

CERTIFIED FOR PARTIAL PUBLICATION¹

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DARYL B. ARMSTEAD,

Defendant and Appellant.

D036223

(Super. Ct. No. SCD143593)

APPEAL from a judgment of the Superior Court of San Diego County, Howard H. Shore, Laura P. Hammes, and William D. Mudd, Judges. Reversed in part and affirmed in part with directions.

Koryn & Koryn, Sylvia Koryn, under appointment by the Court of Appeal for Defendant and Appellant.

¹ Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part I.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, John T. Swan and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

Daryl B. Armstead was convicted by jury of three counts of robbery (counts 4, 5, and 9). (Pen. Code,² § 211.) The jury also found true allegations that Armstead personally used a firearm in the commission of the counts 4 and 5 robberies (§ 12022.53, subd. (b)), and that he was armed with a firearm in the commission of the count 9 robbery. (§ 12022, subd. (a)(1).) The court declared a mistrial as to the remaining robbery counts and their allegations (counts 1-3 and 6-8), on which the jury could not reach verdicts.

As part of an agreement, Armstead subsequently pleaded guilty to the remaining robbery counts and admitted their allegations, with the understanding he would be permitted to withdraw his guilty pleas and admissions if his new trial motion on counts 4, 5 and 9 were granted. After the trial court denied his new trial motion, Armstead was sentenced to a total term of 16 years in prison pursuant to the agreement.

Armstead appealed, contending the trial court prejudicially erred by denying his section 1538.5 motion to suppress, by giving the jurors an erroneous response to their request for clarification of CALJIC No. 2.90 (Presumption of Innocence--Reasonable

² All statutory references are to the Penal Code unless otherwise specified.

Doubt--Burden of Proof), and by erroneously instructing the jury with CALJIC Nos. 2.06 (Efforts to Suppress Evidence) and 17.41.1 (Juror Misconduct).

After reviewing the record in light of the briefed contentions, we asked the parties to file additional briefing on several issues stemming from the trial court's remarks during deliberations in responding to the jury's request for clarification of CALJIC No. 2.90. Because the court's remarks appeared to have had the effect of admitting the evidence of the other charged crimes as evidence of identity, motive and intent as to all other charged crimes, we asked whether consistent with due process, a court can change the basis of admissibility of evidence after the close of evidence, closing argument and the commencement of jury deliberations. We also asked that assuming a court could lawfully do so, whether the evidence in this case met the test of admissibility as established by Evidence Code section 1101, subdivision (b) and *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*).

Having reviewed the record in light of the supplemental briefing, we conclude that a court may not expressly or impliedly change the scope or basis of admissibility of evidence after the case is submitted to the jury because fundamental fairness requires that a defendant be able to address the admissibility and purpose of evidence before the case is ready for argument, instruction and deliberation. Without such due process, a defendant's right to the effective assistance of counsel is effectively diluted. Because we cannot say that the trial court's instructional error did not contribute to the verdicts in this case, we cannot find the error harmless beyond a reasonable doubt. (*Chapman v.*

California (1967) 386 U.S. 18, 24 (*Chapman*.) We, therefore, reverse Armstead's counts 4, 5 and 9 robbery convictions.

As Armstead has not raised any contentions on appeal regarding his remaining six convictions, they are affirmed. However, because he pled guilty to such remaining robbery counts and admitted their accompanying allegations in reliance on an agreement to permit him to withdraw such pleas and admissions if a new trial were granted in this case, in the interests of justice we direct the trial court to permit Armstead to exercise such right to withdraw those pleas and admissions on remand of this case. Should Armstead choose not to exercise such right, the matter must be resentenced on those six counts.

In light of our determinations, we need not address Armstead's other instructional error contentions. As for his claim the trial court erred in denying his suppression motion, we find no merit. We explain.

