect at a coffee shop in Sherman Oaks three or four weeks after the incident. At trial, Robyn identified Larkin as the man who tried to enter her apartment but testified she "could not be certain" he was the individual she had seen at the coffee shop.

On September 13, 2004, Lori told the investigating officer, Los Angeles Police Detective Theresa Gordon, that she was not ready to identify the suspect. Detective Gordon showed Lori a photographic lineup containing Larkin's photograph on October 21, but Lori was unable to make an identification. Lori testified at trial, however, that she had recognized Larkin's face from the bottom center photograph but did not identify him as her assailant because she was "scared to death" and she "froze." Lori also testified that she called the police later that day and said she wanted to try again, but was told she could not. A week before Lori's trial testimony, she knew that Larkin was the individual depicted in the bottom center photograph. Both women positively identified Larkin at trial.

A latent fingerprint was lifted from the back door of Lori's apartment, which is next to the kitchen window, and a palm print was lifted from the inside kitchen

window sill. A latent print examiner from the Los Angeles County Police Department (LAPD) testified that the fingerprint was "full" and "pristine." That examiner and another LAPD print examiner compared the prints to a latent print card and determined that the fingerprint matched Larkin's right middle finger and the palm print matched his left palm. Genetic material obtained from the interior wristband of the watch found in Lori's apartment was sent to Cellmark for analysis. Cellmark's former laboratory director, who was not involved in the testing of the DNA obtained from the wristband, testified that at least three individuals were possible donors of the DNA and that Larkin could not be excluded as a source.

B.

Other Crimes Evidence (Evid. Code, § 1101, subd. (b))

On December 11, 2000, Tara S. was taking a shower in her apartment when she saw Larkin, who lived across the hall, looking up at her around the shower curtain. Tara screamed, and Larkin left. Tara called the police, and subsequently discovered that about $40 was missing from her wallet.

At about 11:30 p.m. on a Saturday night in February 2003, Pamela D. was watching television at her home in Sherman Oaks when she heard a noise in her backyard. As Pamela turned down the sound on her television, her neighbor, Ronald Quigley, called her on the telephone to warn her that someone might be in her backyard. Pamela called the police. Quigley subsequently gave another neighbor, Los Angeles County District Attorney Investigator David Ishibashi, the license plate number of an unfamiliar BMW he had seen parked approximately a block away.

Around 11:00 p.m. on September 17, 2004, Pamela discovered that a backyard light near her bedroom, which had been "unscrewed constantly," was unscrewed again. From her living room window, she saw Larkin bent over and coming around the corner near her bedroom window. Larkin stared at Pamela for a few seconds, then ran away.

At approximately 9:30 p.m. on May 13, 2003, Kimberly B. was watching television at her home in Sherman Oaks when she heard a noise. Kimberly went to her kitchen window, saw a moving shadow in her backyard, then called 911. While she was on the telephone, she saw someone outside looking into her bathroom window. The police arrived approximately a half hour later and saw Larkin jump over Kimberly's backyard fence and start running. Larkin was arrested, and his BMW was impounded. The BMW's license plate matched the number Quigley had written down after the first incident involving Pamela D. Larkin stipulated at trial that he was involved in the Tara S. and Pamela D. incidents, and that he was the registered owner of the BMW during the time in question.

C.

The Defense

When victim Lori C. was shown the six-pack photographic lineup on October 21, 2004, she focused on Larkin's photograph but did not make a positive identification. About a week later, she spoke to Los Angeles Police Detective James Clifford on the telephone and apologized for failing to make an identification. Detective Clifford testified that Lori did not tell him during that conversation that she could identify the suspect. Detective Gordon testified that Lori did not tell her she could make an identification until July 20, 2006, when Lori said she could identify Larkin and that his photograph was in the bottom center position of the six-pack lineup she had been shown. Lori also told Detective Gordon that she had recognized Larkin's photograph but had been too frightened to identify him as her assailant.

