IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PEOPLE OF THE STATE OF CALIFORNIA,	)	Court of Appeal No.
	)	B299405
Plaintiff and Respondent,	)	
	)	
v.	)	Superior Court No.
	)	YA095119-01
TREVEON DESHAWN HARRIS,	)	
	)	
Defendant and Appellant.	)	
_____	)	

FROM THE JUDGEMENT OF THE SUPERIOR COURT LOS ANGELES
THE HONORABLE ALAN B. HONEYUCUT JUDGE, PRESIDING

APPELLANT'S OPENING BRIEF

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INTRODUCTION

In the early morning hours of April 20, 2016, Alex Anene died of multiple gun shot wounds inflicted in the subterranean laundry room of his apartment building. Appellant, who also suffered bullet wounds to the arm and wrist was said to be the shooter. Moments earlier, appellant had knocked on an upstairs door in the apartment complex in an unsuccessful attempt to find his "baby mamma" and was on his way out of the building. It was undisputed that appellant and Anene did not know each other. The motive attributed to appellant was that he was angry that his "baby mama" was not at home and took his anger out on Anene. The prosecution's theory was that appellant's wounds were accidentally self inflicted during a struggle over the gun. The defense theory was that a third person shot both Anene and

appellant. This brief argues that, as developed at the motion for new trial, the defense counsel should have introduced expert evidence in support of the defense theory.

STATEMENT OF APPEALABILITY

This appeal is from a final judgment following a jury trial and is authorized by Penal Code section 1237, subdivision (a).

STATEMENT OF THE CASE

An information filed August 23, 2017, alleged in Count 1 that on or about April 20, 2016, appellant murdered Alexander Anene in violation of Penal Code section 187. (2 CT. 190.) It was also alleged that appellant personally discharged a firearm causing death within the meaning of Penal Code section 12022.53 subdivision (d). (2 C.T. 191.)

Appellant was found guilty on Count 1 of murder in the first degree and the gun allegation was found to be true. (2 C.T. 303.) Appellant's motion for new trial was denied. (2 C.T. 360.) The court declined to strike that firearm enchantment and sentenced appellant to 25 years to life, plus 25 years to life for the firearm enhancement for a total term of 50 years to life. (2 C.T. 361.) He was given credit for 914 actual days. (2 C.T. 3953.) Appellant filed a timely notice of appeal. (2 C.T. 363.)

STATEMENT OF FACTS

Prosecution's Evidence

On April 20, 2016, Yvette Hamilton, was living at 1706 West 125th, Apartment 12, the second door to the right on the first floor with her two children and a foster sister named Alexandra

Davis who had been living with her about a month. (3 R.T. 989-990.) Alexandra had a son, with appellant . (3 R.T. 990.) Appellant came to her apartment and knocked on the door at about 1:45 am. that morning. (3 R.T. 993.) Hamilton had met appellant just once prior to that day. (3 R.T. 963.) Only Hamilton and her son were there. (3 R.T. 992.) She thought that appellant was there to drop off Alexandra's baby but she not see the baby. (3 R.T. 992.) Appellant asked for Alexandra in a normal way but his body language was unusual. (3 R.T. 992- 993.) Hamilton said Alexandra was not there, that she had spent the night out and appellant got a little upset. (3 R.T. 994, 1033.) He kind of jerked and said "okay man." (3 R.T. 1033-1034.) She asked if he wanted her to take the baby but appellant did not answer and walked away from her door. (3 R.T. 994.-995, 1041.) A couple of seconds to a couple of minutes later, the time it would take get down the stairs, she heard about five gunshots directly underneath her. (3 R.T. 967.)

Hamilton called 911. (3 R.T. 997.) Her 911 call was played for the jury and a transcript provided to the jury (People's 6 and 7. (3 R.T. 998-999.) All Hamilton said to the operator was that she heard sour gunshots at 125th and Western and a car going away; she would not leave her name or phone number. (2 C.T. 295, 3 R.T. 1001.)

Hamilton recalled being at appellant's house once when he was not home; she went there to get her hair done by his girlfriend. (3 RT. 1001.-1017, 1019.) At that time she saw a gun in appellant's room. She doesn't remember what the gun looked

like only that it was dark in color. (3 RT. 1001.-1017, 1019.).

At the time of the shooting, Samuel Coleman was living in Apartment 8. (4 R.T. 1504.) At approximately 1:00 a.m. he heard one gunshot, followed by a few seconds pause and then three or four more gunshots that did not sound any different. (3 R.T. 1505, 1508.) The shots sounded like they came from directly under the apartment building. (4 R.T. 1505.)

Monica Anene, the victim's mother, was living with her son in Apartment 6. (4 R.T. 1210.) Their apartment was on the first floor above the parking garage. (4 R.T. 1271, 1272.) When she went to bed about midnight Anene was was still doing his laundry. (4 R.T. 1272, 1284-1273.) At some point, she heard three shots that woke her up; they sounded a bit muffled. (3 R.T. 1273. 1290.) She sat up in bed and after a short gap, she heard six loud blasts. (3 R.T. 276.) Monica testified that her son was a peaceful non violent man whom she had never seen with a gun. (3 R.T. 1276,1293.)

