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

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN REQUEJO,

Defendant and Appellant.

B281659

(Los Angeles County  
Super. Ct. No. TA141633)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Affirmed and remanded with directions.

Gideon Margolis, 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, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found defendant and appellant Jonathan Requejo guilty of attempted murder, possession of a firearm by a felon, and shooting into an occupied vehicle, and made true findings that defendant personally and intentionally discharged a firearm. On appeal, defendant contends that (1) his conviction must be reversed because his trial counsel provided ineffective assistance by failing to request an eyewitness identification instruction pursuant to CALCRIM No. 315, and (2) the recent enactment of Senate Bill No. 620 (SB 620) requires us to remand this matter to allow the trial court to exercise its discretion to strike the firearm enhancements under Penal Code<sup>1</sup> section 12022.53.

As we will explain, defendant has not demonstrated by affirmative evidence that his counsel lacked a “ ‘rational tactical purpose’ ” for failing to request a CALCRIM No. 315 instruction. (*People v. Mickel* (2016) 2 Cal.5th 181, 198 (*Mickel*)). Accordingly, defendant has not shown ineffective assistance of counsel, and we will affirm the judgment of conviction. However, we will remand the matter for the limited purpose of allowing the trial court to exercise sentencing discretion under section 12022.53, subdivision (h).

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *A. Facts*

In mid-August 2015, defendant had a physical altercation with Danari Moore after defendant threw drug paraphernalia on the ground outside Moore’s home. Moore asked defendant not to throw trash on the ground, and defendant responded, “This is my mother fuckin’ hood.” When Moore turned his back, defendant struck him from behind. Moore punched defendant and put him

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

in a headlock. When Moore released him, defendant got into a black Ford Explorer, attempted to run Moore over, and then drove away. Five minutes later, defendant returned on foot and threatened Moore, saying, “I just called my homies. We’ve been to come back over. My homies going to come back burn your mobile home up.” Moore chased defendant on foot, and defendant ran away.

After their altercation, Moore saw defendant daily, often in his Ford Explorer. Sometimes, defendant stared at Moore and “gave me a little evil eye staring down.” Moore’s girlfriend, Xiomara Pulido, who had witnessed the altercation, also saw defendant regularly, “driving the Ford Explorer just around, around the area.” Defendant once approached Pulido and “kind of harassed” her.

On August 26, 2015, Moore, Pulido, and their five-year-old daughter were in Pulido’s car at about midnight looking for an open pizza restaurant. When they pulled to the side of the road to check an address, Pulido saw defendant walking toward her car. Moore and Pulido heard a voice outside the passenger side of the car say, “Remember me?” Moore turned toward the voice, looking “dead at” the shooter. As he did so, he was hit with eight gunshots in the head and neck, and Pulido was hit once in the leg. Pulido drove around the corner and called 911.

Before he was taken to the hospital, Moore described the shooter to Los Angeles Police Department (LAPD) Officer Kris Espinoza as a male Hispanic with a ponytail. On route to the hospital, Pulido gave a description of the shooter’s car and license plate number to another officer.

LAPD Detective Christian Mrakich visited Moore and Pulido at the hospital on August 27 and 28, 2015. Moore was too

incapacitated to be interviewed, but Mrakich spoke twice to Pulido. Pulido told Mrakich about the confrontation between Moore and defendant two weeks earlier, which Pulido believed was the motive for the shooting. Pulido described the shooter as a Hispanic male with long braids and a “G” tattoo in the middle of his forehead, who “sounded like . . . a Black male.” Based on Pulido’s description, Mrakich identified defendant as a possible suspect and created a six-person photo lineup (a “six-pack”) that included defendant and five other men with similar appearances. Mrakich showed the six-pack to Pulido on August 28, and Pulido identified defendant as the man with whom Moore had fought two weeks before. Subsequently, Moore identified defendant from a six-pack, saying, “That’s the guy that shot me.”

In October 2016, Mrakich obtained a court order allowing him to place defendant in a jail cell with a police informant who was secretly wearing a body camera and recording device. The audio recording of defendant’s conversation with the informant was played for the jury.<sup>2</sup> In that conversation, defendant admitted shooting Moore and Pulido.<sup>3</sup>

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<sup>2</sup> A transcript of the audio recording was admitted as Exhibit 15A and is part of the appellate record.

<sup>3</sup> Defendant told the informant that after seeing the victims’ parked car, defendant “just park the car, like, yeah. [¶] Go over there. The car’s right here. Say the car here. I just (clicking sounds . . . ). Go around, get the girl. (Clicking sounds . . . ) Get in that car, back up, . . . go to the hood.” Defendant said after the shooting, he went to Sacramento for two weeks.