FACTUAL BACKGROUND

Between November 1998 and the time of his arrest on the evening of March 17, 1999, Armstead committed a series of robberies, either alone or with his codefendant Agustin Delgado, who pleaded guilty to 15 robberies after their joint section 1538.5 motion to suppress was denied, eight of which were alleged to have been committed with Armstead.³ Because Armstead does not challenge the sufficiency of the evidence to

³ In an unpublished opinion filed June 5, 2001, we affirmed Delgado's convictions and sentence after finding his motion to suppress was properly denied. (*People v. Delgado*, No. D035234.)

support his convictions, we briefly set out the essential facts that supported each count. We will set out more fully those facts pertinent to Armstead's specific contentions in the discussion section of this opinion.⁴

Count 1

On November 19, 1998, at about 8:35 p.m., Shelly Dixon was robbed at gunpoint by a Black male in the parking lot of her residential building on San Diego Mission Road as she adjusted some items on the passenger seat of her car she had just parked. The man, later identified as Armstead, told her, "Gimme your purse," as he pushed a gun against her neck and repeated the demand. When she finally complied, Armstead grabbed her purse and ran away.

Counts 2 and 3

On January 22, 1999, Hector Cordero and Lucilles Urias were robbed by Armstead at gunpoint as they were getting out of their car in the Sizzler Restaurant parking lot on Plaza Boulevard. Armstead pointed the gun at both and also poked Cordero in the ribcage with the gun when he repeated his demands for money. When Urias handed Armstead her purse, which also contained Cordero's wallet, Armstead ran to a "getaway" car driven by Delgado.

⁴ The facts as to counts 1 through 3 and 6 through 8 are taken from the probation officer's report because Armstead's convictions on those counts were based on his guilty plea. The facts as to counts 3, 4 and 9 are taken from the trial transcripts.

Counts 4 and 5

After eating dinner at the Mission Valley Bully's restaurant on January 22, 1999, Charles Osterberger and Richard Capua were robbed of their wallets by a Black male, later identified as Armstead, at gunpoint as they stood near their cars in the parking lot. Armstead put their wallets in his pocket and ran away.

Osterberger and Capua identified Armstead as their robber in a photographic lineup and at trial. Delgado also testified against Armstead regarding the Bully's robberies, saying he drove Armstead there and acted as the getaway driver when he returned with the wallets from the two men he had robbed.

Counts 6, 7 and 8⁵

On January 29, 1999, Gary Gregory, Michele Gregory, Brenda Gonzalez, and Victor Agraz were robbed at gunpoint by Armstead as they walked to their car after eating dinner at the In-N-Out Burger restaurant on Southport Way. Armstead struck Gary Gregory on the shoulder before he took his wallet and then pushed him down, threatening to shoot him, before turning to the women to demand their purses. Once he had their purses, Armstead turned to Agraz who told him he did not have anything. Armstead then ran to a "getaway" car driven by Delgado.

⁵ Although the probation officer's report states the January 29, 1999 incident refers to counts 6 and 7, the description of the incident also includes the facts for count 8.

Count 9

At about 8:05 p.m. on March 17, 1999, a tall Black man, later identified as Delgado, robbed the cashier, Veronica Beas, at the mini-mart of the Exxon gas station on Kearny Mesa Road. When Delgado pointed a handgun at her, Beas opened the cash register and Delgado grabbed the money, demanding one-hundred dollar bills. When Beas said there were no one-hundred dollar bills, Delgado yanked the drawer from the register. Delgado left the store with less than \$200 and ran to his Cadillac car which Armstead was driving that night. Delgado split the money with Armstead and they drove onto a freeway and headed south.⁶

Meanwhile, shortly after 8:00 p.m. that night, San Diego Police Officers Steve Schnick and Gary Avalos, who were on duty near 40th Street, received a call about a robbery in progress at an Exxon gas station. After determining the most likely routes that robbers making a "getaway" would take, they waited near Monroe and 40th Street. Around 8:15 p.m., they saw the Cadillac driven by Armstead, which was similar to the one reported to be on the lookout for in the call, exit Interstate 15 and stop at a signal light on 40th Street. When they pulled up behind the Cadillac, Armstead turned right on Meade Avenue and quickly pulled over to the curb. When the officers followed, Delgado

⁶ Delgado's testimony confirmed he was the person who robbed the Exxon mini-mart, that he divided the money with Armstead, and that Armstead drove his car that night. Delgado said he had been intoxicated that night, that he had resisted arrest after they were stopped shortly after the robbery and that Armstead had nothing to do with it.