At approximately 2:00 a.m. that morning Deputy Eric Chappel responded to a radio call that shots had been fired. (4 R.T. 1602-1603.) He did not go inside the apartment complex but checked the area of the street and intersection. (4 RT. 1608.) At approximately 4:20 am. he responded to another 911 call which was played for the jury and a transcript provided. (4 R.T. 1809, 1810, People's 28, 28 A.) In the call, another resident, named Adetunji, reported that he had just come home from work and found an unconscious man covered with blood on the floor in the subterranean laundry room. (2 C.T.293, 3 R.T. 904, 4 R.T.

1810, 4 R.T. 1621-1623.)

Other deputies were already there when Chappel arrived and he helped them contain the scene. (4 R.T. 1609-1610.) Chappel directed Deputy Huynn to set up the major incident log. (4 R.T. 1620.) In his report he wrote that Hamilton said Harris arrived at 2:00 a.m. not 1:45. (4 R.T. 1625.) He wrote the report at the scene within two hours of talking to her. (4 R.T. 1625.) He used his notes to write the report but disposed of them after he wrote it. (4 R. T. 1626.) Deputy Diaz spoke with five residents. (4 R.T. 1807.) To his knowledge no one reported hearing any arguments, threats or loud words. (4 R.T. 1808.)

At approximately 8:00 a.m, Detective Karen Shonka from the Los Angeles County Sheriff's Department, responded to the crime scene. (3 R.T. 903-904.) Her partner Detective Hosten arrived shortly, thereafter. (3 R.T. 927.) Officers were there when Shonka arrived and the crime scene was marked off. (3 R.T. 902.) Shonka went inside the laundry room and viewed the body. (3 R.T. 908.) A gold colored broken chain bracelet was laying in the hallway. (3 R.T. 910, 966.) The victim had gunshots to his leg, right wrist and thumb area. (3 R.T. 912.) Expended cartridge cases were found in the areas of the laundry room as well as blood spatter. (3 R.T. 912.) Shonka had a forensic identification specialist photograph and sketch the scene, and had criminalists from the biology section collect blood samples. (3 R.T. 913.) [1] She

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[1] Deputy Sheriff Ray Davidson from the scientific services bureau arrived at 10:30 a.m, did the crime scene sketch and the evidence

had firearms examiners help with the ballistic evidence. (3 R.T. 913.) The victim's face was next to the south wall of the hallway and there were two bullet strikes to the wall. (3 R.T.914-915.) The victim had wood chips in his hair. (3 R.T. 914-915.) A trail of blood drops led up the driveway leading away from the laundry room to the street and down the street in a north east direction. (3 R.T. 917-919.)

There were nine expended cartridge casings all .40 caliber Smith and Wesson but they were composed of three different brands. (3 R.T. 950.) Some had a Winchester head stamp which were nickle and another type were brass. (3 R.T. 953, 4 R.T 1528.) There were also some with a head stamp that said C.D.C. (3 R.T. 952.) It is common especially in gang situations to see a gun loaded with cartridges from different manufacturers; it is referred to as a "ghetto load." (3 R.T. 979.)

No GSR testing was requested due to the likely contamination of everything in the room. (3 R.T. 966.) Seven of the casings were submitted for biological examination because they had apparent blood on them. (4 R.T. 1524.) Shonka's first impression was that the bracelet was pulled off during a struggle as opposed to being struck by a bullet fragment because it was broken at the clasp. (3 R.T. 967.) Shonka attended the autopsy but does not recall a conversation wherein she told Ms. Krokauger, whose specialty is biological evidence, not to examine

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legend. (4 R.T. 1581, 1589-1605.)

the victim's pants. (3 R.T. 971-972.)

Shonka talked with Yvette Hamilton, who lived above the laundry room. (3 R.T. 921.) Hamilton say that she heard the shots five seconds after she closed the door. (4 R.T. 1512.) She never said "like a minute." (4 R.T. 1515.) A video clip, (Defense A) shows the stairs and Hamilton's door a the top of the stairs. (3 R.T. 925.) It takes approximately 30 seconds to a minute, at a normal walking pace, to get from Hamilton's apartment number 12 to the bottom of the staircase. (3 R.T. 925.) Shonka knew there were multiple shell casings before she spoke with Hamilton and noted that Hamilton said she only heard five shots. (4 RT. 1515.) Her notes indicate that she interviewed Hamilton at approximately 8:50 a.m. (4 R.T. 1511.) Prior to speaking with Hamilton she had spoken with the victim's mother and family and the apartment manger, Griselda. (3 R. T. 927, 3 R.T. 1287-1288.)

Refreshing her memory with the major incident reports Shonka acknowledges that Deputy Ortiz interviewed six witnesses. (3 R.T. 930.) She does not recall interviewing Martha Carillo, Booubecar Quedraogo, Bara Meoup, Samuel Coleman, Brandon Williams or Vincent Awosika. (3 R.T. 943.)

Dimitri Ramirez, a fire fighter specialist from Station 159 in Gardena, arrived at the scene and walked into the laundry room where they were told the victim was on the floor. (4 R.T. 1817.) They did not move the body. (4 R.T. 1819.) He was still warm and had an agonal type of breathing but was pronounced dead at the scene. (4 R.T. 1822, 1818.)