Simon Cole, a latent print identification expert, testified that the error rate in fingerprint comparison identification is 0.8 percent. While Cole cited a lack of scientific standards in the field of fingerprint identification and referred to two studies indicating that such identifications are subjective, he conceded that there has never been a case of two people having the same prints and that there was no evidence indicating that

the examiners who analyzed the finger and palm prints lifted from the crime scene had mistakenly identified them as Larkin's.

Robert Shomer, an expert on witness identification, testified to his opinion that such identification procedures are unreliable. According to Shomer, cross-racial identifications are "far less accurate," and the likelihood of misidentifying a Black male such as Larkin is five times greater than a White male. Shomer also opined that the accuracy of a six-pack identification is undermined when the individual showing the photographs knows which one depicts the suspect. When presented with a hypothetical involving the facts of Lori's C.'s identification, Shomer believed that an identification made under such circumstances would be "negative for accuracy." Shomer also indicated that of the thousands of six-pack photographic lineups he had seen, at least 85 percent placed the suspect in the number 2 position (top center) or the number 5 position (bottom center).

Greg Marrero, Larkin's talent agent, testified that Larkin had appeared as a model in several commercial and print advertisements in 2001 and 2002, and had also appeared in two national television commercials: one for Nike that ran from January 2001 until February 2002, and another for Diamond Walnuts that aired between September 2002 and November 2004. It was stipulated that Larkin was in jail from September 21, 2004, until December 31, 2004.

D.

Rebuttal and Surrebuttal

Deputy District Attorney Rose Demattia, the prior prosecutor on the case, testified that she had spoken with Lori on several occasions prior to the preliminary hearing on September 15, 2005. Lori told Demattia she had seen the suspect in the six-pack but had been unable to identify him due to her emotional state. Lori asked Demattia if she could view the six-pack again, but Demattia refused. Demattia told Larkin's former attorney, James Blatt, that she was not going to call Lori as a witness at the preliminary hearing because she did not want to taint any subsequent identification at trial. Detective

Gordon testified at the preliminary hearing that Lori told her she could not identify Larkin's face and that she could not identify anyone from the six-pack.

DISCUSSION

I.

Evidence Code Section 1101, Subdivision (b)

Larkin contends the trial court abused its discretion in admitting other crimes evidence pursuant to Evidence Code section 1101, subdivision (b). He claims the incidents involving Kim W., Tara S. and Pamela D. were not sufficiently similar to the charged offenses, and that the evidence should have been excluded as more prejudicial than probative under Evidence Code section 352. We disagree.

Evidence Code section 1101, subdivision (b), allows evidence of uncharged similar acts when relevant to prove a fact other than criminal disposition, such as motive, intent, common plan, or identity. (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146; *People v. Ewoldt* (1994) 7 Cal.4th 380, 400, 402, fn. 6.) "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*Ewoldt, supra*, at p. 402.) "[M]otive 'may be established by evidence of "prior dissimilar crimes." [Citation.] "Similarity of offenses [is] not necessary to establish this theory of relevance" for the evident reason that the motive for the charged crime arises simply from the commission of the prior offense.' [Citation.] However, a nexus or direct link must still exist between the prior crime and the charged offense. [Citation.]" (*People v. Walker* (2006) 139 Cal.App.4th 782, 804.) The trial court's decision to admit evidence of other crimes for these purposes, which includes the determination that the evidence is more prejudicial than probative under Evidence Code section 352, is reviewed for an abuse of discretion. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1149.)

The trial court concluded that the prior uncharged offenses were relevant to prove Larkin had the requisite intent and motive in committing the burglary of Lori C.'s

residence and the attempted burglary of Robyn R.'s residence. The court reasoned: "[O]n the issue of intent, the court feels that the prior offenses do not have to be identical or even similar. They simply have to have a strong showing of an intent of a sexual nature. That is an intent to look in to view women that was sexually motivated in order to be highly relevant on the issue of whether or not there is a sufficient intent on count 2 [the burglary of Lori C.'s residence] and count 5 [the attempted burglary of Robyn R.'s residence]." The court concluded that the evidence was "highly probative on the issue of the intent and motive and that the probative value outweighs the prejudicial effect."