Delgado also testified he had been involved in seven other robberies with Armstead, but could not recall where they had occurred.

looked around, appearing nervous and expectant. The officers stopped their car behind the Cadillac and Officer Schnick approached it on foot. He instructed Armstead and Delgado to put their hands where they could be seen. Armstead complied, but Delgado continued looking around anxiously. When Delgado did not comply with Schnick's command to put his hands on the dashboard, Officer Avalos assisted Schnick, who then had Armstead get out of the car.

While Schnick checked Armstead for his driver's license and then consensually searched his pockets, Avalos handled Delgado who became verbally and physically abusive before being restrained and searched by Avalos and other officers. The officers found "wadded-up" money in both Armstead's and Delgado's pockets. A subsequent search of the Cadillac revealed a loaded handgun, a crumpled five-dollar bill, and a black knit cap. Delgado was identified as the robber of the Exxon gas station at a curbside lineup by Beas. She was unable to identify Armstead as being involved in the robbery.

DISCUSSION

I

MOTION TO SUPPRESS

Armstead contends the trial court committed reversible error by denying his section 1538.5 motion to suppress evidence because the officers did not have reasonable cause to stop the car he was driving. He specifically argues that because there were inconsistent descriptions of the robbery suspects and the vehicle they were driving that the facts known to the officers who stopped him were not sufficiently specific to comport with constitutional standards. Alternatively, he claims, that even if the descriptions of the

suspects and vehicle were sufficiently specific and consistent, that the car stopped by the officers fit none of the descriptions provided by the witnesses or radio broadcasts. His contentions and arguments are meritless.

It is well settled that "[o]n appellate review of a motion to suppress evidence, we must accept the trial court's resolution of disputed facts and its assessment of credibility (see *People v. Lawler* (1973) 9 Cal.3d 156, 160), but, the issue whether, under the facts found, a seizure or search was unreasonable is a question of law, as to which [we are] bound to exercise [our] independent judgment. (See *People v. Loewen* (1983) 35 Cal.3d 117, 123; *People v. Leyba* (1981) 29 Cal.3d 591, 597.)" (*People v. Valenzuela* (1994) 28 Cal.App.4th 817, 823.)

Specifically concerning the justification of an investigative stop or detention, the circumstances known to the police officer must include "specific and articulable facts which . . . would cause a reasonable officer to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person the officer intends to stop or detain is involved in that activity." (*People v. Conway* (1994) 25 Cal.App.4th 385, 388, citing *In re Tony C.* (1978) 21 Cal.3d 888, 893.) An officer may detain suspects based on information furnished by other police officers. (*People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1553.) Whether a reasonable suspicion exists is measured by the objective facts known to the officer and not by the officer's subjective state of mind at the time of the detention. (*Whren v. United States* (1996) 517 U.S. 806, 813.) As a reviewing court, we must consider the totality of the circumstances in

determining whether a reasonable suspicion existed at the time of the challenged detention. (*United States v. Sokolow* (1989) 490 U.S. 1, 7-8.)

Here, the facts adduced at the hearing on the suppression motion showed that San Diego police detectives had an on-going investigation of a series of robberies classified as the "Black male restaurant parking lot series." Fact sheets regarding the series were distributed to police officers and various investigators, and included robberies occurring on January 10 and 16, 1999, in the parking lot of Stuart Andersons/Black Angus restaurant, and the January 22, 1999 robberies at Bully's. Further leads in February and March 1999, provided police and detectives with information that there were possibly two suspects, one over six feet tall and the other about five feet eight inches tall, that they were armed and probably driving away from the scene of the robberies in a late model Cadillac.

