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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN F. PEREIDA,

Defendant and Appellant.

2d Crim. No. B271443
(Super. Ct. No. BA414327)
(Los Angeles County)

Jonathan F. Pereida appeals after a jury convicted him on two counts of attempted willful, deliberate, and premeditated murder. (Pen. Code, §§ 187, subd. (a), 664.)¹ The jury also found that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), and that a principal personally used a firearm in committing the offenses (§ 12022.53, subds. (b) & (e)(1)). The trial court sentenced him to 25 years to life in state prison. Appellant contends that the

¹ All statutory references are to the Penal Code unless otherwise stated.

victims' identifications of him as the perpetrator should have been excluded and his convictions must be reversed for insufficient evidence. We affirm.

STATEMENT OF FACTS

On August 1, 2013, Grace Rodriguez and her boyfriend Andrew Bossuyt lived on Estara Avenue in Los Angeles. At around 12:30 a.m. that morning, they arrived at home in their car. Shortly after Bossuyt pulled into the driveway, a man he and Rodriguez later identified as appellant pointed a gun at him through the open driver's side window and asked, "Where you from, Puto?" Appellant moved the slide on the gun, lunged forward, and appeared to pull the trigger twice. He made a jerking motion as if the gun had malfunctioned, said "fuck," and walked to a white taxicab that had pulled up alongside Bossuyt's car. A man later identified as Michael Herrera² was sitting in the back seat of the taxicab and briefly opened the rear passenger door. Appellant got in the front passenger seat and the taxicab sped away. Bossuyt called 911.

At about 1:00 a.m., Los Angeles Police Officer Zachary Jordan was patrolling on Estara Avenue and saw freshly-painted gang graffiti. As he was investigating the area, two people told him that someone had pointed a gun at them and threatened them. Officer Jordan knew that Estara Avenue was within the territory of the Avenues gang and recognized that the graffiti contained signs and symbols adopted by the Avenues' primary rival, the Toonerville gang.

² Herrera pled no contest to both counts of attempted murder and admitted firearm use and gang enhancement allegations. He is not a party to this appeal.

Around 1:20 a.m., Officers Monica Tokoro and Michael Flores arrived at Bossuyt and Rodriguez's house in response to the 911 call. At about 1:45 a.m., the officers were notified that fresh Toonerville graffiti had been found nearby at 32nd Street, which is also within the Avenues gang's territory. After observing the graffiti, the officers concluded that Toonerville members were currently in the area.

At about 2:15 a.m., Officers Tokoro and Flores saw a white taxicab that matched the description given by Bossuyt and Rodriguez. Officer Flores directed his spotlight on the taxicab's interior and saw appellant sitting in the driver's seat and Herrera sitting in the front passenger seat. Based on prior contacts, both officers knew appellant was a member of the Toonerville gang. The officers made a u-turn and followed the taxicab as appellant continued driving. Officer Tokoro turned on her siren and lights but appellant did not stop. After a brief pursuit, appellant crashed into a fence and he and Herrera ran away. Both men were subsequently apprehended. A loaded handgun was found on the taxicab's front passenger floorboard. Herrera's father was the registered owner of the taxicab and appellant and Herrera's fingerprints were found on the vehicle.

At about 6:00 a.m., Bossuyt and Rodriguez were separately driven to a nearby location for in-field showups. From a distance of about 30 yards and with the aid of binoculars, Bossuyt and Rodriguez separately identified appellant as the gunman and Herrera as the individual sitting in the back seat of the taxicab. They both also identified the gun and the taxicab.

At the preliminary hearing, both Bossuyt and Rodriguez initially identified Herrera as the gunman. After moving and standing a couple of feet from appellant and Herrera,

Rodriguez corrected herself and identified appellant as the gunman. Bossuyt also changed his testimony after the prosecutor asked him about his in-field identifications. At trial, both Bossuyt and Rodriguez identified appellant as the gunman. When asked about his prior misidentifications at the preliminary hearing, Bossuyt said he “felt extremely intimidated by” appellant because appellant “was kind of smirking” at him.

