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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIPE LUIS CALDERON,

Defendant and Appellant.

B253758

(Los Angeles County
Super. Ct. No. BA416266)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara R. Johnson, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II, David C. Cook and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Phillipe Luis Calderon appeals from the judgment entered after a jury convicted him of one count of second degree robbery in violation of Penal Code section 211. Calderon contends that the judgment should be reversed because his defense counsel rendered ineffective assistance by failing to request a jury instruction on eyewitness identification and the prosecutor committed prejudicial misconduct during closing argument. We reject his contentions and thus affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

An information, filed on October 17, 2013, charged Calderon with one count of second degree robbery. According to the evidence presented at trial, on September 1, 2013, at approximately 2:00 a.m., District Safety Officer Brandon Clinkscale was on Los Angeles Street near the intersection of Fifth Street. He saw a Black man, whom he identified at trial as Calderon, hit another man in the face and take a wallet from the pocket of the man's pants. Clinkscale crossed the street and approached Calderon. When Calderon walked away, Clinkscale followed him and called 911, describing the assailant as a Black man wearing black pants and a gray shirt. Calderon turned onto Winston Street, where Clinkscale lost sight of Calderon for 10 seconds because of a curve in the road. Calderon then turned around and walked back past Clinkscale.

Police responded and arrested Calderon, who was wearing black pants and a gray shirt. The victim was identified as Wilson Carranza. Calderon had in his hand a TAP card (used for the Metro bus) in Carranza's name. Police also found Carranza's identification card where Calderon had been seated in the patrol car. A few days later, after viewing a six-pack photographic lineup, Carranza pointed to Calderon's picture in the second position and told the administering officer, "This one." Carranza wrote, "The person on No. 2 seems to be the same as the person that assaulted me." At trial, Carranza said that his attacker was not in the courtroom, even though Calderon was present during Carranza's testimony.

Calderon testified in his defense that, although he has a drug problem and stole to support his habit, he did not hit Carranza and take a wallet from Carranza's person.

According to Calderon, he witnessed a commotion near Fifth Street and Los Angeles Street at the time of the attack on Carranza but was not involved in it. After the commotion, two men ran past Calderon and threw a wallet on the street. Calderon picked up the wallet and was going through it when Clinkscale approached him. Calderon took the TAP and identification cards from the wallet and threw the wallet back on the ground. He was trying to dispose of the cards when the police stopped him.

The jury found Calderon guilty of robbery. The trial court sentenced Calderon to the upper term of five years in state prison.¹ Calderon appealed.

DISCUSSION

1. *No Basis Exists to Reverse the Judgment for Ineffective Assistance of Counsel*

To establish ineffective assistance of counsel, the defendant must show that his counsel's performance was deficient in falling below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 688; *In re Valdez* (2010) 49 Cal.4th 715, 729.) The defendant also must establish that the deficient performance prejudiced him, in other words, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, at p. 694; see also *Valdez*, at p. 729.) "If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Holt* (1997) 15 Cal.4th 619, 703.) As a result, if a reviewing court concludes that the alleged ineffective assistance did not prejudice the defendant, it need not address whether counsel's performance was deficient. (*People v. King* (2010) 183 Cal.App.4th 1281, 1298.)

Calderon contends that his defense counsel rendered ineffective assistance because he did not request the trial court to instruct the jury under CALCRIM No. 315 on

¹ The information specifically alleged that Calderon had served eight prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). The trial court struck those allegations in furtherance of justice.

eyewitness identification.² We need not address whether the failure to request CALCRIM No. 315 constituted ineffective assistance because, even if the court had given the instruction, it is not reasonably probable that the jury would have reached a verdict more favorable to Calderon.

In *People v. Wright* (1988) 45 Cal.3d 1126, 1144-1152 (*Wright*), the Supreme Court addressed the question of prejudice from a failure to instruct on factors relating to eyewitness identification. There, after considering the entire record, the Supreme Court concluded that the lack of such an instruction was not prejudicial given “(a) the overall strength of the evidence; (b) the fact that factors relating to the reliability of the eyewitness identifications were brought to the jury’s attention by (i) cross examination, (ii) opening and closing arguments of counsel, and (iii) the jury instructions given; and (c) the absence of any indication that the jury was uncertain or confused.”

² CALCRIM No. 315 states: “You have 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[, and _____<insert any other relevant circumstances>]? [¶] • How closely was the witness paying attention? [¶] • Was the witness under stress when he or she 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 or her mind about the identification? [¶] • How certain was the witness when he or she made an identification? [¶] • Are the witness and the defendant of different races? [¶] • [Was the witness able to identify other participants in the crime?] [¶] • [Was the witness able to identify the defendant in a photographic or physical lineup?] [¶] • [_____<insert other relevant factors raised by the evidence>.] [¶] • 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.”