Given the trail of blood drops leading away from the complex, Shonka called "Med Alert" to see if any gunshot victims were in the area and received a notification from St Francis Hospital that appellant had been there with a gunshot wound at approximately 2:00 a.m. that morning but left without being treated. (3 R.T. 919.) She then learned that he had subsequently been treated at California Dignity Hospital Medical Center in Los Angeles. (3 R.T. 919.)

On April 20, 2016, Dr. Ryan Raam was working in the emergency room at California Hospital Medical Center when appellant arrived at 5.12 a.m. (3 R.T. 1210-1210, 1223.) Appellant had a gun shot wound to his arm that traversed a long distance and was interesting from a medical perspective. (3 R.T. 1211.) Appellant had wounds to his left arm and an x-ray showed a bullet in his hand. (3 R.T. 1211.) There were two wounds to the back of the forearm, one near the wrist which is dime size and one further up which is larger. (3 R.T. 1216.) Muscle and tendon were visible in the larger wound. (3 R.T. 1216.) Raam copiously irrigated the wound, loosely stitched it up and gave him antibiotics and pain medications. (3 R.T. 1214.) Raam is not a ballistic expert but guesses that both wounds were likely caused by the bullet that was still in appellant's hand. (3 R.T. 1221.) His notes do not indicate that he observed any dark matter or soot like matter inside the wound. (3 R.T. 1228.) The medical records were introduced into evidence including appellant's initial statement " I was shot." (5 R.T. 2738.)

Appellant was arrested that evening outside of his

residence. (3 R.T. 926.) Shonka and her partner subsequently conducted a search of the defendant's residence which he shared with his mother Yolanda. (3 R.T. 926, 3 R.T. 1311-1312 .) The officers also found a box of .40 caliber Aguilla Amunition, the same caliber as used in the murder in appellant's bedroom closet. (3 R.T. 1311-12, 1315, 4 R.T. 1551-1553.) A black T-shirt and sweat pants which appeared to have blood on them were recovered from the outside trash can. (3 R.T. 1321, 4 R.T. 2484, 4 R.T. 1539, 1545, 1550.)

The police also seized a photo of appellant wearing the bracelet found at the scene. (3 R.T. 1328.) Shonka requested GSR testing of the clothing but it was not done. (4 R.T. 1550.) After the officers had already conducted a search of appellant's bedroom, Shonka seized a pair of Adidas. (4 R.T. 1549-1550.) A cell phone was recovered. (3 R.T. 920,4 R.T. 1568.) The phone was booked into evidence and sent to a tech crew to be downloaded. (3 R.T. 921.) The clothes appellant was wearing when he was arrested were also booked into evidence including a pair of Nike Shoes. (4 R.T. 1546.) Shonka observed the injuries on appellant's left forearm, a wrist and hand. (3 R.T. 1322.) She also looked at appellant's forearm and hand when he was at the police station. (3 R.T. 975.)

Andrea Davis, a senior criminalist for the Los Angeles County Sheriff's Department works in the firearms identification unit. (4 R.T. 1827.) Davis responded to the laundry room whch was connected with the underground parking garage and discovered fired cartridge casing, fired bullets and bullet

fragments. (4 R.T. 1829.) She also observed and documented several bullet holes and bullet impacts within the location. (4 R.T. 1829.) Among the fired bullets , which had three different head stamps, there were both jacketed, full metal jacket, and hollow point bullets. (4 R.T. 1861-1862.) She determined that all were fired from the same weapon and were all .40 caliber. (4 R.T.1850 1862.) The Aguila ammunition in the box was also .40 caliber and could be fired by the same gun as that used in the murder. (4 R.T. 1863.)

Davis observed four bullet holes and one bullet impact. (4 R.T. 1873.) With respect to the two bullet holes, depicted in People's Exhibit 36 D in the face of the washing machine each entered in an eastbound and downward direction, but one came from the northeast and one from the southeast. (4 R.T. 1874-1875.) She was not able to determine the pitch because there was no way to insert and support a trajectory rod for an angle determination. (4 R.T. 1875.) The fired bullet or bullet fragments and lead core within the washing machine could be attributed to at least one or two bullets and the fragment within the plywood and the drywall could be attributed to one or two. (4 R.T. 1874.) She collected two lead cores one behind the panel in the washing machine and one in the middle of the laundry room. (4 R.T. 1873.) She is not able to determine a height or location of the muzzle nor the position of the decedent at the time either shot was fired. (4 R.T. 1883.)

Deputy Sheriff Steve Wolum was assigned to the chemical processing unit at the Sheriff's crime lab. (4 R.T. 2108.) He

processed the expended cartridge cases for fingerprints. (4 R.T. 2110.) Nine were submitted but he only tested seven because two of them appeared to have biological material on on them and were wrapped in tissue. (4 R.T. 2111.) He reasoned that it would be better to have them specifically tested for DNA or other biological evidence. (4 R.T. 2111.) He was not able to lift any prints off the cartridges he tested which was not suprising as he has never been able to develp useable print off a fired cartridge. (4 R.T. 2112..)

