People v. Cheung

2005 | Cited 0 times | California Court of Appeal | September 26, 2005

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

OPINION

Defendant Vincent Wai Choy Cheung was convicted of two counts of first degree murder. The jury also found true the enhancement allegations defendant personally used a dangerous or deadly weapon to commit the murders and the special circumstance allegation of multiple murders. The trial court sentenced defendant to life without the possibility of parole plus one year for count 1 and the related enhancement and 25 years to life for count 2.

Evidence relied upon to convict defendant of the crimes charged included testimony about the methods used to analyze a large drop of blood found on defendant's car. Testing revealed the sample contained a mixture of deoxyribonucleic acid (DNA), which the prosecution's experts concluded belonged to defendant and the two murder victims. Defendant sought to have a hearing pursuant to People v. Kelly (1976) 17 Cal.3d 24 (Kelly) contending the methods used to extract and analyze DNA from a three-person mixture were not generally accepted within the scientific community. The trial court denied the request for a Kelly hearing on the basis that defendant's contentions raised issues going to the weight of the evidence and not its admissibility. Defendant argues the trial court erred in admitting the DNA evidence without conducting a Kelly hearing. He further contends the trial court erred by instructing the jury on motive pursuant to CALJIC No. 2.51. We disagree and affirm the judgment.

FACTS

Evidence of the Murders

On July 27, 1999, Guy Thomas Whitney and Lawrence James Wong were found murdered in Whitney's home in Irvine. Wong had been stabbed 25 times, and Whitney had been stabbed 36 times. The evidence indicated the men had been attacked as they lay asleep in bed together. Wong's body was found next to the bed in the master bedroom. Whitney's body was found at the bottom of the stairs, covered in blood. There was blood on the walls, ceiling, and banister. The house smelled like

gas, and the police discovered that the stove burners had been turned on, but no flame appeared.

Bloody footprints were found in the kitchen and other places in the house. An expert witness on footprint impressions testified that the footprints from the crime scene appeared to have been made from a socked foot. When compared with inked impressions of defendant's footprints, the expert found no inconsistencies with the bloody footprints found at Whitney's house. In the expert's opinion, defendant's "inked barefoot impression could have made the blood impressions found at the crime scene." The expert further concluded the inked impressions of Wong's former lover and the former lover's new partner did not match the impressions from the crime scene.

Defendant's car was searched for blood evidence, and a sample was collected from a large drop of blood found on the interior running board of the driver's door. Defendant had purchased the car from Whitney in February, and there was no evidence showing that Wong had ever been in the car. Forensic scientist Mary Hong performed the DNA typing of the sample and found that it contained a mixture of DNA from three people. Hong testified defendant and the victims, whose known blood samples were also typed, could not be excluded as the contributors. Forensic scientist John Hartmann independently looked at the data generated from the tests performed on the sample and similarly concluded defendant, Wong, and Whitney could not be excluded as contributors to the mixture.

Two bloody knives used to commit the murders were found in Whitney's kitchen. Evidence collected from the knives contained DNA mixtures consistent with both victims. DNA analyst Ruth Ikeda detected one DNA peak which was consistent with defendant's DNA profile in a sample taken from the handle of one of the knives, but it was such a low amount that she could not say for certain it was his. The DNA peak was also consistent with 50 percent of the population.

Defendant's Involvement With Whitney

Defendant and Whitney met in late December 1998 or early January 1999 and began dating. Whitney ended the relationship a few months later and began a new relationship with Wong soon thereafter. In early April 1999, defendant spoke of his relationship with Whitney while out to dinner with several friends. Defendant was upset about the break up because he had not had many loving relationships with men. One of the people at the dinner described defendant as "[h]eartbroken." But after a month or so, defendant stopped talking about Whitney to his friends.

On April 15, Bolen High called Whitney to wish him happy birthday. During their telephone conversation Whitney told High he saw a man named "Choy" outside of his house. Whitney became upset and said, "Oh my god, he's back again," and "I think he's trying to get into the house." Whitney told High this person had become obsessive, had been coming around, and had gotten into the house twice. High described Whitney's demeanor as "hysterical." Whitney told him the person was pounding on the doors and trying to get in. When High suggested Whitney call the police, Whitney

told him he did not want to do that because it was an embarrassing situation.

