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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS ALBERTO PASILLAS,

Defendant and Appellant.

B292132

(Los Angeles County
Super. Ct. No. BA459047)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ray G. Jurado, Judge. Affirmed.

Tasha G. Timbadia, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Carlos Pasillas guilty of second-degree robbery. On appeal, he contends reversal is required because the eyewitness's identification of him at a field showup was unduly suggestive and unreliable under a totality of the circumstances. We affirm the judgment.

FACTS

The Robbery

Antonio Gaona worked at an AutoZone as a parts sales manager in 2017. On May 29, 2017, he noticed a white Lexus drive slowly past the front of the store "like they were scoping the place." Gaona mentioned this to one of his coworkers, but then became busy helping customers. Shortly thereafter, three young Latino men entered the store. They asked Gaona to help them find various car parts, including a light bulb for a Lexus. Gaona was suspicious of them and observed them closely as they walked through the store. Approximately five minutes after he assisted them, the alarm at the front entrance began to sound.

Gaona noticed the man who had asked for the Lexus light bulb walk out of the store, pretending to speak into a mobile phone and ignoring the alarm. Gaona asked a coworker to call the customer back in, but the man ignored the request. When Gaona followed and pressed him to return to the counter, the man replied, "No. I didn't take nothing. I didn't take shit." He continued to walk out of the store. Gaona retrieved his mobile phone and followed the man out, intending to take a picture of his license plate. As Gaona exited, he saw the man near the rear of the store dispose of the retail packaging that contained the bulb. At trial, Gaona identified Pasillas as the man who set off the alarm and whom he followed.

Gaona took several photos of the white Lexus. As Gaona turned to walk back into the store, the other two men confronted him, demanding to know whether he had taken a picture of their car. Before he could respond, Pasillas hit him on the head from behind. Pasillas also took Gaona's phone from him. After Pasillas punched Gaona, the other two men began to punch him as well. Gaona's glasses fell to the ground and he covered his head to protect himself. He also retreated to a small alleyway to prevent them from surrounding him. The men ran back to the white Lexus.

Gaona attempted to write down their license plate number, but Pasillas strode back to resume the attack. A customer, who had exited the store and observed the conflict, pushed Pasillas to the ground. Pasillas left in the white Lexus at his companions' request. When Gaona returned to the store, he was bleeding, his face was swollen, and he could not hear out of his right ear. Officers were unable to retrieve video from the cameras in the store. The customer had taken a picture of the Lexus's license plate, but stated he did not want to get involved.

The Field Identification

The license plate number given to Gaona was registered to a white Lexus GS with an address in Los Angeles. On June 5, 2017, officers arrived at the address and encountered Pasillas, who admitted he drove the Lexus, but denied involvement in any robbery. Pasillas was detained. Officers asked Gaona to accompany them for a field identification.

Gaona was escorted to Pasillas's address in the back seat of the patrol car. The patrol car initially stopped approximately 30 to 40 yards away from Pasillas, who was in handcuffs. Because Gaona did not have his prescription glasses with him that day,

he asked the officer who was driving to move the patrol car closer. The officer complied, and the car was moved within 20 yards of Pasillas. Gaona identified Pasillas from the back of the patrol car as the one who punched him and took his phone. At trial, Gaona explained he used his glasses mainly for reading, and not for distance. He preferred to drive without his glasses.

The following day, Gaona's coworker identified Pasillas from a six-pack photographic line-up as one of the men at the AutoZone on the day of the robbery. He also incorrectly identified another person in the same six-pack as having "possibly" been there as well.

The Criminal Proceedings

Pasillas was charged with one count of second degree robbery in violation of Penal Code section 211. At trial, the People presented Gaona's testimony regarding the robbery as described above.

The defense presented testimony from the responding officer. He testified Gaona described the three suspects as young Hispanic men between 20 and 25 years of age with black hair and brown eyes with average height of five-foot eight-inches. One of them was shorter than the other two. Gaona further told the officer one suspect wore a gold chain, a white jersey, and dark pants. The second suspect wore a dark jersey and dark shorts. The third wore a white t-shirt or tank top. Gaona originally reported the person wearing the gold chain, white jersey, and dark pants set off the alarm and initiated the attack while the person wearing the white t-shirt or tank top took his cell phone.