Then on the evening of March 3, 1999, a Union 76 gasoline station on Waring Road was robbed by a Black male wearing dark clothes, a bandana and a hood, who left the area on foot. A witness saw the robbery suspect drive out of the parking lot in an older model dark blue two-door Cadillac. San Diego Police Officer Thomas Chapman assisted in the investigation of this robbery which was believed to be one in a series of robberies committed by a lone Black male who left the area in a 1970 series-type Cadillac.

Two weeks later, on the evening of March 17, 1999, an Exxon station on Kearny Mesa Road was robbed by a Black male, about six feet tall, wearing a dark jacket with a hood, who ran from the station. Hearing the broadcast report of this robbery, Chapman

told the dispatcher to add to the broadcast that all units should be on the lookout for an older model, two-door Cadillac, as Chapman believed the Exxon robbery might be related to the Union 76 robbery.

Officers Schnick and Avalos were on patrol in the known high crime area of 40th Street and Monroe when they received the broadcast about the Exxon robbery.

Recognizing that Interstate 15, which then became 40th Street, was a possible escape route from Kearny Mesa, Schnick and Avalos decided to park on 40th Street to watch for the suspect vehicle. Within a few minutes, the officers saw an older model blue Cadillac stopped at the signal light at 40th Street and Monroe. Thinking the car might be the suspect vehicle from the Exxon robbery, the officers began to follow it. The officers observed two Black men, one taller than the other, in the car, with the taller passenger, later identified as Delgado, looking around and appearing to be nervous.

When the Cadillac turned right onto Meade Avenue, it immediately pulled over to the right hand curb. Although dispatch verified the suspect vehicle was a blue 1982 Cadillac, while the plates on the blue Cadillac in front of them belonged to a 1979 blue Cadillac, the officers pulled in behind the car and turned on their spotlight. Delgado, wearing a hooded jacket, continued to look around nervously and at the officers. Schnick got out of the patrol car, approached the Cadillac, and ordered its occupants to put their hands where he could see them. The driver, identified as Armstead, complied, but Delgado did not. Schnick again told Delgado to put his hands on the dash, and observed that Delgado matched the description of the Exxon robber.

Schnick contacted Armstead and in response to questions Armstead said he did not have a license, and the car belonged to Delgado. Schnick directed Armstead to get out of the car and handcuffed him. In conducting a pat-down search of Armstead, Schnick discovered a wad of cash in his pocket.

Avalos and backup officers wrestled Delgado from the Cadillac and handcuffed him after he continued to struggle with them. Delgado, who wore a black jacket with a hood, was also handcuffed and searched, with a similar "wadded up" amount of cash being found in his pocket as had been found on Armstead.

At the hearing, Schnick further testified that besides the vehicle and suspects fitting the descriptions broadcast over the radio, his suspicions were aroused by Delgado's nervous behavior and the fact Armstead pulled over and stopped without any activation of the patrol car's lights or siren. Avalos additionally explained:

"Well, first of all, all of the information that we had up to that point, a suspect in a robbery that just occurred, the time frame was there. It matched. Black male matched. Also, I could see the clothing. [Delgado] had a black jacket, I saw that he had a hood. . . . That matched. Behavior. Ke[pt] looking around. Looked like, in my opinion, . . . he wanted to run. That heightened my awareness to the circumstances."

Both officers believed they had the suspect car, that Delgado, who was about six feet three inches tall, and Armstead, who was about five feet nine inches tall, were the suspects, and that they had a weapon in the car.

After hearing all the testimony and argument, the trial court denied the motion to suppress, noting any conflict in the various witness' testimony regarding the description

of the suspect vehicle was "much ado about nothing" and did not negate the reasonableness of the stop. The trial judge explained:

"Now, here we have a situation where the officers knew the San Diego area well enough to be able to estimate where a vehicle, assuming that a vehicle was involved in the robbery, and assuming it were going in a certain direction, where it would be at a certain time. They may have been right, they may have been wrong, but obviously that fact by itself indicates that they were not taking the dragnet approach. There was no indication that they were prepared to stop every car driven by two Black males that passed by them. They knew it was a Cadillac. There might have been some confusion about what kind of Cadillac but they knew it was an older model and sure enough, around the time that they expected the vehicle to come by them, there was a Cadillac with two Black males in it. I believe that fact by itself would be sufficient for the officers to detain the vehicle. [¶] But in addition to that, the vehicle pulled over on its own without any command from the officers. At the same time, when the passenger was looking around in what appeared to be a nervous fashion, by itself, that doesn't necessarily mean anything, but as the courts have stressed, it is the totality of the circumstances that count and the totality of the circumstances in this case clearly indicate to me that the officers conduct was proper under the circumstances.