Delton Schilling visited Whitney several times between April and July. About three or four weeks before the murders, Schilling accompanied Whitney home, and Whitney had Schilling get out of the car as he drove into the garage to make sure no one followed them inside. Whitney pointed out boxes of items in the garage that were gifts from a Chinese man.

In early May, Nina Rasmussen helped Whitney clear his garage of gifts received from defendant. According to Rasmussen, "Half the garage was filled with delivery boxes, Fed-Ex, mail, pouches, all different sizes." She estimated they opened a total of 50 to 60 packages that day. Rasmussen knew Whitney had given defendant a garage door opener and later took it back. She further testified Whitney used to keep a spare key to the house above an outdoor light, but "did away with that key" and changed his locks in June.

Whitney's cleaning lady usually used a key to enter the home through the front door. About three weeks before the murders, she came in unexpectedly through the garage. Whitney "turned yellow" and looked "really scared," but then said, "Oh, that's you," when he realized it was her.

Defendant's Conduct Leading Up to and After the Murders

Attorney James Rosenberg represented defendant on a couple of shoplifting charges and also in an immigration matter. Defendant had several petty theft convictions, and in June he was ordered removed from the country. Defendant failed to appear in a criminal proceeding on July 15, and a bench warrant had been issued for his arrest.

In July, without explanation, defendant sent an old friend, Otto Rotach, a box containing all the letters Rotach had written to him over a span of 20 years. Defendant also sent a good-bye letter to his sister that month.

On July 26, defendant mailed a package to Phanthong Mesomsub which included mementos of their friendship, defendant's green card, and an envelope marked "top secret" and "my final words and instructions." That same evening Mesomsub and Scott Zimmerman returned from a trip. Defendant had arranged to meet the couple at the airport around 10:00 p.m. to have a good-bye dinner before being deported. He failed to show up, but Zimmerman testified this was not out of character for defendant. Mesomsub later called defendant's home, but no one answered.

Alex Varden saw defendant around 11:00 a.m. on July 27. Defendant stopped by to say he was going to Hong Kong for good. An hour earlier, defendant had called an old friend, Robert Furman, to arrange a lunch date. When Furman suggested they meet the next day, defendant told him, "I won't be here tomorrow. This is the last time you may ever see me." During lunch, defendant told Furman about his relationship with an older man who did not want to see him anymore, but then said it had

ended four months earlier and was by now forgotten. Furman described defendant's overall demeanor during the lunch as "upbeat." Around 6:00 p.m., defendant checked into a motel near his home and subsequently tried to commit suicide.

The next day, defendant called Mesomsub and told him he had been outside Whitney's house during the murders and heard Whitney's voice. But defendant also told Mesomsub he had been home asleep during the murders. In a recorded call, defendant left Mesomsub a message saying, "I did it." In a later telephone conversation, Mesomsub asked defendant what he meant by that statement and defendant replied that he had tried to commit suicide. In a second recorded conversation, defendant told Mesomsub he was being held on a parole violation and had not yet been charged with the murders. Defendant told Mesomsub, "I know who did it but I didn't do it." When Mesomsub asked him who did it, defendant told him, "My partner."

When defendant was arrested on July 29, the police noted he had a superficial laceration on the center of his chest less than an inch long. Defendant could not recall how he got it. He told the police he was home asleep on the night of July 26 and acted surprised when they told him about the murders. Defendant's mother, with whom he lived, told the police she had not seen him for two or three weeks. Defendant claimed he last saw Whitney in April and that he waited outside Whitney's home on his birthday until Whitney returned and then followed Whitney's car into the garage.

Pretrial Proceedings Relating to the Admissibility of the DNA Evidence

In conjunction with the preliminary hearing, the prosecutor sought to admit DNA evidence showing the sample taken from the large drop of blood found on the driver's side running board contained a three-person mixture. Defense counsel argued that before such evidence could be admitted, the court needed to conduct a hearing under Kelly, supra, 17 Cal.3d 24 to determine whether the methods used to extract the DNA from the sample were generally accepted within the relevant scientific community and, if they were, whether the accepted methods had been followed.

