Filed 5/1/18 P. v. Roden CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DEREK RYAN RODEN,

Defendant and Appellant.

2d Crim. No. B277830
(Super. Ct. No. 15F-04404)
(San Luis Obispo County)

Derek Ryan Roden appeals a judgment following his conviction for first degree residential burglary of an occupied residence (Pen. Code, § 459), a felony, (count 1), and receiving stolen property (§ 496, subd. (a), misdemeanors (counts 2 and 3). The trial court found that he suffered a prior strike serious felony conviction under the Three Strikes law. (§§ 667, subd. (a), 1170.12 (b).) The court imposed an aggregate prison term of 17 years on count 1. We conclude, among other things, 1) the trial court did not abuse its discretion by excluding expert testimony on eyewitness identification, 2) Roden has not shown that his

counsel provided ineffective assistance, and 3) the court did not impose an unauthorized sentence. We affirm.

FACTS

On August 31, 2015, the People filed an information alleging Roden committed first degree burglary of an inhabited dwelling (count 1), received stolen property by possessing a "US Passport Card" belonging to Joanne Absher (count 2) and a Costco Card belonging to Matthew Lalanne (count 3).

The First Trial

Logan Austin testified that on April 18, 2015, he was sleeping in his bedroom. He woke up when he heard "heavy breathing." He turned on a light and saw Roden wearing a "CHP hat" and "using hand gestures." Roden took Austin's bottle of "Abercrombie & Fitch Fierce" cologne and ran out of the house to a car and drove away.

Police Officer Chad Pfarr had met Roden before the burglary. Roden was a "deaf, possibly deaf-mute" man who made hand gestures and had a CHP hat.

Absher testified that someone stole her wallet containing her passport card. Lalanne also testified someone stole his wallet containing his Costco card.

In a search of Roden's car, police found Lalanne's Costco card, Absher's passport card, and a "bottle of cologne."

In the defense case Robert Shomer, an expert on eyewitness identification, testified "eyewitness identification . . . works at a very low level of reliability." He said that photographs "can combine with your memory of who you saw, and so the evidence, which is only in the mind, then changes. . . . [T]here's no good relationship between how confident an eyewitness is and the actual accuracy of their identification. . . . [M]any people

resemble each other and that under the conditions of seeing a stranger suddenly, unexpectedly, we get the generalities, but we're less accurate about the details . . . ." He was asked, "[A]re you going to be giving us *your opinion as to whether or not the eyewitness in this case was or was not correct*?" (Italics added.) Shomer responded, "*I will not be doing that*." (Italics added.) Shomer said there are "valid and legitimate six-pack lineups that occur." In his field of "experimental psychology," there is no "certificate as to eyewitness identification expertise."

The jury found Roden guilty of counts 2 and 3 (receiving stolen property). It was unable to reach a verdict on count 1 (burglary), and the court declared a mistrial on that count.

The People's Motion in Limine
Before the Second Trial on Count 1

In the second trial, the People moved to exclude the testimony of defense expert Shomer. The trial court granted the motion. It ruled sufficient evidence corroborated Austin's identification of Roden, including Officer Pfarr's testimony. It said: 1) much of Shomer's testimony "was not particularly relevant to the only factors in this case that could arguably be the basis for expert testimony," and 2) it posed a danger of confusing or misleading the jury.

The Second Trial (Burglary)

Austin testified that during the April 18, 2015, burglary, he asked Roden why he was in his room. Roden was "looking" at Austin. They were only a couple feet away from each other. Austin could "clearly see" Roden's face. Roden did not speak. He used "sign language" and "hand gestures." Roden wore a CHP hat and was gesturing to the brim of that hat. Roden took Austin's "Abercrombie & Fitch Fierce" cologne bottle. After

Roden fled, the police showed Austin a photo lineup. As soon as he saw Roden's face in the photos, he identified Roden as the burglar.