Joseph Cavaleri works at the Los Angeles Sheriff's Department in the crime lab and is assigned to the trace evidence section. (4 R.T. 2123.) Cavaleri did not work on this case but testified as an expert about gunshot residue [GSR] (4 R.T. 2123) Given a hypothetical based on the facts of this case he opined that the landry room would be considered a gunshot residue environment. (4 R.T. 2127.) He would have rejected the metal bracelet to be tested for GSR because the bracelet would have gunshot residue from being in the laundry room. (4 R.T. 12.) He would not test anything in the room for GSR because anything could have GSR on it and no information would be learned from the testing. (4 R.T. 2129.)

Llene Krokaugger, a senior criminalist in the Sheriff"s crime lab is assigned to the biology section as well as crime scene investigation. (4 R.T. 2428.) She examines evidence for biological fluids. (4 R.T. 2429.) Krokaugger responded to the crime scene on April 20, 2016, because she was told by her supervisor that there were some biological fluids that needed to be documented and collected. (4 R.T. 2129.) White placards designated the evidence

she was going to be collecting. (4 R.T. 2430) Krokaugger recognizes photos of blood stains on the ground a blood stain at the top of the driveway leading to the garage of the apartment complex. (4 R.T. 2433.) She placed small red cones to show where the blood stains continued in a trail. (4 R.T. 2434.)

Krokaugger was able to generate DNA profiles from reference samples she was given[2] for both the victim and appellant and compared them against items of evidence she collected. (4 R.T. 2442, 2445) Anene is a major contributor to People's 38 A, item 1, and 21 B, located with the laundry room.) (4 R.T. 2445, 2447.) Appellant is a major contributor to samples from the beginning, middle and end of the blood stains. (4 R.T. 2450.) People's 39 A, item 2, and People's 21 A-, item 2, People's 40-A, item 3, People's 41 A item 4 and People's 42-A and People's 21-A, item 5, the blood stain on the west door in the laundry room hallway. (4 R.T. 2448-2449, 253.) Item 6 is a blood stain on the right heel of Anene and the profile is a mixture consistent with at least two contributors with Anene as the major contributor and no conclusion can be drawn as to the minor contributors. (4 R.T. 2454.) People's 45, the bracelet which was scuffed up and dirty was swabbed for touch

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[2] It was stipulated that Brittan Ciullo would testify that she is criminalist in the Los Angeles County Office of the Coroner and that on May 4, 2016 she took a heart blood sample from the victim and prepared a blood stain cared wth the sample. (4 R.T. 2440.) It was also stipulatd that Detective Derek White would testify that he took a buccal swab from appellant. (4 R.T. 2441.)

DNA. (4 R.T. 2456- 2457, 2469.) Appellant is a major contributor to the touch DNA found on the bracelet and Anene is included as a possible minor contributor. (4 R.T. 2457.) She did not examine the clasps for DNA or gunshot residue. (4 R.T. 2472.) She does not know whether the touch DNA was tissue, or any particular bodily fluid. (4 R.T. 2468.) When a person suffers a gunshot wound some of the blood can be expelled from the wound in the form of a fine spray which could have accounted for Anene's DNA on the bracelet. (4 R.T. 2462.) No one at the scene told her that the man who had been in the hallway and found Anene had tried to get to wake him up. (4 R.T. 2466.) She never received any information from the coroner about fingernail scrapings. (4R.T. 2474.) Shonka told her that Anene's pants did not need to be analyzed. (4 R.T. 2447.) She does not recall receiving any information that Anene struggled with the person who shot him. (4 R.T. 2479.)

Appellant's T-shirt and sweat pants tested positive for blood (4 R.T. 2484.) Appellant was the major contributor of the blood stain on the left front thigh and the right front thigh. (4 R.T. 2484, 2485.) The stain on the back of the shirt was a mixture of at least two contributors, the major one being appellant. (4 R.T. 2486.)

Peter Anderson, an investigator with the Los Angeles County District Attorney's Office attempted to locate Alexandra Davis, a witness in this case. (3 R.T. 12051296.) He was never, however, able to successfully serve her with a subpoena. (3 R.T. 1295.)

Martina Kennedy, from the coroner's office, did the autopsy. 5 R.T. 2511. Anene was 5'7" inches tall and weighed 173 pounds. (5 R.T. 2511.) The cause of death was multiple gunshot wounds. (5 R.T. 2510.) He had six gunshot wounds, two to the forehead one to the right thigh, two to the left thigh, and one to the right hand at the base of the thumb. (5 R.T. 2455.) The range of fire was indeterminate as to the right thigh wound as she found no soot or stippling. (5 R.T. 2494, 2496-2497.) The direction of the wound was from left to right, front to back and slightly downward. (5 R.T. 2499.) With respect to the gun shot wound to the left thigh, the angle of the shooter was indeterminate. (5 R.T. 2500.) The absence of soot or stippling means that the shooter would have to have been at least 30 inches away. (5 R.T. R. T. 2500.) The direction of the wound was front to back and upward. (5 R.T. 2501.)