At the end of the preliminary hearing, the magistrate "admit[ted] all of the crime lab testimony over foundation objection of the defense, number one, and number two, [found] that proper scientific procedures were followed for purposes of the prong-three Kelly analysis." (Italics added.) Noting that analysis of the results of the DNA tests "could very well be a situation where reasonable minds can differ," the magistrate found the issue "really goes to the weight of the evidence as opposed to [its] admissibility. In other words, th[at] is something ultimately for the trier of fact to determine."

Before trial, defense counsel moved to set aside the information, in part, on the basis that the DNA evidence should not have been admitted at the preliminary hearing without a full Kelly hearing. The trial court denied the motion stating, "I think the issue about whether or not there's a Kelly[] requirement, I don't think that it is really an issue about Kelly[]. It is just a matter of what weight to attach to the interpretations that individuals reach." (Italics added.)

Defense counsel later objected to "any testimony regarding the DNA . . . complex mixtures" as previously argued at the preliminary hearing and on the pretrial motion. The trial court overruled the objection, indicating it had reviewed a recent case on the issue, People v. Smith (2003) 107 Cal.App.4th 646, which had allowed similar evidence to be admitted.

DISCUSSION

The Trial Court Did Not Err in Admitting the DNA Evidence

1. A Hearing Under Prong One of Kelly Was Not Required

Defendant argues the trial court erred by admitting expert testimony regarding the DNA evidence derived from tests conducted on a sample taken from a large blood drop on the driver's side running board of defendant's car. He contends the court should have conducted a hearing pursuant to Kelly, supra, 17 Cal.3d 24 to determine whether the methods used to obtain the DNA evidence were reliable and generally accepted within the relevant scientific community.

"[A]dmissibility of expert testimony based upon the application of a new scientific technique traditionally involves a two-step process: (1) [T]he reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. [Citations.] Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. [Citations.]" (Kelly, supra, 17 Cal.3d at p. 30.)

"The general acceptance issue is a mixed question of law and fact. [Citations.] When the trial court concludes that a new scientific technique is generally accepted in the scientific community, we independently review that decision. [Citations.]" (People v. Smith, supra, 107 Cal.App.4th at pp. 666-667.) "`"[C]ase-by-case adjudication as to the `general acceptance' prong of the Kelly test is not required once the scientific technique in question has been endorsed in a published appellate opinion. [Citation.]" [Citation.]' [Citation.]" (Id. at pp. 665-666.)

In Smith, the court concluded "that the use of polymerase chain reaction and short tandem repeats technology to analyze a mixed-source forensic sample is neither a new or novel technique or methodology." (People v. Smith, supra, 107 Cal.App.4th at p. 665.) The court further stated, "any challenges regarding errors in multiple sample [DNA] analysis should be directed to the weight of the evidence and not its admissibility." (Id. at p. 672.)

The Attorney General argues the trial court properly overruled defendant's objections to the admission of DNA evidence because the scientific techniques relied upon by the prosecution's experts were endorsed in Smith. But defendant contends the ruling in Smith does not apply to the methods at issue in this case because Smith involved a two-person mixture. Specifically, he argues

"the analysis in this case, and statistical calculations based on that analysis, of a complex mixture, with three or more contributors, are significantly different from the simpler, two contributor mixture involved in Smith."

Expert testimony presented during the preliminary hearing showed the questioned sample collected from the driver's side running board of defendant's car was tested by methods previously determined in Smith to be reliable and generally accepted within the relevant scientific community.

Mary Hong, a forensic scientist with the Orange County Sheriff's Department's crime lab, testified the crime lab uses polymerase chain reaction (PCR) technology to type and analyze DNA. In this case she used the Profiler Plus system to type the DNA. The Profiler Plus system "looks at nine DNA markers plus the sex marker, amelogenin, all at once in one sample." After the DNA is extracted from the sample and tested to see if the extraction was successful, it is amplified and copied using the Profiler Plus system. A capillary electrophoresis machine is used to separate the DNA within the sample according to size so the forensic scientist can see the DNA.