When the informant asked whether the female victim would recognize his voice, defendant said, “She seen my face.” The informant said defendant should have killed her. Defendant

At trial, Moore and Pulido testified that they were able to see the shooter because he was only three or four feet away from them and was directly under a streetlight. Pulido said she recognized defendant's voice as the man who said, "Remember me?" prior to the shooting, and saw defendant's black car parked nearby immediately after the shooting.

Defendant presented no evidence at trial.

*B. Procedure*

A jury convicted defendant of attempted willful, deliberate, and premeditated murder (§§ 664, 187, subd. (a), counts 1 and 2); possession of a firearm by a felon (§ 29800, subd. (a)(1), count 4); and shooting at an occupied motor vehicle (§ 246, count 5). The jury also made true findings as to counts 1 and 2 that defendant personally and intentionally discharged a firearm, causing great bodily injury. (§ 12022.53, subds. (b)–(d).) The trial court made a true finding pursuant to section 667.5 that defendant had suffered a prior prison term.

The court sentenced defendant to two consecutive life terms, plus two terms of 25 years to life, on counts 1 and 2; stayed sentence on counts 4 and 5 pursuant to section 654; and imposed a one-year sentence pursuant to section 667.5, subdivision (b). It imposed a victim restitution fine, a parole

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responded, "I tried to kill her. I shot the bitch four times." He heard the woman say, "'Oh, my God. Oh, my God.' I'm like, whatever. . . . Oh, shit. Do-do-do-do. Well, she's, like, oh, just lays there. [¶] I'm like, I'm outta here now. . . . So I get on. But, shit, like I said, that's two years ago." The informant said he hoped defendant had gotten rid of the gun. Defendant responded: "Yeah. That shit gone. It's over with. Yeah."

revocation fine, a criminal conviction fee, and a criminal security fee.

Defendant timely appealed.

## DISCUSSION

### I.

#### **Defendant Has Not Demonstrated That He Received Ineffective Assistance of Counsel**

Defendant contends that his trial counsel's failure to request a CALCRIM No. 315 instruction was constitutionally deficient. To obtain a reversal for ineffective assistance in this direct appeal, defendant must demonstrate by *affirmative evidence* that counsel "had ' " 'no rational tactical purpose' " ' for an act or omission." (*Mickel, supra*, 2 Cal.5th at p. 198.) As we now discuss, defendant has failed to make such a showing, and thus his ineffective assistance claim necessarily fails.

##### *A. CALCRIM No. 315*

Defendant contends that he received ineffective assistance of counsel because his attorney failed to request an eyewitness identification instruction pursuant to CALCRIM No. 315. That instruction provides:

"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 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?]

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

A trial court does not have a sua sponte duty to instruct on the evaluation of eyewitness testimony. (*People v. Alcala* (1992) 4 Cal.4th 742, 802–803.) However, an eyewitness identification instruction should be given “when requested in a case in which identification is a crucial issue.” (*Ibid.*) It is undisputed that defense counsel did not request a CALCRIM No. 315 instruction; we therefore consider whether the failure to do so constituted ineffective assistance of counsel.

*B. Defendant Has Not Demonstrated by Affirmative Evidence That His Counsel Lacked a “Rational Tactical Purpose” for Failing to Request CALCRIM No. 315*

“In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel’s performance was deficient and that the defendant suffered prejudice as a result of such deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–692 [104 S.Ct. 2052].) To demonstrate deficient performance, defendant bears the burden of showing that counsel’s performance ‘ ‘ ‘fell below an objective standard of reasonableness . . . under prevailing professional norms.’ ’ ’ ( *People v. Lopez* (2008) 42 Cal.4th 960, 966.) To demonstrate prejudice, defendant bears the burden of showing a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different. (*Ibid.*; *In re Harris* (1993) 5 Cal.4th 813, 833.)” (*Mickel, supra*, 2 Cal.5th at p. 198.)

Our Supreme Court has observed that “certain practical constraints make it more difficult to address ineffective assistance claims on direct appeal rather than in the context of a habeas corpus proceeding. [Citations.] The record on appeal may not explain why counsel chose to act as he or she did. Under those circumstances, a reviewing court has no basis on which to determine whether counsel had a legitimate reason for making a particular decision, or whether counsel’s actions or failure to take certain actions were objectively unreasonable. [Citation.] [¶] Moreover, we begin with the presumption that counsel’s actions fall within the broad range of reasonableness, and afford ‘great



deference to counsel's tactical decisions.' [Citation.]" (*Mickel, supra*, 2 Cal.5th at p. 198.)