Both of the head wounds would have been fatal and would have rendered him unconscious due to the numerous skull fractures and injury to the brain with associated hemorrhage. (4 R.T. 2510.) She is unable to opine as to the specific position of either Anene or the shooter with respect any of the gunshot wounds. (5 R.T. 2519.) Despite the fact that a struggle was suspected between Anene and the shooter no fingernail scrapping were done. (5. R.T.2705.) A GSR kit from Anene's hands was submitted for analysis and tested positive for GSR. (5 R.T. 2714.) Appellant's wounds, as depicted in a picture she is shown do not show soot or stippling indicating that the range of fire was indeterminate. (4 R.T. 1215, 5 R.T. 2716.) Soot and stippling are

deposited in the same direction as the muzzle of the gun. (5 R.T.2715.) A deflected bullet or ricochet means that the bullet hit a hard surface which can cause the metal jacket to break up or fall off. (5 R.T. 2733) There is nothing in the x-ray of appellant's hand that indicates whether the bullet fragment came from a deflected bullet. (5 R.T. 2748, 2752.) She cannot determine if the wound is an entrance or exit wound. (5 R.T. 2757.)

Detective Jerry Saba is assigned to the high tech crimes unit and his primary duty is to extract data from computers and cell phones that have been taken into evidence. (4 R.T. 1231.) He generated a report and cell phone records pertaining to phone number 323 635 3697 including a call log and texts from dates of April 19 and 20, 2016. (3 R.T. 1231, 1233.) People's 11 A through 11 H is a text and call log which are contents of appellant's phone for the dates April 19, through April 20. (3 R.T. 1233.) The text messages between appellant and Alexandra, were, admitted into evidence but only read during argument and the jury was told that they would have them during deliberations. (5 R.T. 2779.) The texts concerned appellant's efforts to reach Alexandra in the hours prior to the shooting; she was not always returning his messages and did not confirm that she had gotten home to the apartment she shared with Yvette Hamilton. (5 R.T. 2780 2781.) In messages several hours after the shooting, appellant told her to call him, not to text him, that people were calling his phone to try and get information and that he would be getting a new phone soon; he did not mention that he had been shot. (5 R.T. 2792.)

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL AND NEWLY DISCOVERED EVIDENCE

A. Introduction

Appellant told the police he went to the apartment to see his "baby mama" that he was told she was not home and left. (2 C.T. 231,246.) He was shot at on his way out and ran. (2 C.T. 220-222.) Appellant volunteered that he had thrown his bloody clothes in the trash. (2 C.T. 240.) Appellant stated that he did not call police because his interactions with the police have always been negative. (2 C.T.222- 223) He admitted he is a gang member from Ten Line Crips. (2 C.T. 234-235.) He admitted he was on probation that, he had a drug case and a gun case [possession of a controlled substance for sale in 2014 and felon in possession of a firearm in 2015. (2 C.T. 192., 2 C.T. 222, 225.) Appellant insisted he was a victim of a shooting and speculated that he may have been followed to the location. (2 C.T. 234, 254, 250-251.) Pursuant to a defense motion the court suppressed appellant's statement as a deliberate violation of *Miranda* and ruled that it would only be admissible for impeachment should appellant testify differently. (2 R.T. 681,687.)

Counsel, apparently, however adopted his client's statement as his theory of the case. In his opening statement defense counsel told the jury that the evidence was consistent with

appellant having been the primary target, that a third person targeted appellant and in the course of the attack shot both appellant and Anene. (2 R.T. 673-674.) The court permitted counsel to argue the possibility of a third party being the shooter but refused to specifically instruct on third party culpability stating that counsel had presented no evidence of a third party shooter. (5 R.T. 3001-3012.)

Appellant substituted new counsel for the motion for new trial and sentencing. (2 C.T. 334, 343.) The motion for new trial alleged that appellant was deprived of the effective assistance of trial counsel by counsel's failure to call Bryan Burnett, the appointed defense ballistic expert, to present exculpatory evidence. (2 C.T. 351.) Following the hearing the court denied the motion for new trial finding that counsel was not ineffective in failing to call Burnett and viewing Burnett's exculpatory evidence is viewed as newly discovered evidence it is merely speculation as to what happened. (6 R.T.3936-3940.) The court failed to apply the appropriate standard, failed to make a finding as to whether it was reasonably probable that the omitted evidence would have changed the outcome of the trial and, thus, abused its discretion in not ordering a new trial. Appellant's conviction should be reversed.

B. Standard of Review

The determination of a motion for a new trial rests within the trial court's discretion. (*People v. Riel* (2000) 22 Cal.4th 1153.) The trial court's action will not be disturbed on appeal unless a manifest and unmistakable abuse of discretion appears. (*People v.*

Turner, supra, 8 Cal.4th at p. 212.) "Although this standard of review is deferential, it is not empty. It asks in substance whether the ruling in question falls outside the bounds of reason under the applicable law and the relevant facts." (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659.) "In determining whether there has been a proper exercise of discretion on such a motion, each case must be judged from its own factual background." (*People v. Turner, supra*, 8 Cal.4th at p. 212, citing *People v. Dyer* (1988) 45 Cal.3d 26, 52.) Judicial discretion has "rational bounds.... [and] implies absence of arbitrary determination, capricious disposition or whimsical thinking." (*People v. Rist* (1976) 16 Cal.3d 211, 219, citing *In re Cortez* (1971) 6 Cal.3d 78, 85-86 and *People v. Surplice* (1962) 203 Cal.App.3d 784, 791 [internal quotation marks omitted].)