The court did not abuse its discretion in admitting the evidence of Larkin's prior uncharged offenses. While the court stated that the prior offenses "[did] not have to be identical or even similar" to prove intent, the court's subsequent comments indicate its recognition that the prior offenses were sufficiently similar to the charged crimes for the purpose of proving intent. In all five crimes, Larkin either entered or attempted to enter the homes of single women who were alone. Like the Lori C. incident, all three of the uncharged offenses occurred at night. In the Pamela D., Kimberly W., and Robyn R. incidents, Larkin was found at or near a window. The Tara S. and Lori C. incidents involved overt attempts to obtain sexual gratification without the victim's consent. These similarities are sufficient to support the inference that Larkin entered the residences of Robyn R. and Lori C. with the specific intent and motive to commit sexual assault. While Larkin characterizes the prior uncharged offenses as "mere peeping Tom conduct," the evidence supports the inference that Larkin intended to enter each of the victims' homes. Moreover, the court did not abuse its discretion in finding that the uncharged offenses were substantially more probative than prejudicial because, among other things, the evidence had a strong tendency to demonstrate Larkin's intent to commit sexual assault and was not stronger or more inflammatory than the evidence relating to the charged offenses. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 405.)

Even if the court erred in admitting the evidence of Larkin's prior offenses, the error would be harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v.*

Welch (1999) 20 Cal.4th 701, 749-750 [recognizing that erroneously admitted other crimes evidence is subject to *Watson* harmless error standard of review].) Larkin was acquitted of the attempted burglary of Robyn R.'s residence, and his palm print was found on the inside kitchen window sill of Lori C.'s apartment. This evidence is sufficient by itself to identify Larkin as the perpetrator of the crime against Lori C. (*People v. Andrews* (1989) 49 Cal.3d 200, 211, overruled on other grounds in *People v. Trevino* (2001) 26 Cal.4th 237.)

II.

In his opening brief, Larkin contends that his Sixth Amendment right of confrontation was violated when the trial court permitted former Cellmark employee Word to testify about DNA tests that she did not perform because the test results were "testimonial" as contemplated by *Crawford v. Washington* (2004) 541 U.S. 36. After Larkin filed his brief, our Supreme Court expressly rejected this claim. (*People v. Geier* (2007) 41 Cal.4th 555, 596-607.) Larkin acknowledges the Supreme Court's recent decision "disposed of" the claim, and that we are bound to follow that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III.

Denial Motion for Mistrial and Refusal to Instruct on Late Discovery

Larkin contends that the trial court erred in denying his motion for a mistrial based on the late discovery of Lori C.'s statements to Demattia. He also argues that the court erred in refusing to give a late discovery instruction. Neither claim has merit.

A.

Background

Lori testified during cross-examination that she was unable to identify Larkin from the six-pack photographic lineup, but that she had called Detective Clifford later that day and told him she was ready to make an identification. She also testified that Detective Clifford told her she should not return to the station, and that she had told the

previous prosecutor that she knew what her assailant looked like. At the conclusion of Lori's testimony, the current prosecutor indicated that he would speak with Detective Clifford and Demattia, the former prosecutor, about Lori's statements. The following day, the prosecutor relayed his interviews with Detective Clifford and Demattia to defense counsel. The prosecutor also agreed to have Detective Clifford and Demattia on call. Defense counsel moved for a mistrial on the ground that Lori's failure to identify Larkin was "a big deal." The court indicated it would address the matter later. Detectives Gordon and Clifford subsequently testified for the defense, and the prosecution called Demattia as a rebuttal witness.