(*Id.* at pp. 1144-1145, fn. omitted.) Consideration of the same factors in this case demonstrates that the failure to instruct under CALCRIM No. 315 did not prejudice Calderon.

Initially, the evidence against Calderon was strong. Clinkscale witnessed the attack and identified Calderon at trial as the assailant. Clinkscale's description of the clothing of the assailant when he called 911 to report the attack matched that worn by Calderon at the time. Carranza identified Calderon as the assailant in a photographic lineup days after the attack, even though he later did not identify him at trial. Calderon admitted being in the vicinity of the attack. And police found him nearby with Carranza's TAP card. Police also retrieved Carranza's identification card from the patrol car in the location where Calderon had been seated.

Moreover, defense counsel through cross-examination and closing argument presented to the jury factors relating to eyewitness identification. Cross-examination of Clinkscale highlighted circumstances, including obstructions, that could have affected Clinkscale's ability to observe and accurately identify the assailant, including the fact that Clinkscale lost sight of Calderon for 10 seconds because of a curve in the road. In closing argument, defense counsel detailed the potential unreliability of eyewitness identifications. He reminded the jury that Carranza had failed to positively identify Calderon at trial. He argued that Carranza's written notation based on the photographic lineup stating that the person in the picture "'seems to be the same as the person [who] assaulted [him]'" was an equivocal identification, even though Carranza had said "'[t]his one'" when looking at Calderon's photograph. Defense counsel pointed out that Carranza initially had identified an assailant in addition to Calderon and that Clinkscale and Carranza had given differing height and weight descriptions of the assailant, neither of which matched Calderon's height and weight.

In addition, although the jury did not receive CALCRIM No. 315, the trial court gave CALCRIM No. 226, regarding the credibility or believability of witnesses, which outlined certain factors relevant to eyewitness identification. For example, under CALCRIM No. 226, the court instructed that, in determining the truth or accuracy of a

witness's testimony, the jury "alone must judge the credibility or believability of the witnesses" and may consider how well the witness could "see, hear, or otherwise perceive the things about which the witness testified" and how well the witness was "able to remember and describe what happened." CALCRIM No. 226 also directed the jury to consider prior inconsistent identifications and stated that witness observations may be unreliable.

Finally, no indication exists of jury confusion. The jurors deliberated about two hours only and did not request any read back of testimony or ask any questions.

Considering all factors—the strength of the evidence, cross-examination, defense counsel's closing argument, the jury instruction given and the absence of juror confusion—the jury was adequately informed on factors relevant to eyewitness identification. Calderon thus cannot show a reasonable probability that the result of the trial would have been more favorable to him had the jury been instructed under CALCRIM No. 315.

2. *No Basis Exists to Reverse the Judgment for Prosecutorial Misconduct*

"The applicable federal and state standards regarding prosecutorial misconduct are well established. "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ""the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."" [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

Calderon contends the prosecutor committed misconduct by making an improper remark during his rebuttal closing argument. The prosecutor stated, "[Defense counsel] said . . . to not even consider [Calderon's] testimony and to just consider the evidence you heard before that. I would want to do that too if I knew the person I was relying on directly lied to the jury. And that's what he did to you." According to Calderon, that remark improperly accused defense counsel of fabricating a defense.

We need not decide whether the prosecutor's remark was improper because it is not reasonably probable that Calderon would have obtained a more favorable verdict absent the alleged misconduct. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1220 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of prejudice to claim of prosecutorial misconduct].) As discussed above, although defense counsel examined Carranza and Clinkscale about their identifications and urged the jury to question the identifications, the evidence against Calderon was strong. Moreover, the trial court instructed the jury under CALCRIM No. 222 that, "Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence." It also told the jury under the same instruction that, "Nothing that the attorneys say is evidence. In their . . . closing arguments, the attorneys discuss the case, but their remarks are not evidence." It is presumed that the jury followed those instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436 [alleged prosecutorial misconduct not prejudicial when trial court properly instructed on the law because jury presumed to have followed instructions]; *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8 [jury presumed to have treated "prosecutor's comments as words spoken by an advocate in an attempt to persuade"].) Given the strength of the evidence and the jury instructions, the prosecutor's remark did not prejudice Calderon and certainly did not so infect the trial with unfairness as to constitute a denial of due process.

DISPOSITION

The judgment is affirmed.

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ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.*

* Judge of the Los Angeles Superior Court, Assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.