The defense argued Gaona misidentified Pasillas as the robber, focusing on Gaona's inconsistent description of the suspects and events as well as the problems with his field

identification. In particular, Pasillas argued the identification was unreliable because Gaona did not have his glasses at the time of the field identification and Pasillas was the only person in handcuffs.

The jury found Pasillas guilty of second-degree robbery. The trial court suspended imposition of the sentence and placed Pasillas on formal probation for five years. It further ordered him to perform 30 days of Caltrans work and make restitution to the victim pursuant to Penal Code section 1202.4, subdivision (f), as well as pay various fines and fees. Pasillas timely appealed.

DISCUSSION

I. The Field Identification Was Not Unduly Suggestive

Pasillas argues Gaona's identification of him should not have been admitted because the field identification procedure was unduly suggestive and unreliable under a totality of the circumstances. Thus, his due process rights were violated. He acknowledges his trial counsel failed to object to the admission of the field identification, however. To avoid forfeiture, he raises an ineffective assistance of counsel claim. We agree this issue is forfeited. (*People v. Elliot* (2012) 53 Cal.4th 535, 585.) Nevertheless, we consider the merits of Pasillas's argument within the context of an ineffective assistance of counsel analysis.

A. Applicable Law

To show ineffective assistance of counsel, a defendant has the burden to demonstrate (1) the counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) the deficient performance prejudiced the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 691–692; *People v. Lewis* (1990) 50 Cal.3d 262, 288.)

“ ‘ “In order to determine whether the admission of identification evidence violates a defendant’s right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness’s degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.” [Citation.]’ ” (*People v. Thomas* (2012) 54 Cal.4th 908, 930.) The defendant bears the burden of demonstrating that the identification procedure was unreliable. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

B. Analysis

Pasillas asserts the admission of the field identification violated his due process rights because it was unduly suggestive; he was the only suspect present at the field identification and one of the officers said to Gaona, “I think we have one of the guys in custody from the incident.” We conclude the field identification was not unduly suggestive. As a result, his trial counsel was not ineffective in failing to object on this basis.

“To begin with, [t]he “single person showup” is not inherently unfair.’ ” (*People v. Ochoa* (1998) 19 Cal.4th 353, 413.) It is well established that a single person showup does not require suppression of identification evidence even when the suspect is surrounded by officers and in handcuffs. While such a procedure has been recognized to be somewhat “suggestive,” courts have consistently refused to deem these factors so

suggestive as to render the resulting identification evidence inadmissible, given the countervailing benefits to law enforcement and the accused of an immediate determination of whether the correct person has been apprehended. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386–387 [defendant handcuffed]; see also *People v. Gomez* (1976) 63 Cal.App.3d 328, 335–337 [no due process violation when handcuffed defendant stood outside the patrol car with two deputies standing near him]; *In re Richard W.* (1979) 91 Cal.App.3d 960, 969–970 [no due process violation when witness identified defendant while he was handcuffed and seated in the back of a patrol car]; *People v. Savala* (1981) 116 Cal.App.3d 41, 49 [no due process violation where showup procedures were “factually similar” to those in *Richard W.*]; *People v. Craig* (1978) 86 Cal.App.3d 905, 914 [defendants were inside a police car and officers stood around the car].) We agree with these cases and find the single person showup here was not unduly suggestive.

Moreover, the officer’s statement to Gaona—“I think we have one of the guys in custody from the incident”—does not amount to an improper suggestion. Gaona testified the officer informed him: “I think we have one of the guys in custody from the incident that happened. We need you to identify if it’s him or not.” Gaona further testified the police “didn’t know if it was him or not.” Taken in context, the officer’s remarks did not improperly suggest to Gaona that the person he was about to view was the one who robbed him. Instead, Gaona’s testimony clearly demonstrated he was aware he needed to identify the person and the police were unsure about the suspect’s identity. The officer’s comments were not improperly suggestive. (*People v. Contreras* (1993) 17 Cal.App.4th 813, 820 [“Telling a witness

suspects are in custody . . . is not impermissible” in the context of an identification procedure].)

Because the field identification was not unduly suggestive, a motion to suppress the admission of the field identification evidence would have been properly denied. Pasillas’s trial counsel did not render ineffective assistance by failing to object to the admission of this evidence. (*People v. Riel* (2000) 22 Cal.4th 1153, 1213.)

