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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS LEWIS,

Defendant and Appellant.

B275997

(Los Angeles County  
Super. Ct. No. GA097408)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Abzug, Judge. Affirmed.

Nadezhda M. Habinek, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Dennis Lewis was convicted following a jury trial on one count of carjacking. (Pen. Code, § 215, subd. (a).)<sup>1</sup> Appellant’s counsel on appeal filed a *Wende* brief (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*)) requesting that we conduct an independent review of the record. We have done so and conclude that no arguable issues exist. Accordingly, we affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *Prosecution Evidence*

On October 20, 2015, around 8:00 p.m., Lilit Kepenekian was on the Bob Hope Drive offramp of the 134 freeway when she saw a man, later identified as appellant, holding what appeared to be a gun wrapped in a red blanket and pointing it at the car in front of her on the offramp. She called 911 to report the incident, stating that appellant was standing in the traffic lanes pointing the gun at the car in front of her and blocking the car. She described appellant as “a white old man” with white hair. She heard appellant screaming at the car but did not know what he was saying.

Abraham Tseng was the driver of the car in front of Kepenekian. He was slowing down for a red light on the Bob Hope Drive offramp when he had to stop suddenly in order to avoid hitting someone.<sup>2</sup> The person was standing in front of his car on the driver’s side, yelling, “Get out of the car. I’m going to shoot you.” Tseng’s headlights allowed him

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<sup>1</sup> Unspecified statutory references are to the Penal Code.

<sup>2</sup> Tseng was unable to identify the perpetrator at trial.

to see the person's face fairly clearly. The person was wearing or holding a red jacket and was concealing his hand, which Tseng was afraid held a weapon. When Tseng hesitated, the man yelled, "Do you wanna get shot? I will shoot you." Tseng got out of the car and backed away. Tseng called 911 to report the incident.

Jennifer Guevara and her boyfriend, Luis Lopez, were at a park near Bob Hope Drive by the Los Angeles River, around 8:00 p.m. on October 20, 2015. Around 8:30 p.m., Guevara saw a car that seemed to be out of control, going at a high speed and entering the grass area of the park. The car drove across the park, through grass and trees, hit a curb, and came to a stop next to the river. Lopez heard a loud boom and saw the car driving around 40 miles per hour before it hit the curb. The car passed close to Guevara and Lopez, and Lopez was able to see the driver. At trial, Lopez identified appellant as the driver of the car.

California Highway Patrol Officer David Adams and his partner, Officer Traugott, responded to the Bob Hope Drive offramp. While Officer Traugott was speaking with Tseng, Officer Adams learned that the car had been found nearby. Officer Adams went to the location of the car and saw that the car had crashed into a fence along the Los Angeles River and was teetering over the edge of the river. No one was in the car. Officers used flashlights and a helicopter spotlight to search the river and spotted someone in the river, approximately 75-100 feet away from the car. Appellant was identified at trial as the person found in the river.

The officers climbed down a ladder into the river and saw appellant lying on his back in the middle of the river, which was

approximately six inches deep. When appellant did not comply with police commands to show his hands, an officer shot him with a bean bag. Appellant was unable to walk, so he crawled toward the officers. Appellant was taken out of the river by gurney, and the car was pulled off the edge of the river by a tow truck. No red jacket or red blanket was found at the scene or with appellant.

Police officers brought Tseng to the location where his car was found. Tseng identified his car. He also identified appellant, who was in an ambulance, as his assailant. At trial, Tseng was “reasonably sure” of his identification of appellant for the police, although at the time of the identification he was positive. California Highway Patrol Sergeant Michael Munoz testified that Tseng was not unsure of his identification of appellant in the ambulance.

### *Defense Evidence*

Dr. Iris Blandin-Gitlin, a psychologist, testified about mistaken eyewitness identification. Blandin-Gitlin reviewed materials from appellant’s case, such as the police report, a photograph, and a transcript of the 911 call. She testified that factors such as low lighting, cross-race identification, and “weapon focus effect” tended to make eyewitness identification less reliable. She also testified that “show-up identifications,” in which a witness is shown one suspect, can influence a witness and lead to misidentifications. Blandin-Gitlin testified that the in-court identification of appellant, eight months after the incident, was susceptible to mistake because of delay and the suggestive environment of being in court. She also testified that a witness’s

confidence in the identification is not a good measure of the accuracy of the identification.