C. The Motion for New Trial

Trial counsel, Michael Cabori, testified at the hearing on the motion that during the course of his representation he utilized the services of an appointed expert, Bryan Burnett, to assist him with issues involving crime scene reconstruction and gun shot residue. (6 R.T. 3905.) He did not call Burnett as a witness because he was able to elicit some of his findings from the prosecution's experts and because Cabori did not agree with some of the things Burnett said and neither did Cabori's other expert with whom he spoke by phone. (6 R.T. 3906-3907, 3914.) Cabori did not think Burnett's conclusions were well founded. (6 R.T. 3906.) According to Cabori, Burnett believed that there were two guns involved. (6 R.T. 3912.) Cabori felt that if the jury believed there was a second gun that they would believe it was in appellant's hand. (6 R.T.

3908.) Burnett had written and provided Cabori with a report about the bracelet. (6 R.T. 3910.) Cabori determined that whatever useful information he could get from Burnett about the bracelet, would be overshadowed by the fact that Burnett had previously been professionally disciplined and also, that he would have trouble in keeping Burnett focused. (6 R.T. 3908.) Burnett's reports was marked as Court's A and B. (6 R.T. 3911, 1 Aug C.T. 1-30.)

Burnet testified at the hearing that he is a forensic scientist whose areas of expertise are scanning electron microscopy and crime scene reconstruction, digital imaging and documentation of particles causing lung disease. (6 R.T.3916.) He is also an expert in the field of terminal ballistics which involves analyzing the angle of bullets that are fired over or through another object into a human body. (6 R.T. 3916.) An example would be when a bullet strikes a car, he would attempt to determine the angle of the bullet by looking at the defect on the car. (6 R.T. 3916.) He has testified as an expert in Superior Court approximately 40 times, twice for the prosecution and the rest for the defense. (6 R.T. 3917.) The prosecution refused to stipulate that the court coould consider Burnett's curriculum vitae. (6 R.T. 3933.)

Burnett testified that he reviewed all the discovery in the case but after a discussion with Cabori was restricted to an analysis of the bracelet and he was going to be testifying at trial on that issue. (5 R.T. 3919.) When counsel attempted to ask Burnett what, in his expert opinion, happened in this case and whether his opinion was that there was another shooter the court

admonished counsel that he had raised an ineffective assistance of counsel claim and that he needed to stick to what Burnett told Cabori. (6 R.T.3921.) However, the court stated that if counsel's alternative theory was newly discovered evidence, and there was new evidence that was not available at the time of trial that he would hear it. (6 R.T. 3921.) Ultimately the court in its ruling addressed the evidence in Burnett's testimony and reports with respect to both the claim of ineffective assistance of trial counsel and as newly discovered evidence. (6 R.T.3936-3940.)

Burnett did communicate to Cabori his analysis of the bracelet. (6 R.T. 3921, Court Exhibit A.) The essence of the report is that the bracelet has remnants of a bullet fragment on it indicating it had been shot off. (6 R.T. 3922.) One link of the bracelet was distorted and copper fragments which in his opinion came from a bullet jacket were associated with that distortion. (6 R.T. 3922.) The composition of the bracelet was brass which is copper- zine a different material than the particles found on the surface. (6 R.T. 3922.) In addition there was tissue [3]on the one distorted link of the bracelet which came from appellant's wound. (6 R.T. 3922.) He considered this evidence exculpatory and conveyed it to Cabori because the bracelet was presented as being pulled off appellant's wrist and his findings indicated that it was knocked off by the bullet which also caused the wound in

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[3] The prosecution's experts tested the bracelet for DNA but not human tissue and the DNA expert did not know whether the touch DNA was tissue, or any particular bodily fluid. (4 R.T. 2468.)

appellant's wrist. (6 R.T. 3923.) The second report that he provided to the court, (Court Exhibit B), was not provided to Cabori and he did not convey any of this information to Cabori. (6 R.T. 3926.) When he met with Cabori to discuss his testimony Cabori decided at the end of the discussion not to call him to testify. (6 R.T. 3928.) Burnett had already come up with the analysis in Court Exhibit B but had not committed it to writing. (6 R.T. 3929.)

Burnett's theory was that there was a struggle outside the laundry room or in the laundry room and the victim was shot. (6 R.T. 3930, Exhibit B, page 4-5, Aug. C.T. 11.) There were abrasions on the victim's back which were unexplained indicating that he was pushed up against the projecting lock mechanisms of the mailboxes. (6 R.T. 3930, Exhibit B, p. 5, Aug. C.T. 12.) The wounds to his legs did not, however, appear to have occurred in the laundry room because there were three through and through, shots and there were no defects in the walls or anywhere in the laundry room where those bullets hit after the intermediate target of the victim's legs. (6 R.T. 3930.) So his opinion is that the victim was shot in the legs while rotating outside of the laundry room before he succumbed inside the laundry room. (6 R.T. 3930, Exhibit B, p. 9, 19, Aug. C.T. 16.,26) The time from leaving Hamilton's door, from her account, was insufficient for appellant to have participated in the physical assault on the victim prior to the shooting but he was obviously present during the shooting in the mailbox laundry room (Exhibit B, p. 8, Aug. C.T. 15.)