The court further found that after the initial detention, the officers had a separate basis to detain and arrest Armstead when he failed to show he had a driver's license with him. The officers also had a separate, independent basis for arresting Delgado when he failed to cooperate with the police. The court noted the overall length of the detention was very brief before the events escalated, finding "every step of the way, that the officers acted appropriately," and thus denied the suppression motion.

When measured by the applicable law, we find the above facts reveal that the officers had reasonable suspicion to detain Armstead and his companion Delgado. As we noted when we addressed this same issue in Delgado's appeal, "the facts of the present

matter are quite close to those of an earlier case from this Court. In that case, the facts were:

'Officer Kline was at the Coronado Bridge toll plaza in his marked police unit when he received a dispatch informing him two armed Black men wearing dark clothing with hoods had just robbed the La Avenida Motel, approximately five to seven minutes away. The only other highway out of Coronado going to Imperial Beach was being monitored by another officer. Within minutes of the dispatch, Officer Kline saw Overten and a Black man wearing a dark jacket, with a possible hood down, drive by him onto the bridge. Officer Kline followed Overten's car over the bridge. He then saw the heads of two Black males pop up from the front passenger's seat and rear passenger's seat of Overten's car. After they looked at his police car, the two men popped their heads up two or three times and then ducked down out of sight. It was at that point Officer Kline decided to pull the car over to investigate any possible involvement in the reported armed robbery. (*People v. Overten* (1994) 28 Cal.App.4th 1497, 1504-1505.)

"Against the argument that there was insufficient justification for a detention in the *Overten* case, we responded:

'The foregoing persuades us Officer Kline had reasonable cause to stop Overten, believing he and his confederates were involved in recent criminal activity. Law enforcement can reasonably anticipate that a car will be employed to facilitate escape from a crime scene regardless whether one was reported. [Citations.] Given that the robbery occurred just minutes earlier [citation], three Black males matching the general description of the robbers were in a car traveling away from the crime scene on one of two logical escape routes from Coronado [citations], and the two passengers were furtively trying to conceal themselves when they saw Officer Kline's marked police unit [citation], we conclude Officer Kline at the time he determined to stop the car and detain its occupants had sufficient specific and articulable facts to cause him to suspect the individuals in the car were connected with the reported armed robbery. [Citation.]' (*People v. Overten, supra*, 28 Cal.App.4th at p. 1505.)

"On the facts of this case, where the suspect vehicle was more particularly identified and where that vehicle had initiated its own stop, thus rendering a contact or detention even less intrusive than a stop of a moving vehicle, the officers had more than ample reasons for suspecting that the car with the robbers inside for which they had been waiting was indeed the car they suspected it to be.⁷" (*People v. Delgado, supra*, D035234, nonpub. opn., pp. 5-6; original fn.)

Again, as we pointed out in Delgado's earlier appeal, "accepting the premise of [Armstead] as to the impropriety of the detention would essentially preclude many forms of good police investigatory actions and techniques, such as surveilling possible escape routes, as here. This sort of already particularized focus and response to the detection of a vehicle closely matching a previously suspect vehicle is simply nonintrusive. The fact that the officers correctly anticipated [Armstead's] behavior cannot possibly be converted to a basis for suppressing the facts uncovered by their detention. All that was required to support a detention in this case was 'an articulable suspicion' the persons before them had been involved in a crime. (*In re James D.* (1987) 43 Cal.3d 903, 911; *Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784; *People v. Ramirez, supra*, 41 Cal.App.4th at p. 1618; *People v. Soun* (1995) 34 Cal.App.4th 1499, 1515.) The suspicion here was not only