Pfarr testified that one month prior to the burglary, he saw Roden in a parking lot at 2:15 a.m. Roden was a "deaf man" who made hand gestures to communicate. Roden pointed to his car. There was a CHP hat on the back windshield deck of that vehicle. Roden wrote a note indicating he was a friend of law enforcement and he showed Pfarr the CHP hat. Pfarr testified that after he received a description of the suspect in the Austin burglary, he "believed he knew who that was."

During a search of Roden's car, police recovered a bottle of Abercrombie & Fitch Fierce cologne.

In the defense case, Eric Roden, Roden's brother, testified he bought Roden a bottle of Abercrombie & Fitch Fierce cologne two years ago. He had not spoken to his brother about his testimony. Later the prosecutor asked, "[D]id you speak to your brother about your testimony?" He said, "[I]f it was about cologne, I guess, yes."

DISCUSSION

Exclusion of Expert Testimony on Eyewitness Identifications

Roden notes that in the first trial "the defense was allowed to present . . . an expert witness on the psychological factors pertaining to eyewitness identifications and the reliability of such evidence." He contends the trial court erred by excluding this testimony before the second trial. We disagree.

"[T]he decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion . . . ." (*People v. McDonald* (1984) 37 Cal.3d 351, 377, overruled on

another ground in *People v. Mendoza* (2000) 23 Cal.4th 896; see also *People v. Sanchez* (2016) 63 Cal.4th 411, 462 [a matter within the trial court's discretion].) "We expect that *such evidence will not often be needed*, and in the usual case the appellate court will continue to defer to the trial court's discretion in this matter." (*McDonald*, at p. 377, italics added.)

A trial court may exclude such expert testimony "if there is other evidence that substantially corroborates the eyewitness identification and gives it independent reliability." (*People v. Jones* (2003) 30 Cal.4th 1084, 1112.) Here the trial court found there was such evidence to corroborate the eyewitness testimony.

Austin testified Roden did not speak and he used "sign language" or "hand gestures." Roden took Austin's "Abercrombie & Fitch Fierce" cologne. He wore a CHP hat and was "gesturing" to the brim of that hat.

Pfarr said a few weeks before the burglary he met Roden who was a "deaf man" who made hand gestures and had a CHP hat. Roden showed Pfarr the CHP hat. When Pfarr heard the description of the burglary suspect, he "believed [he] knew who that was." Police recovered a bottle of Abercrombie & Fitch Fierce cologne in Roden's car. This evidence substantially corroborated Austin's testimony. Shomer said he would not testify about the accuracy of Austin's eyewitness identification. Roden has not shown the trial court abused its discretion by finding a lack of relevance for much of Shomer's testimony and its potential to confuse the jury.

Ineffective Assistance of Counsel

Roden contends his trial counsel was ineffective in the second trial by "open[ing] the door" to the admission of evidence that he was in possession of stolen property.

To establish ineffective assistance, Roden must show that 1) his counsel's performance fell "below an objective standard of reasonableness," and that 2) there is "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." (*People v. Benavides* (2005) 35 Cal.4th 69, 93.) "'Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, not on appeal.'" (*People v. Lucero* (2000) 23 Cal.4th 692, 728-729.)

Roden notes that in the first trial there was evidence that the police searched the "glove box" of his car and seized a Costco card that belonged to another person. The prosecutor agreed not to present evidence about this stolen card in the second trial "unless there was testimony which came up that opened the door." In the second trial, Police Officer Eric Vitale testified that in a search of the glove box there was a bottle of Abercrombie & Fitch cologne. On cross-examination, Roden's counsel asked Vitale, "What else was discovered in the glove box?" Vitale said, "[A] phone car charger, pens, some coins, miscellaneous papers." He did not mention the stolen Costco card.