After the prosecutor agreed to allow the defense to read part of Lori's preliminary hearing testimony to the jury as surrebuttal evidence, defense counsel asked the court to instruct the jury on late discovery "given the lateness . . . of these proposed statements by Lori, and then the subsequent investigation that lead [*sic*] to other late statements from Ms. Demattia regarding statements that have been made to her that she's known about for a long, long time that have never been turned over." The court denied the request.

Defense counsel moved for a mistrial again prior to closing argument. Counsel complained that Demattia had never told her Lori had repeatedly said she could identify the suspect in a six-pack lineup. According to defense counsel, she was "sandbagged" by the prosecution's decision to withhold the information that it had prevented Lori from making a subsequent identification. The prosecutor responded that Lori had told him about the six-pack on July 7, and that he told defense counsel about it the same day. The prosecutor also indicated Demattia told him that she had told James Blatt, Larkin's prior attorney, about the information, and that Demattia had made herself available to the defense. Defense counsel represented, however, that Blatt had denied that Demattia told him this. The court denied Larkin's motion for a mistrial without comment.

During jury deliberations, Larkin's attorney renewed her motion for a mistrial. Counsel asserted that Demattia's testimony was "substantially different" from what Demattia had told her. The prosecutor, who was present when defense counsel had spoken to Demattia, indicated that Demattia's testimony was consistent with her representations to defense counsel. The prosecutor specifically recalled Demattia saying that "she decided not to show [Lori] the six-pack because they didn't want to taint any subsequent physical lineup if one was requested or, you know, in-court identification or something to that effect." The court denied Larkin's motion for a mistrial, reasoning: "It does seem clear that, certainly, Ms. Demattia talked to Mr. Blatt and communicated something to this effect to him, since it would be highly unusual, I think, in a case like this not to call the victim at the preliminary hearing . . . . [N]ot only did [Demattia] testify that she told [Blatt] something about this, but she testified that it was in the context of an explanation as to why the victim would not be called at the hearing and, certainly, that makes sense. . . . [¶] Part of the problem, I think, stems from the fact that the differences in terms of the wording are extremely minor. It might have significant differences to the defense as to exactly how it's worded, but the differences in the wording itself are very minor . . . . [¶] But I was trying to listen carefully to when the court reporter read it back as to what Ms. Demattia actually said; and she said it in several different ways. I mean, at times she said she told me that she wanted to look at pictures because she thought she could identify somebody, and at other times she said she told me she wanted to look at the pictures because she had recognized somebody and she just hadn't told anybody. [¶] So she worded it in different ways during the course of her testimony here at trial. Whether all those different ways were said during her interview with [defense counsel] Ms. Many or not, I have no idea; but I don't think at this point in time that it is something that rises to a level of a mistrial if that, in fact, was the intent of the defense bringing it to the court's attention." The court also noted "that the defense counsel did call Detective Clifford during the trial, who substantially contradicted Lori's testimony about what she told him immediately afterwards. . . . [¶] So, certainly, defense counsel had corroboration

for that way of wording it. . . . [I]t's frustrating and it's a problem, but I don't think it rises to the level of mistrial given the entire state of the evidence at this time."

B.

Analysis

We review the trial court's denial of Larkin's mistrial motion for an abuse of discretion. (*People v. Valdez* (2004) 32 Cal.4th 73, 128.) A motion for mistrial should not be granted unless the defendant's "'chances of receiving a fair trial have been irreparably damaged.' [Citation.]" (*Ibid.*) The court plainly did not abuse its discretion here. As the court noted, Larkin presented evidence contradicting Demattia's testimony that Lori said she could identify the suspect. Larkin's identification expert also testified that Lori' late identification was not credible. In any event, Detective Gordon testified that Lori had told him a week before her testimony that she knew the suspect was depicted in the bottom center photograph of the six-pack, even though she had only seen the six-pack once in October 2004. In light of this evidence, the court did not abuse its discretion in concluding that Larkin's chances of receiving a fair trial had not been irreparably damaged by Demattia's testimony that Lori had said she could identify the suspect.