Hong explained: The capillary is "a little thin column that takes one [DNA] sample at a time. It separates the DNA based upon size, and then . . . it moves through [a] column and . . . goes by [a] little window where a laser light hits it. That captures and then . . . excites this little fluorescent tag. And that's captured by a camera, and th[e] electronic signal is sent through the computer. [The analyst] see[s] it on a computer screen as a [DNA] peak."

The DNA peaks viewed on the computer screen are compared to an allelic ladder which "is a set of samples that has all of the known common peaks for each DNA marker . . . ." The peaks in the questioned sample are then compared to the known peaks in the allelic ladder. To avoid errors, two analysts independently look at the peaks and determine the results. But the second analyst looks at what the computer did and decides if the computer is correct.

Samples from defendant and the victims were also tested and typed in the same manner. Comparisons were later made between the standards for defendant, Whitney, and Wong and the questioned sample to see if any of the three individuals could be eliminated as contributors to the mixed-source sample. Hong found that none of them could be eliminated. John Hartmann, the second analyst, independently viewed the data and made the same conclusion.

The methods used to obtain the DNA evidence in this case paralleled those used in Smith to test a two-person mixed source sample. Following a 19-day hearing, the trial court in Smith found "the mixed source sampling of [DNA] testing had gained general acceptance in its field pursuant to prong one of Kelly." (People v. Smith, supra, 107 Cal.App.4th at p. 651.) Smith contains a thorough discussion of expert testimony regarding the technology employed to extract and type DNA and need not be repeated here. It is evident from our review of Smith and the record in this case that defendant's argument that a mixed source sample with three contributors constitutes a "new"

scientific method is simply unfounded.

During the preliminary hearing, Hartmann testified when a mixed source sample is being analyzed, the analyst must consider that smaller alleles from one source may be masked by larger alleles from another source and not observed because they appear at the same place. A "`stutter'" "`is a phenomenon that occurs unpredictably and can mask small alleles or actually be an allele that occurs in a stutter position.'" (People v. Smith, supra, 107 Cal.App.4th at p. 657.) Thus, as Hong explained, the analyst decides whether to call a stutter a DNA peak or a stutter peak. As the magistrate noted, defense expert Dr. Libby's criticisms in this regard had to do with the analyst's ability to interpret the data generated by the tests, rather than with the testing methods themselves. Those methods are the same regardless of the number of contributors to the sample being tested. And "any challenges regarding errors in multiple sample [DNA] analysis should be directed to the weight of the evidence and not its admissibility." (People v. Smith, supra, 107 Cal.App.4th at p. 672; see also People v. Henderson (2003) 107 Cal.App.4th 769, 773 ["the added complication of analyzing a multiple source DNA sample did not affect the admissibility of the evidence, but, instead, was a consideration for the jury in weighing the evidence and determining the credibility and accuracy of the DNA test results"].) Thus, because Smith endorsed the scientific technology at issue here, a hearing under the first prong of Kelly was not required.

2. The Correct Procedures Were Followed By the Prosecution's Analysts

Defendant further argues incorrect procedures were used to analyze the questioned sample, thus failing to satisfy the third prong of Kelly. His argument is aimed at Hartmann's use of Asian databases to make population frequency calculations. Defendant contends "the specific sources of the Hong Kong and Singapore data bases . . . were not . . . identified, and no effort was made to meet these foundational requirements for the use of a population frequency data base."

We agree with the Attorney General that defendant waived this contention by failing to raise it earlier. (Evid. Code, § 353, subd. (a).) The time to have challenged the validity of the Asian databases relied on by the prosecution's expert witness was at the trial court level.

Defendant makes the further assertion that incorrect procedures were used in making the statistical frequency calculations. The trial court implicitly adopted the magistrate's finding that correct procedures were used to calculate the population frequency relating to each database. We review the trial court finding for abuse of discretion. (People v. Reeves (2001) 91 Cal.App.4th 14, 47.)