⁷ We have also noted that detentions such as the present one are motivated and supported in part by exigent circumstances, such as the report of a recent robbery or drug dealing: "The form of this type of intervention [investigatory detention] is of necessity an exigency because some type of crime is suspected to be afoot, requiring investigation based on reasonable suspicion. [Appellant]'s argument overlooks that reasonable suspicion is a less demanding standard than probable cause to arrest. [Citation.]" (*People v. Ramirez* (1996) 41 Cal.App.4th 1608, 1618.)

articulable but accurate, and was also wholly lawful." (*People v. Delgado, supra*, D035234, nonpub. opn., pp. 6-7.) We thus conclude the trial court properly denied Armstead's motion to suppress.

II

ADDITIONAL INSTRUCTIONS REGARDING CALJIC NO. 2.90

During deliberations, the jury sent the court a note which read, "CALJIC [No.] 2.90 includes the phrase 'consideration of all the evidence' in the second paragraph. Does this phrase mean, 1) all of the evidence presented throughout the trial, or 2) all of the evidence presented per count? In other words, do we base our judgment on each count based solely on the evidence related specifically to the exact robbery and/or victim?" The court proposed to counsel that the following answer be provided the jury in response to the question:

"You may consider evidence of the other charged crimes in deciding each count under consideration. In doing so you must treat the other crimes evidence as circumstantial evidence and follow the instructions on circumstantial evidence. 'Other crimes' evidence may not be considered to prove that defendant is a person of bad character or that he has a disposition to commit crimes, but may be considered by you only for the limited purpose of determining if it tends to show identity of the perpetrator, motive, or intent."

At a hearing on the matter, Armstead's counsel essentially agreed the jury could consider all the evidence, but argued the jury could not consider and use a finding of guilt on one count against Armstead on another count. Counsel further objected to using such evidence to establish identity because there had been no "signature modus operandi" established as required before its admission for such purpose. He also objected to the

evidence being used for motive or intent as neither were at issue in this case. Although the trial judge agreed neither motive nor intent were at issue, she explained that she had looked at CALJIC No. 2.50 which defines other crimes evidence to answer the jury query, even though counsel had not raised such in their arguments.

Defense counsel then suggested the court merely tell the jury, "You may consider all the evidence that's been presented at the trial. If you believe [Armstead] is guilty or innocent as to other counts, you may not consider that as to any other particular counts. As to each particular count, the prosecution must prove his guilt beyond a reasonable doubt."

The prosecutor strongly disagreed with "that" wording, saying the jury "can consider [all of the trial evidence] for whatever they feel that it shows or tends to show [without any limitation as Evidence Code section 1101, subdivision (b) evidence]. [¶] They can look at the big picture." The prosecutor was adamant the court should not limit CALJIC No. 2.90 with language from CALJIC No. 2.50.

The trial judge disagreed, saying it thought the jury was "fairly sophisticated" in asking the question of how to use "those other crimes evidence in deciding each count individually." Noting this situation had arisen in another case and the court had borrowed the format of CALJIC No. 2.50, it denied the prosecutor's request to take the limiting language out of the response and found defense counsel's concerns regarding the jury deciding each count separately adequately covered by another instruction. The court, however, noted it was concerned with that portion of CALJIC No. 2.50 which referred to finding other crimes evidence by a preponderance of the evidence before it can be used

and suggested "hammer[ing] home" the fact such evidence in this case is circumstantial evidence that can be used if it is shown beyond a reasonable doubt. The prosecutor agreed with the court that such was necessary so that the burden of proof would not be lessened, but still disagreed with the court's limiting language in the proposed response.

The court also commented that after listening to Delgado's testimony, it was clear there was a conspiracy or plan to commit the robberies with Armstead, and thus the evidence would have been admitted under Evidence Code section 1101, subdivision (b) if such had been sought to have been admitted as other crimes evidence at the time of the trial. The court then considered adding language from CALJIC No. 2.50.1, that "within the meaning of the preceding instruction, the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed a crime other than that for which he is on trial. Then you'd have to define preponderance, and then you'd have to go the next step and say once you meet that threshold, it's circumstantial evidence. . . ." When defense counsel stated such would only confuse the jury and possibly lower the burden of proof, the court overruled counsel's original concerns with the court's response to the jury question, commenting the matter was on the record and identity was the issue in this case. The court thereafter provided its proposed response to the jury.