We also review the court's refusal to instruct the jury on late discovery for an abuse of discretion. (*People v. Lamb* (2006) 136 Cal.App.4th 575, 581.) As we have explained, Larkin was not prejudiced by the late discovery of Demattia's testimony because he was given the opportunity to present opposing evidence and was given access to all of the witnesses. Besides, Demattia also testified that she had told Larkin's prior attorney about Lori's statement, so it is unclear whether the prosecution even failed to comply with the discovery requirements of section 1054.5, subdivision (b). Accordingly, it cannot be said that the court abused its discretion in refusing to instruct the jury that the prosecution had violated its duty to provide reciprocal discovery.

IV.

Ineffective Assistance of Counsel

Larkin claims that his trial attorney provided constitutionally ineffective assistance by failing to call his former attorney James Blatt as a surrebuttal witness. According to Larkin, Blatt's testimony was necessary to rebut Demattia's testimony that Lori had told her she could identify the suspect from the six-pack. We disagree.

"A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. . . .'" (*People v. Holt* (1997) 15 Cal.4th 619, 703; *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.) "To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) We presume that counsel's conduct "'. . . falls within the wide range of reasonable professional assistance' [citations], and we accord great deference to counsel's tactical decisions. [Citation.] Were it otherwise, appellate courts would be required to engage in the "'perilous process'" of second-guessing counsel's trial strategy." (*People v. Frye* (1998) 18 Cal.4th 894, 979.)

Larkin's ineffective assistance claim fails on both prongs. Because the record is silent as to why counsel decided not to call Blatt as a witness, we cannot speculate about her reasons for doing so. (*People v. Bolin, supra*, 18 Cal.4th at p. 333.) Besides, there is no indication that Blatt would have been able to rebut Demattia's testimony. Counsel indicated that she may have misunderstood what Blatt had told her. Counsel may have also considered Blatt's testimony unnecessary in light of Detective

Gordon's preliminary hearing testimony, which was read to the jury, indicating that Lori said she would not be able to identify the suspect's face. Lori's testimony was also undermined by Detective Clifford, who testified that Lori never called him to say she was ready to make an identification as she had claimed. In any event, Larkin fails to demonstrate that he was prejudiced by his attorney's failure to call Blatt as a witness. Overwhelming, uncontradicted testimony independent of Lori's identification established that Larkin was her assailant. Because Larkin cannot show a reasonable probability that the result of the proceeding would have been different had Blatt been called to testify, his claim of ineffective assistance necessarily fails.

V.

Upper Term

Larkin also contends the trial court sentenced him to the upper term based on facts that were neither admitted by him or found true by the jury, in violation of *Cunningham v. California*, *supra*, 127 S.Ct. 856. We disagree.

At sentencing the trial court may consider the fact of a defendant's prior conviction without submitting that prior conviction to a jury. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 ["Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"].) The California Supreme Court has construed the *Apprendi* prior conviction exception broadly to include "not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*People v. Black* (2007) 41 Cal.4th 799, 819.) The court also concluded that "as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial."

(*Black, supra*, at p. 812.) We are bound by these pronouncements. (*Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at p. 455.)

In sentencing Larkin to the upper term, the court relied in part on the facts that Larkin was on parole at the time he committed the offense and had only been out of prison for three months. These facts are unequivocally "related" to the fact of Larkin's prior conviction, and are easily determined by an examination of the records of that conviction. Accordingly, the imposition of the upper term sentence was constitutionally authorized. (*People v. Black, supra,* 41 Cal.4th at pp. 812, 819.)

The judgment is affirmed.
NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Kathryne A. Stoltz, Judge

Superior Court County of Los Angeles

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant.

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