His analysis is that a bullet fired at appellant hit the

bracelet left a wound on appellant's wrist and the bracelet simultaneously gouged his skin. (6 R.T. 3920. Exhibit B, p. 15, 1 Aug. C.T. 22.) The bracelet is of major importance because the bracelet was shot off of appellant's wrist, according to Burnett, by a copper jacketed bullet and the bracelet link was distorted by the bullet impact. (Exhibit B, p. 20, 1 Aug. C.T. 27.) The interaction of the bullet and the bracelet link produced numerous copper particles from the bullet jacket. (Exhibit B, p. 20, 1 Aug. C.T. 27.) The bullet's removal of the bracelet and wrist wound could not have been due to a self inflicted gun shot. (Exhibit B, p. 20, 1 Aug. C.T. 27.)

As to the larger wound Burnett examined the x-rays of appellant's arm and hand and opined that the massive entrance wound was caused by a lead bullet core that hit an intermediate target and lost its jacket before striking his arm.(Exhibit B, p. 15, 1 Aug. C.T. 22.) The intermediate target was either the concrete floor or the wall. (Exhibit B, p. 15, 1 Aug. C.T. 22.) The lead core which was removed from appellant's hand while he was in custody was distorted, fragmenting and tumbling when it hit appellant's arm. It had lost much of its momentum so that there was no bone fracturing at the arm impact; it only slid distally aong the bone to the dorsal hand causing no serious muscle, blood vessel or neve damage. This wound could not have been self inflicted. (Exhibit B, p. 15, 1 Aug. C.T. 22.)

D. The Court's Ruling

The court found that there was some conflict in the testimony, as to how much information Cabori had been given but

that Cabori made a tactical choice with respect to the bracelet because the jury received the information to which Burnett would have testified. (6 R.T. 3937.) The court noted that as to the alternative theories of the shooting posited by Burnett, in Court Exhibit B. Cabori said he was given the information and Burnett said he did not give it to him. (6 R.T. 3937.) The court also noted that in considering Burnett's report as newly discovered evidence the contents are really just speculation on Burnett's part as to what happened. (6 R.T.3938.)

With respect to the ineffective assistance of counsel claim the court found that Cabori made a tactical decision not to put Burnett on the stand based on his interactions with him in court and his unpredictability. (6 R.T. 3939.) As for the interactions in court, the record reveals that there were interactions but nothing untoward or unpleasant: Apparently Burnett had tested the bracelet for gunshot residue and forgotten to return the separately packaged clasp so he made a special trip to court to return the clasp. (3 R.T. 975, 4 R.T. 1543.) There was also a discussion on the record as to Burnett's proposed testimony with respect to human tissue [likely on the bracelet] and whether he was qualified in that regard, the issue was apparently dropped as Burnett did not testify and the matter was not addressed again. (5 R.T. 2404.)

A claim of ineffective assistance of counsel requires a showing that: (1) defense counsel's performance was deficient in falling below an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable

probability of a more favorable result in the absence of counsel's deficient performance. A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696.)

While ineffective assistance claims are often resolved in a habeas corpus proceeding, a conviction will be reversed for ineffective assistance on direct appeal if: (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. (*People v. Vines* (2011) 51 Cal.4th 830, 875–876; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.) Here, the record discloses no rational tactical purpose for failing to introduce available evidence in support of the defense theory of the case. Counsel essentially adopted his client's version of what transpired and set out to prove that it was true by trying to poke holes in the prosecution's evidence and expose the inadequacy of the investigation. "To sustain a claim of inadequate representation by reason of failure to call a witness, there must be a showing from which it can be determined whether the testimony of the alleged additional defense witness was material, necessary, or admissible, or that defense counsel did not exercise proper judgment in failing to call him." (*People v. Hill* (1969) 70 Cal.2d 678, 690-691.) Counsel could have no rational tactical reason for failing to call Burnett, and, thus, introduce evidence in support of his theory. Accordingly, the issue may be reached on direct appeal.

Moreover, counsel's testimony at the hearing as to his problems with Burnett's analysis is not supported by the evidence. Counsel testified at the hearing that Burnett insisted there were two guns (6 R.T. 3912,) Counsel's testimony is, however, inconsistent with Burnett's report. He does say that if another gun was involved, the absence of casings indicate that it had to be a revolver. (Exhibit B. p. 19, 1 Aug. C.T. 26.). However, he also states that there is no evidence more than one gun was involved. (Exhibit B. p. 19, 1 Aug. C.T. 26.) Cabori's purported concern that if the jury believed there was a second gun that they would believe it was in appellant's hand, was not in any case reasonable as the prosecution's theory was that there was only one gun and it was in appellant's hand. (6 R.T. 3908.) In any, event, any reasonable concern that counsel may have had was trumped by the fact that Burnett's theory matched his own in the most important point; Burnett said that there was a third party involved and appellant was a victim not a perpetrator. (Exhibit B, p. 20, 1 Aug. C.T. 27 .)