Accordingly, on direct appeal we will reverse a conviction based on ineffective assistance of counsel "only if there is *affirmative evidence* that counsel had ' "no rational tactical purpose' " ' for an action or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 437.)" (*Mickel, supra*, 2 Cal.5th at p. 198, italics added.) Stated differently, "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. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus." (*People v. Carter* (2005) 36 Cal.4th 1114, 1189, italics added.)

In the present case, defendant has not pointed to affirmative evidence, and our independent review of the record does not reveal any, suggesting that counsel lacked a "rational tactical purpose" for failing to request a CALCRIM No. 315 instruction. We thus do not know why counsel did not request a CALCRIM No. 315 instruction, and "[r]ather than attempt to glean inferences from a record where the critical questions were irrelevant and unasked, we do not reach the merits of that issue." (*People v. Mendoza Tello, supra*, 15 Cal.4th at p. 268.)

Moreover, the face of the record demonstrates ample reason why counsel may have chosen not to request a CALCRIM No. 315 instruction—namely, that most of the factors identified in CALCRIM No. 315 would have tended to *bolster*, rather than to

undermine, the reliability of the witness identifications. For example:

- Both Moore and Pulido had multiple contacts with defendant before the shooting—both on the day of the altercation between defendant and Moore, and in the two weeks between the altercation and the shooting.

- Moore and Pulido testified that they were able to see defendant clearly when he shot them because he was only three or four feet away from them and standing under a streetlight.

- Moore described the shooter minutes after the shooting, and Pulido described him the next day. Both descriptions accurately described defendant, including identifying him as having a “G” tattooed on his forehead.

- Both Moore and Pulido identified defendant from a photographic lineup as the shooter.

- Neither victim ever failed to identify defendant.

- Both victims identified defendant at the preliminary hearing.

- Neither victim ever changed his or her mind about the identification.

- Moments after the shooting, Pulido identified defendant’s vehicle.

Thus, most of the factors enumerated in CALCRIM No. 315 tend to bolster the credibility of Moore’s and Pulido’s identifications of defendant. Only two could have the opposite effect: that Moore and Pulido were under stress when they observed defendant, and that Moore and defendant are of

different races.<sup>4</sup> Under these circumstances, defense counsel may rationally have concluded that CALCRIM No. 315 would have undermined the defense, not supported it.

The present case thus is distinguishable from *People v. Hussain* (2014) 231 Cal.App.4th 261 (*Hussain*), on which defendant relies. In *Hussain*, the defendant claimed his counsel was constitutionally inadequate because counsel failed to request an instruction on defendant's key defense—that he had a “claim of right” to the vehicle he was alleged to have unlawfully taken. The Court of Appeal concluded that defense counsel's failure to request a claim-of-right instruction constituted ineffective assistance of counsel because “[c]laim of right was the *core* of defendant's defense to the grand theft charge.” (*Id.* at p. 270.) Thus, “there [could] be no satisfactory reason not to request an instruction to support the core of the defense.” (*Id.* at pp. 270–271.)

In the present case, in contrast, there is as we have said a reasonable explanation for defense counsel's failure to request a CALCRIM No. 315 instruction—that it tended to undermine, rather than to bolster, the defense.

As defendant thus has failed to show affirmative evidence (or indeed, any evidence) that counsel could have had “‘no rational tactical purpose’” for his decision, he has not demonstrated constitutionally deficient performance. It thus would be inappropriate for us to address defendant's ineffectiveness claim on direct appeal. (*Mickel, supra*, 2 Cal.5th at p. 200.)

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<sup>4</sup> Moore is African-American; defendant is Latino. Pulido's race is not apparent from the record.

**II.**  
**Remand for a New Sentencing Hearing**  
**Is Necessary in Light of SB 620**

When the trial court sentenced defendant, it was required to impose any firearm enhancements found true under section 12022.53. (See former § 12022.53, subd. (h) [“Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.”], amended by Stats. 2017, ch. 682, § 2.) Since SB 620 went into effect on January 1, 2018, however, sentencing courts now have discretion to “strike or dismiss an enhancement otherwise required to be imposed by” section 12022.53, if doing so would be “in the interest of justice pursuant to Section 1385.” (§ 12022.53, subd. (h).)

In their respondents’ brief, the People concede SB 620 applies retroactively to defendant’s judgment because it is not yet final. We agree. (E.g., *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091 [amendment to section 12022.53, subdivision (h) applies retroactively].) We therefore will remand the matter to allow the trial court the opportunity to exercise its sentencing discretion under section 12022.53, subdivision (h). In remanding the matter for a new sentencing hearing, we offer no opinion on how the court should exercise its discretion under the amended statute.

### **DISPOSITION**

The judgment of conviction is affirmed. The matter is remanded for the limited purpose of allowing the trial court to exercise its sentencing discretion under section 12022.53, subdivision (h), as amended by SB 620.

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EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.