The prosecutor sought to introduce evidence that the stolen card also was found in the glove box, claiming defense counsel's question opened the door. The trial court overruled defense counsel's objection on Evidence Code section 352 grounds. The court said defense counsel's question opened the door to further questions concerning the stolen card. Vitale testified the stolen Costco card was found in Roden's "glove compartment."

Roden contends his counsel's performance was unreasonable because his cross-examination opened the door for the admission of the stolen card.

But in his direct testimony, Vitale said one of the items seized in the search was a "headband" light commonly used by burglars. Roden's counsel tried to refute the inference that Roden was a professional burglar by showing that the glove box did not contain the other types of tools commonly used by burglars. In addition, his counsel could reasonably believe that asking the question would not lead to the introduction of evidence about the stolen card. Because of the prosecutor's agreement, he could have anticipated that the prosecutor would have instructed Vitale not to mention the stolen card. In fact, the prosecutor did not mention it when Roden's counsel asked the question. Counsel also could have expected that the court would not allow introduction about a crime that was not directly connected to the burglary.

But even if defense counsel's question was a mistake, the result does not change. Roden has not shown a reasonable probability that "but for counsel's errors" the result would have been different. (*People v. Benavides*, *supra*, 35 Cal.4th at p. 93.) Austin had a clear opportunity to see Roden. Roden was "looking" at Austin. The two men were only a "couple feet away" from each other. "[A]s soon as [Austin] saw [the police photo lineup]," he identified Roden. Austin's eyewitness testimony was corroborated by other prosecution evidence. The police found an Abercombie & Fitch Fierce cologne bottle in Roden's car and a headband light commonly used by burglars.

Unauthorized Sentence

On June 9, 2016, the trial court held a bench trial on the People's allegations in the information that Roden had a prior 2008 first degree burglary conviction. The court found Roden "sustained the prior alleged pursuant to Penal Code section 667(d) and 1170.12 (b) . . . as a strike prior." It said, "[A]nd I further find it would qualify as a serious felony under Penal Code section 667(a)."

On June 14, 2016, the jury found Roden guilty on counts 2 and 3 (receiving stolen property), but it could not reach a verdict on count 1 (burglary). The court declared a mistrial on count 1.

On September 14, 2016, after the second trial and guilty verdict on count 1, the trial court sentenced Roden. For his conviction on count 1, first degree burglary (§ 459), it imposed the upper term of six years in state prison. It doubled that sentence to 12 years pursuant to the three strikes law because of the June 9th findings that he was convicted of a prior strike in 2008 for first degree burglary, a serious felony. Because of that prior conviction, it imposed a consecutive five years (§ 667, subd. (a)) for an aggregate sentence of 17 years on count 1.

Because of Roden's conviction in the first trial on counts 2 and 3 for the misdemeanor, receiving stolen property (§ 496, subd. (a)), the court sentenced him to "180 days in the county jail to be stayed."

Roden contends there was no adjudication of the prior conviction enhancement allegations in the second trial and consequently his sentence is unauthorized. But there was a court trial on the enhancement allegations on June 9, 2016.

The People contend the trial court's findings on those allegations were "effective regardless of the fact that a partial

mistrial in Roden's first trial required a second trial." They claim the findings "became operative after the jury convicted [Roden] in the second trial." We agree.

The mistrial on count 1 in the first trial did not invalidate the court's June 9th findings. Roden has not shown that he was denied due process at that June 9th trial or that the court's findings are not accurate. He has made no showing on how he could challenge the court's findings. At the June 9th trial, Roden's counsel said he had no evidence to present and he had no objection to the People's exhibits. Those exhibits supported the findings on the prior conviction.

Moreover, in Roden's sentencing memorandum, it is noted that he "*was convicted* of a violation of Penal Code [section] 459, First Degree Burglary, on May 12, 2008 in Santa Maria." (Italics added.)

We have reviewed Roden's remaining contentions and we conclude he has not shown grounds for reversal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Jacquelyn H. Duffy, Judge

Superior Court County of San Luis Obispo

Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.