Defendant's reliance on People v. Pizarro (2003) 110 Cal.App.4th 530 is misplaced. The foundational requirement at issue in Pizarro related to the prosecution's selection of a single ethnic database due to the defendant's ethnicity rather than a more unbiased approach based on evidence of the perpetrator's ethnicity. (Id. at pp. 547-548.) Unlike Pizarro, statistical frequency calculations in this case were performed by using several ethnically diverse population databases.

Hartmann did not make any assumptions about the DNA types of the potential contributors to the questioned sample in making the likelihood ratio calculations. He testified that he used several databases to calculate the population frequencies, including African-American, Caucasian, Southeast Hispanic, Southwest Hispanic, and "data bases from laboratories in Hong Kong and in Singapore with Chinese frequencies." Hartmann did not know whether the Singapore database had been checked statistically for equilibrium, but the Hong Kong database had been.

As to the various populations, Hartmann testified the calculations were used to determine "the probability of choosing a person at random and their profile being consistent with being one of the major contributors" to the questioned sample. Hartmann testified that, taking into account "all [of] the feasible genotypes for being a major contributor, neither Cheung nor Wong was eliminated." Hartmann likewise testified Whitney could not be excluded as the minor contributor. While defendant's expert challenged Hartmann's determination of the major and minor contributors to the sample, Libby did not otherwise take issue with the calculations performed by Hartmann.

The California Supreme Court approved of the use of statistical calculations in DNA profiling in People v. Soto (1999) 21 Cal.4th 512. There, the court noted that laboratories doing DNA testing "do not use a single interracial United States database, presumably because the incidence of random mating between members of the different racial categories is deemed low enough to preclude use of the product rule to calculate an overall frequency statistic for the United States population as a whole." (Id. at p. 526, fn. 18.) The Soto court cited the National Research Council (1996) The Evaluation of Forensic DNA Evidence report's recommendation that "`[i]f the race of the person who left the evidence-sample DNA is known, the database for the person's race should be used; if the race is not known, calculations for all racial groups to which possible suspects belong should be made. . . .'" (People v. Soto, supra, 21 Cal.4th at p. 532, fn. 27.)

As the Soto court explained: "The question properly addressed by the DNA [probability] analysis is therefore this: Given that the suspect's known sample has satisfied the `match criteria,' what is the probability that a person chosen at random from the relevant population would likewise have a DNA profile matching that of the evidentiary sample? That probability is usually expressed as a fraction-i.e., the probability that one out of a stated number of persons in the population (e.g., 1 out of 100,000) would match the DNA profile of the evidentiary sample in question. A greater probability, that is to say, a fraction with a smaller denominator (e.g., 1 out of 10,000), would tend to favor the suspect by increasing the probability that one or more other persons has a DNA profile matching the evidentiary sample." (People v. Soto, supra, 21 Cal.4th at p. 523, fn. omitted.)

These are precisely the type of calculations performed by the prosecution's expert witness Hartmann. In sum, the trial court did not abuse its discretion in determining that correct procedures were used by the prosecution's expert to perform the statistical frequency calculations.

The Trial Court Properly Instructed the Jury on Motive With CALJIC No. 2.51

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The trial court instructed the jury on the issue of motive pursuant to CALJIC No. 2.51 as follows: "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty." Defendant argues it was error to give CALJIC No. 2.51 because the instruction lessened the prosecution's burden of proof by allowing the jury to consider the presence of motive as tending to show guilt.

A similar argument was made and rejected in People v. Petznick (2003) 114 Cal.App.4th 663. There, the court concluded, "Since CALJIC No. 2.51 very plainly establishes that motive is not an element of the crimes, it is hard to imagine how a jury might conclude that motive alone would be sufficient to establish guilt. In light of the instructions as a whole it is not reasonably probable the jury would have understood the instruction as defendant urges." (Id. at p. 685.)

The same reasoning applies here. The jury was instructed on the concurrence of act and specific intent (CALJIC No. 3.31) and the elements to be proven to convict defendant of murder (CALJIC No. 8.10). The instruction on motive, viewed in context with these other instructions, in no way suggested that evidence of defendant's motive to commit the murders relieved the prosecution of its burden of proof on the elements of the crimes charged.

DISPOSITION

The judgment is affirmed.

WE CONCUR: MOORE, J., FYBEL, J.