Even if we were to find the circumstances of the field identification to be unduly suggestive, which we do not, it was nevertheless reliable under the totality of the circumstances. Here, Gaona had ample opportunity to view Pasillas at the time of the offense. Gaona testified he suspected the men “were scoping the place” when they initially drove by in the white Lexus. As a result, he paid particular attention to them during the 15 to 20 minutes they were in the store. He also spent time assisting them. At the time of the field identification, Gaona ensured he could see Pasillas clearly when he asked the officer to move the patrol car closer. At trial, he testified he was “100 percent sure, [and had] no hesitation” that Pasillas was the one who punched him and took his cell phone. Gaona’s identification of Pasillas was corroborated by his coworker, who identified Pasillas from a photographic lineup as being present on the day of the robbery.

We reject Pasillas’s argument that the identification was unreliable because it occurred a week after the incident, Gaona was not wearing his prescription glasses at the time, and he had initially implicated a different person as the one who took his phone. These matters go to the weight, not the admissibility of this evidence. Due process is not violated merely because

identification evidence is not “the most reliable” since “ ‘ “[c]ounsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to . . . any suggestibility in the identification procedure” ’ [Citation.]” (*People v. Gordon* (1990) 50 Cal.3d 1223, 1243, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835.) Short of a “ ‘substantial likelihood of irreparable misidentification’ . . . [identification] evidence is for the jury to weigh. . . . Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.” (*Manson v. Brathwaite* (1977) 432 U.S. 98, 116.) The evidence of the field identification was properly admitted for the jury’s consideration.

II. Substantial Evidence Supports the Robbery

For the same reasons, we reject Pasillas’s substantial evidence claim. Pasillas contends there is insufficient evidence to support his conviction due to the unreliable field identification and the resulting unreliable identification at trial. According to Pasillas, the only evidence that he was the perpetrator is Gaona’s identification of him; a search of the Lexus and his residence produced no evidence linking him to the crime, there was no video from the cameras at Autozone, and Gaona’s coworker was inside the store during the robbery. Pasillas’s argument presumes Gaona’s identification was inadmissible. As discussed above, our conclusion is to the contrary. Substantial evidence supports his conviction because “the testimony of a single witness is sufficient to uphold the judgment even if it is contradicted by other evidence, inconsistent or false as to other portions.” (*People*

v. Leigh (1985) 168 Cal.App.3d 217, 221.) Pasillas’s substantial evidence argument thus falls alongside his due process argument.

III. The Jury Was Properly Instructed With CALCRIM No. 315

Pasillas next claims it was error for the trial court to instruct the jury that it had heard “eyewitness testimony identifying the defendant,” given the problematic identifications provided by Gaona and his coworker. He repeats his contentions regarding the deficiencies of Gaona’s identification and adds that the coworker’s identification was problematic because the coworker was inside the store at the time of the robbery. He contends a reasonable juror could interpret the trial court’s instruction to mean Pasillas had been adequately identified when he had not. A cursory reading of the full instruction belies Pasillas’s claim. Here, the court instructed the jury on CALCRIM No. 315 as follows.

“You’ve heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. In evaluating identification testimony, consider the following questions:

Did the witness know or have contact with the defendant before the event?

How well could the witness see the perpetrator?

What were the circumstances affecting the witness’s ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation?

How closely was the witness paying attention?

Was the witness under stress when he made the observation?

Did the witness give a description and how does that description compare to the defendant?

How much time passed between the event and the time when the witness identified the defendant?

Was the witness asked to pick the perpetrator out of a group?

Did the witness ever fail to identify the defendant?

Did the witness ever change his mind about the identification?

How certain was the witness when he made the identification?

Were the witness and the defendant of different races?

Were there any other circumstances affecting the witness's ability to make an accurate identification?

The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty.”

A full reading of the instruction makes clear that the trial court did not suggest to the jury that Ganoa's or his coworker's testimony was sufficient to identify Pasillas as the perpetrator. Instead, the court properly instructed the jury to consider a long list of factors to evaluate whether their eyewitness testimony was accurate and truthful. It is presumed the jury followed these instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Pasillas has demonstrated no error resulting from the trial court's instruction to the jury.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

STRATTON, J.

WILEY, J.