Officer Flores, the prosecution’s gang expert, testified that the Toonerville gang was a criminal street gang and that appellant and Herrera were members of the gang. In response to a hypothetical, the officer opined that the crimes were committed for the benefit of the gang because they promoted the gang’s reputation, elevated appellant and Herrera’s status within the gang, and instilled fear in the community. The officer also opined that appellant intended to incite a gang war by committing crimes in the Avenues’ territory.

Kathy Pezdek, a psychology professor, testified for the defense as an expert on eyewitness memory and identification. Pezdek opined that in-field showups are not a reliable identification method because presenting only one individual for identification conveys that he or she perpetrated the crime. In-court identifications are inherently biased for the same reason. Pezdek added that memory is less reliable in highly stressful situations and that confidence in an identification close in time to an event is more predictive of accuracy than confidence in an identification occurring at a later time. When presented with a hypothetical based on Bossuyt and Rodriguez’s identifications, Pezdek opined that the witness’s memories were less reliable due to the dim lighting, the brevity of the contact, and the distraction created by the presence of a

weapon. Although Pezdek concluded that the delay between the crime and the in-field identifications was not particularly long, she opined that the identification procedure was biased because only one suspect at a time was presented. She also opined that a witness who spent more time observing a suspect during an in-field showup than when the crime was committed thereby contaminated any subsequent identification.

DISCUSSION

Appellant contends that Bossuyt and Rodriguez's identifications of him should have been excluded because they were the result of an unduly suggestive in-field identification procedure. He also contends that "[w]ith or without the in-field identification evidence, the evidence was insufficient to support the conviction[s], for the identification was clearly suspect." Neither contention has merit.

"In determining whether a defendant's right to due process is violated by the admission of identification evidence, 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." [Citation.] (*People v. Clark* (2016) 63 Cal.4th 522, 556.) The factors relevant to our determination "include the opportunity [for] the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself." (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114.)

The defendant bears the burden of establishing the unreliability of an identification. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 933.) The erroneous admission of pretrial identification evidence does not warrant reversal unless the identification procedure was “so impermissibly suggestive as to give rise to a very substantial likelihood of . . . misidentification.” (*Simmons v. United States* (1968) 390 U.S. 377, 384.) Such a claim “raises a mixed question of law and fact to which we apply a standard of independent review, although we review the determination of historical facts regarding the procedure under a deferential standard. [Citation.]” (*People v. Clark, supra*, 63 Cal.4th at pp. 556-557.)

Prior to trial, appellant moved to exclude Bossuyt and Rodriguez’s identifications of him at the in-field showup and preliminary hearing. He offered that (1) Bossuyt had indicated he only had about 10 seconds to observe appellant at the time of the incident and spend half of that time focused on the gun; (2) the in-field showup took place over three hours after the incident, and it took five minutes for Bossuyt to identify appellant;³ (3) Rodriguez’s description of the suspect’s clothing was inconsistent with what appellant was wearing at the in-field showup; (4) Rodriguez said she was more focused on the gun than the suspect; and (5) Bossuyt and Rodriguez both initially identified Herrera as the gunman when they testified at the preliminary hearing.

³ At the preliminary hearing, Bossuyt testified that he observed appellant for about five minutes during the in-field showup. At trial, he testified that he had observed appellant for “at least a good 15 minutes or so.”

After the trial court announced that its tentative ruling was to deny the motion, it asked the prosecutor to summarize the circumstances of the in-field showup. After the prosecutor did so, the court asked if Bossuyt and Rodriguez had been admonished prior to their identifications. The prosecutor replied that the officers had stated in the police report that they gave the admonishments prior to the showup. Herrera's attorney represented that both Bossuyt and Rodriguez had testified at the preliminary hearing that they were not admonished. Counsel added: "I think there may be something in the prelim about the witnesses being told by the officers that they had recovered a gun from this vehicle prior to the showup. I'm not 100 percent sure on that. . . . So that would be more suggestive." The prosecutor replied that "[a]ccording to the officers, they provided a field show-up admonition. Whether or not three-and-a-half months after the fact victims remember verbatim what they are told by the officers, I think, is irrelevant if we believe the officers."

The court said it would read the preliminary hearing transcript that night and added, "if you want to have some more argument tomorrow, you can, but, tentatively, I would deny the defense motion to exclude the prior identification. I don't think it is impermissibly suggestive, and I think many of the inconsistencies that are raised are certainly proper areas for cross-examination and that goes to weight and not admissibility." No further argument on the motion was requested and the court subsequently denied it "for the reasons stated in [its] tentative [ruling]."