In finding that counsel was not ineffective, the court overlooked that evidence of third party culpability was promised in opening statement and that the court declined to give a defense requested instruction on third party culpability finding that no such evidence had been presented. (2 R.T. 673-674.)

Burnett, an expert in crime scene reconstruction, could have presented the evidence counsel both promised and needed. The conclusions Burnett came to would have been helpful to the defense and provided expert opinion consistent with the defense

theory of the case. There was nothing inconsistent with Burnett's analysis and the theory counsel tried and failed to develop from the testimony of the prosecution's witnesses.

As to the Barnett evidence being based on speculation, of course, crime scene reconstruction is a theory which to some extent requires speculation but so was the testimony of the prosecution's experts. Burnett's drawing and reconstruction, unlike those of the prosecution's experts were to scale and his analysis equally if not more compelling. (Exhibit B, p. 3, 1 Aug. C.T. 10.) In the absence of Burnett's testimony, the jury was left only with the analysis done by the prosecution's experts. In its ruling the court ignored the fact that the whole case was based on crime scene reconstruction which is necessarily to some extent speculative and the entire conviction was based on such speculation. Burnett candidly acknowledges in a disclaimer "Remember that reconstruction is putting together the physical evidence and eyewitness accounts into a meaningful scenario that best explains a crime scene. There is always uncertainty, where new or missed evidence might significantly alter that scenario " Joseph Orantes, former head of the San Diego Police Crime Laboratory. (Ca 1996). (Exhibit B, p. 20, Aug. C.T. 27 .)

E. Burnett's Analysis Could Have Raised a Reasonable Doubt

A motion for a new trial based on newly discovered evidence should be granted when the new evidence "contradicts the strongest evidence introduced against the defendant." (*People v. Martinez* (1984) 36 Cal.3d 816, 823.) Here, the strongest evidence

was expert testimony based on crime scene reconstruction. Burnett offered contradictory evidence based on crime scene reconstruction not to show that the prosecution's witnesses were necessarily lying but rather that experts could disagree as to what transpired thus raising a reasonable doubt

Whether ineffective assistance or newly discovered evidence, in deciding the motion, the trial court did not address whether the evidence in question "render[s] a different result probable" in a retrial. (*People v. Soojian* (2010) 190 Cal.App.4th 491, 511-512.)

A "different result" in this context means only a reasonable probability that a single juror would have found appellant not guilty, thus causing a hung jury. (*People v. Soojian*, *supra,* 190 Cal.App.4th at p. 519.) A "reasonable probability" does not have to rise to the level of "more likely than not. (*Ibid*.) It only means "more than an abstract possibility." (*Ibid*; accord *People v. Johnson* (2016) 6 Cal.App.5th 505, 514.) Of course, this test is simply a straightforward application of the general test for prejudice set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 which requires a reviewing court to grant relief for trial errors only where "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

Here, there is at least a reasonable portability that if Burnett had testified at least one juror would have entertained a reasonable doubt. Appellant's conviction should, therefore, be reversed.

CONCLUSION

For all of the foregoing reasons appellant is entitled to a new trial.

Dated: April 14, 2020 Respectfully submitted,

Marilee Marshall

MARILEE MARSHALL
Attorney for Appellant Trevon Harris

CERTIFICATE OF COMPLIANCE

This brief consist of 7,212 words in 13 point font as counted by the word processing program used to generate it.

Dated: April 14, 2020

Marilee Marshall
_____
MARILEE MARSHALL

DECLARATION OF SERVICE BY MAIL & ELECTRONIC SERVICE

I, the undersigned, declare:

I am over eighteen (18) years of age, and not a party to the within cause; my business address is 20 North Raymond Ave, Suite 240, Pasadena, CA 91103; that on April 14, 2020, I served a copy of the within:

APPELLANT'S OPENING BRIEF

on the interested parties by placing them in an envelope (or envelopes) addressed respectively as follows:

Clerk of the Superior Court
Torrance Courthouse
825 Maple Ave, Dept. 8
Torrance, CA 90503
For Delivery to Hon. Alan Honeycutt

Office of the District Attorney
Torrance Office
825 Maple Ave, Rm.190
Torrance, CA 90503
Attn: Alexander Bott

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Mr. Treveon D. Harris, BJ4100
K.V.S.P.
B-1-212
P.O. Box 3130
Delano, CA 93216-6000

Each said envelope was then, on April 14, 2020, sealed and deposited in the United States mail at Pasadena, California, the county in which I maintain my office, with postage fully prepaid.

And, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71(f)(1)(A)-(D), I electronically served a copy of the above document on April 14, 2020 by 5:00pm., on the close of business day to the following entities electronic notification addresses:
California Appellate Project, capdocs@lacap.com
Attorney General, docketingLAawt@doj.ca.go

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 14, 2020, at Pasadena, California.

Leslie Amaya
LESLIE AMAYA