On appeal, Armstead contended the trial court's response to the jury's request for clarification of CALJIC No. 2.90 was erroneous and violated the due process clause. He specifically argued the response was confusing because it contained reference to "other acts" evidence which was inconsistent with other instructions telling the jurors that each count charged a distinct crime which needed to be decided separately (CALJIC No.

17.02), and that the response improperly lowered or diluted the prosecution's burden of proof.

We requested supplemental briefing because the court's clarifying instruction "appear[ed] to have had the effect of admitting the evidence of the other charged crimes as evidence of identity, motive and intent as to all other charged crimes[,]" which raised the question "whether a court can, consistent with due process, change the basis of admissibility of evidence after the close of evidence and indeed after closing argument and the commencement of jury deliberations?" Finally, we asked the parties whether the evidence if lawfully admissible at such late point in the trial process met the test of admissibility under *Ewoldt* and Evidence Code section 1101, subdivision (b). Having reviewed the matter in light of the record and the entirety of the briefing, we conclude the trial court's implied change of the basis of admissibility of evidence at such late point in this case did not comport with due process and effectively denied Armstead his right to counsel.

It is elemental that a fair hearing or trial, due process, and the presumption of innocence are foundations on which our criminal justice system rests. To ensure the strength of these foundations, certain rules have evolved. One such general rule is that in a criminal case the trial court must instruct on the "principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty 'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' [Citation.]" (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) Equally true are the

fundamental rules that in order to have a fair trial the jury must be correctly instructed on a defendant's presumption of innocence and the meaning of reasonable doubt (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 (*Sullivan*)), and that the defendant has the constitutional right to the effective assistance of counsel (see *People v. Pope* (1979) 23 Cal.3d 412, 422).

In addition, section 1044 makes it the duty of the trial court "to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." Section 1093 sets forth the usual order, which may be changed when there is good cause to do so in the sound discretion of the court, of a criminal trial in which the court fulfills its duty to ensure a fair trial. (§ 1094.) The normal order of such trial is to have the prosecuting attorney offer evidence in support of the criminal charges against the defendant after the jury has been impaneled and sworn, the accusatory pleading with the defendant's plea has been read, and an opening statement has been made. (§ 1093, subs. (a)-(c).) The defendant next may offer evidence in defense and both parties may then offer rebuttal evidence before the case is submitted and argued before the judge instructs the jury on the law. (§ 1093, subs. (c)-(f).)

Although the trial court is vested with broad discretion in determining the admission of evidence at trial, such exercise of discretion presupposes that either the prosecutor or the defendant sought to have that evidence admitted during the trial. Further, with regard to evidence of other offenses of the defendant, because such

evidence is admissible only in certain exceptional situations where it is relevant to an issue (Evid. Code, § 1101, subd. (b); see 1 Witkin Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 74, pp. 409-410), the comment on such alleged offenses that have not been admitted or proved under one of the exceptions is generally improper and highly prejudicial. (See *People v. Valliere* (1899) 127 Cal. 65, 66.) So too is the comment on matters that are not in evidence. (See *People v. Hall* (2000) 82 Cal.App.4th 813, 817 (*Hall*); *People v. Handcock* (1983) 145 Cal.App.3d Supp. 25, 32-33.)

Here, the trial court's response to the jury question ran afoul of several of these foundational principles necessary to a fair trial. The trial court's response to the juror's question in effect changed the scope or basis of admissibility of the evidence, essentially redefining it as "other crimes" evidence on the issues of identity, motive and intent, without having had that evidence properly admitted for such purposes during the trial. In the usual course of considering the admissibility of "other crimes" evidence, the court follows well established rules of evidence and law after hearing argument from counsel on the matter, which requires the court to carefully review each count in light of the alleged "other crimes" evidence to determine its probativeness to prove a material fact other than criminal disposition and then to weigh its probative value against its prejudicial effect before it is admitted. (Evid. Code §§ 352, 1101; *Ewoldt, supra*, 7 Cal.4th at pp. 393-407.) This was not done here.