The trial court did not err in denying the motion. In arguing to the contrary, appellant complains that "[w]hen [appellant] was shown to the witnesses, he was standing there

alone. This was basically a ‘single person show-up.’” Appellant acknowledges, however, that single in-field showups are not inherently unfair. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 413.) Indeed, “single-person show-ups for purposes of in-field identifications are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness’s mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended. [Citation.]” (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 387, italics omitted.) The relevant determination is whether “the procedures used are . . . so impermissibly suggestive as to give rise to a substantial likelihood of misidentification.” (*Ibid.*) Appellant fails to make that showing here.

Appellant also complains that “neither Bossuyt nor Rodriguez were given the standard field admonition, i.e., that the person in protective custody is a suspect only, that the fact the person was in police custody did not indicate his guilt or innocence, and that the purpose of the show-up was either to eliminate or identify the person as a suspect involved in the crime.” Neither witness unequivocally denied being admonished. Rodriguez did not recall if she had been admonished, while Bossuyt did not know what “admonish” meant. Moreover, both officers testified that they had given the standard admonishment.⁴ Any conflicts as to whether Bossuyt and

⁴ The officer who transported Bossuyt to the in-field showup admonished Bossuyt as follows: “The person i[n] protective custody is a suspect only. And the fact the person is in police custody does not indicate his guilt or innocence. And the

Rodriguez were properly admonished went to the weight of their identifications rather than their admissibility. (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1258-1259 (*Watts*).)

Appellant further claims that prior to the showups, the police told Bossuyt they “might have found a suspect, and they found the taxicab,” and told Rodriguez “they had two guys in a white taxi, that they found a gun in the taxi, and they needed her to come identify them.” As the People correctly note, there is conflicting evidence in the record as to what the officers actually said to Bossuyt and Rodriguez. Appellant focuses exclusively on Bossuyt and Rodriguez’s preliminary hearing testimony. At trial, both witnesses denied that the police made any suggestive comments about the suspects or told them prior to their identifications that a gun had been found in the taxicab. Any conflicts or inconsistencies in this regard merely went to the weight of the witness’s identifications. (*Watts, supra*, 76 Cal.App.4th at pp. 1258-1259.) This also applies to the evidence that both witnesses initially identified Herrera as the gunman when they testified at the preliminary hearing.

Because appellant failed to meet his burden of demonstrating that the in-field identification procedure was unduly suggestive, his motion to exclude the identifications arising from that procedure was properly denied. Contemplating this conclusion, appellant alternatively contends that the identifications were so unreliable under the totality of the circumstances so as to render the evidence insufficient to support his convictions. This contention also lacks merit. It is well-

purpose [of] the showup is either to eliminate or identify the person as a suspect involved in the crime.” Rodriguez was given a substantially identical admonishment.

settled that the testimony of a single eyewitness identifying the defendant as the perpetrator is sufficient to prove that fact. (See, e.g., *People v. Champion* (1995) 9 Cal.4th 879, 926-927.) Even an out-of-court identification that has been repudiated at trial can suffice. (*People v. Cuevas* (1995) 12 Cal.4th 252, 270, 276-277.)

Appellant notes there were inconsistencies between the witnesses' descriptions of his physical appearance and clothing. Once again, such inconsistencies went to the weight of the identification evidence rather than its sufficiency to prove appellant's identity. (*Watts, supra*, 76 Cal.App.4th at pp. 1258-1259; *People v. Prado* (1982) 130 Cal.App.3d 669, 673.) "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there are any, the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters which go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration, and directed solely to the attention of the jury in the first instance" [Citation.]" (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 522.) For a reviewing court to set aside a verdict on these circumstances, "the evidence of identity must be so weak as to constitute practically no evidence at all." [Citations.]" (*Id.* at p. 521.)

Here, the jury heard all the evidence and found Bossuyt and Rodriguez's identifications of appellant both accurate and credible. For purposes of our review, it is irrelevant whether "the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Jennings* (2010) 50 Cal.4th 616, 638-639.) Appellant's claim of insufficient evidence thus fails.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Charlaine F. Olmedo, Judge
Superior Court County of Los Angeles

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