### *Procedural Background*

Appellant was charged by information with one count of carjacking. (§ 215, subd. (a).) The information further alleged that appellant had suffered one prior strike (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), which also qualified as a serious felony conviction (§ 667, subd. (a)(1)) and a violent felony conviction (§ 667.5, subd. (c)). Appellant entered a not guilty plea and denied the prior conviction allegation.

The People made appellant an offer of 15 years in state prison. Defense counsel sought additional time to obtain more evidence with which to negotiate a settlement.

Appellant filed a motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 to dismiss his prior strike. The trial court set forth findings of fact and conclusions of law in denying the *Romero* motion. The court stated that its denial was without prejudice to later revisiting the decision if new facts developed.

Appellant's trial counsel had been developing evidence to reach a settlement when she became unavailable due to medical leave. On May 2, 2016, the public defender's office designated a new lawyer, and appellant made a *Marsden* motion. (*People v. Marsden* (1970) 2 Cal.3d 118.)

The trial court held a hearing on appellant's *Marsden* motion, at which appellant asserted that defense counsel was not investigating the

case thoroughly. Appellant further asserted that defense counsel was not complying with his request to receive copies of police reports, witness statements, and other documents. He requested a “state appointed attorney” in place of his public defender. The trial court spoke with defense counsel and explained to appellant that his new lawyer needed time to prepare for trial. After further discussion, the court denied the motion.

On June 10, 2016, appellant’s new trial counsel filed a motion for continuance, stating that he was unable to proceed to trial for health reasons. Appellant was represented by a different deputy public defender at trial.

The case proceeded to a jury trial on June 14, 2016. The jury found appellant guilty of carjacking. Following his conviction, appellant waived his right to a court trial on his prior conviction and admitted to the allegation. The court accepted the waiver and found the allegation to be true.

At sentencing, the court granted appellant’s request to reconsider his *Romero* motion and granted the motion. The court sentenced appellant to the high term of 9 years, plus a 5-year enhancement for a serious felony conviction (§ 667, subd. (a)(1)) for a total term of 14 years. Appellant filed a timely notice of appeal.

## **DISCUSSION**

After review of the record, appellant’s court-appointed counsel filed an opening brief asking this court to review the record independently pursuant to the holding of *Wende, supra*, 25 Cal.3d at

page 441. On June 12, 2017, appellant filed a supplemental brief, challenging the denial of his *Marsden* motion and asserting ineffective assistance of counsel.

The denial of a *Marsden* motion is reviewed for abuse of discretion. (*People v. Carter* (2010) 182 Cal.App.4th 522, 527.) “The court does not abuse its discretion in denying the motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant’s right to assistance of counsel. [Citation.]’ [Citation.]” (*Ibid.*) We have reviewed the record and find no abuse of discretion in the denial of appellant’s request for substitution of counsel.

“The standard for showing ineffective assistance of counsel is well settled. ‘In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could

be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus.’ [Citation.]” (*People v. Gray* (2005) 37 Cal.4th 168, 206-207.)

“To succeed on his claim of ineffective assistance of counsel, defendant would have to show that his ‘(1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel’s failings.’ [Citation.]” (*People v. Richardson* (2007) 156 Cal.App.4th 574, 596.) Appellant has not established either prong.

Appellant contends that his trial counsel did not have time to properly prepare and that the witnesses were not questioned thoroughly. He asserts that this was a case of mistaken identity, and that the truth would have been revealed at trial had he received effective assistance.

Contrary to appellant’s contention, the record reveals that his trial counsel cross-examined the witnesses thoroughly, including cross-examination about the witnesses’ identification of appellant. His trial counsel also brought in an expert who testified extensively about eyewitness misidentification. In addition, trial counsel’s closing argument raised the issue of misidentification, pointing out that Tseng was not positive about identifying appellant and citing the factors raised by the expert, such as distance, lighting, the witnesses’ potential state of shock at the time of the incident, and the unreliability of the identification at the scene.



Appellant contends that his trial counsel was assigned on the day before trial. While this may be true, the transcript indicates that trial counsel was well prepared and familiar with the case. Appellant has not met his burden of establishing ineffective assistance of counsel.

We have examined the entire record and conclude that there are no arguable issues on appeal. (See *Wende, supra*, 25 Cal.3d at pp. 441–442; see also *Smith v. Robbins* (2000) 528 U.S. 259, 278–279 [upholding the *Wende* procedure].)

### **DISPOSITION**

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.