The substantial change in the scope of the evidence before the jury as a result of the court's response to its question after the case was submitted for deliberation, also deprived Armstead of the opportunity to meaningfully challenge the evidence in its new

character. The evidence as to individual counts was not offered or received during the trial as "other crimes" evidence. In addition to not having a fair opportunity to contest the admissibility of evidence for such purpose, Armstead had no fair opportunity to argue the weight of "other crimes" evidence to the jury. We thus think the trial court's ad hoc shift in the scope of the evidence after the case had been submitted to the jury was fundamentally unfair and denied Armstead due process.

Moreover, similar to cases where error has been found by the reference to evidence that was outside the record or had not been admitted, we believe Armstead was denied his Sixth Amendment right to confront the evidence by being precluded from addressing its admissibility and purpose before the case was argued and the jury instructed. (See *Hall, supra*, 82 Cal.App.4th at p. 817.) Without the opportunity to do so, Armstead simply had no effective way to defend, argue and submit instructions on the issue of the admissibility of the other crimes evidence which was not presented in trial. (*Id.* at pp. 817-818.) Nor was his counsel able to assist in meeting such evidence and advising Armstead about the change in the scope of the evidence. Thus, the court's response to the jury after the case had been fully submitted and the jury had been in deliberations for several days not only denied Armstead due process, but also denied him the effective assistance of counsel.

What the court did in this case in its response is somewhat analogous to the situation in *People v. Martin* (1954) 128 Cal.App.2d 724 (*Martin*), where the trial court first admitted evidence during the trial and then after the case was argued, instructed the

jury not to consider that evidence in its deliberations. (*Id.* at p. 729.) In finding the ruling and action of the trial court prejudicial, the court in *Martin* stated:

"Judges are not justified by the law in admitting evidence before the jury under objection and exception, and then, after the case has been argued by counsel, instruct the jury that such evidence should not be considered by them in making up their verdict. Such a course, if practiced, certainly would be out of the ordinary, and not just to a defendant." (*Ibid.*, citing *People v. Oldham* (1896) 111 Cal. 648, 654.)

In this case, nearly the opposite occurred. Rather than first admitting evidence and then striking it after argument as in *Martin*, the court here admitted evidence after argument for a purpose other than what it was admitted for at trial. In both cases, the court failed to apply the rules of evidence that govern the conduct of a fair trial.

The question remains whether the court's erroneous response or instructional error mandates reversal. Because Armstead's constitutional rights to due process and counsel were impacted, "reversal is required unless we are satisfied beyond a reasonable doubt that the [error] did not affect the jury's verdict. [Citations.]" (*Hall, supra*, 82 Cal.App.4th at p. 817.) Even though there was considerable evidence pointing to Armstead's guilt on counts 4, 5 and 9, it is impossible to know whether the court's response contributed to the convictions on those counts. Thus under the *Chapman* harmless-beyond-a-reasonable-doubt standard (*Chapman, supra*, 386 U.S. at p. 24), we cannot say the error was harmless. We, therefore, must reverse those counts.

As noted in the introduction of this opinion, because Armstead has not raised any contentions regarding his remaining six convictions, those must be affirmed.

Nevertheless, as we also mentioned, in the interests of justice, Armstead must be

permitted to exercise his right to withdraw his guilty pleas and admissions to those counts and their accompanying allegations which were entered in reliance on an agreement they could be withdrawn if a new trial were granted with regard to counts 4, 5 and 9.

DISPOSITION

The convictions for counts 4, 5 and 9 are reversed. The convictions for counts 1 through 3 and 6 through 8 are affirmed. The San Diego Superior Court is directed to permit Armstead to exercise his right to withdraw his guilty pleas and admissions for the affirmed convictions in accordance with this opinion.

CERTIFIED FOR PARTIAL PUBLICATION

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.