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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DYLAN CAGLIERO, Defendant and Appellant.	B232438 (Los Angeles County Super. Ct. No. NA084900)

THE COURT:*

Dylan Cagliero (defendant) appeals from the judgment entered following a jury trial that resulted in his conviction of four counts of attempted murder in violation of Penal Code sections 664 and 187, subdivision (a)[1] (counts 1-4). The jury found true the allegations that the attempted murders were willful, deliberate, and premeditated and that defendant personally and intentionally discharged and used a firearm within the meaning of sections 12022.53, subdivisions (b) and (c). The jury also convicted defendant of one count of unlawful firearm activity in violation of section 12021, subdivision (e) (count 9).

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* BOREN, P. J., DOI TODD, J., CHAVEZ, J.

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

The trial court sentenced defendant to four consecutive sentences of life with the possibility of parole in counts 1 through 4. The trial court also imposed consecutive terms of 20 years to life in each of these counts for the enhancement under section 12022.53, subdivision (b). In count 9, the trial court imposed the midterm of two years, to run concurrently with count 1. The trial court granted defendant 418 actual days of credit and 62 days of conduct credits.

We appointed counsel to represent defendant on this appeal. After examination of the record, counsel filed an "opening brief" containing an acknowledgment that he had been unable to find any arguable issues. On November 14, 2011, we advised defendant that he had 30 days within which to personally submit any contentions or issues that he wished us to consider. Defendant was granted two extensions of time. On January 10, 2012, he filed his brief in which he contends: (1) the photographic lineups used to identify him were suggestive; (2) trial counsel was ineffective for failing to investigate; (3) trial counsel was ineffective for not properly preparing and for opening the door to questioning about defendant's juvenile priors; (4) trial counsel was ineffective for failing to properly give reasons as to why defendant should not have been sentenced consecutively; and (5) his convictions were based on less than proof beyond a reasonable doubt.

FACTS

At approximately 6:40 p.m. on February 20, 2010, Alexis Cameron and her boyfriend, Christian York, left Alexis's apartment on foot to go to a store. Alexis's brother, Christian Cameron, and a neighbor, Chrislon Smith, stayed behind and remained standing outside Alexis's apartment building.[2] Alexis and York saw a man, later identified as defendant, come out of the alley. Defendant approached Alexis and York and stood three feet from them. Defendant asked them where they were from, and they replied, "nowhere." Defendant looked toward Christian and Smith. He then pulled out a

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[2] We refer to Alexis Cameron as "Alexis," Christian Cameron as "Christian," Christian York as "York," and Chrislon Smith as "Smith."

gun and shot at the two young men. When the shots were fired, York ran away and called out to Alexis to run. Alexis looked over her shoulder as she ran and saw defendant point at her and shoot and then shoot at York.

Alexis called 911. Alexis and York described the shooter as a white male wearing a black hat, a gray hoodie, and a white T-shirt. He had a mustache, and it appeared he had a mole. York thought defendant had acne or bumps on his cheeks.

The day after the shooting, police showed Alexis a photographic lineup (six-pack) after giving her an admonishment form to read. She circled a photograph of defendant. Alexis identified defendant in court as the shooter. York also selected defendant's photograph after being admonished, and he identified defendant in court.

Christian recalled seeing a car with tinted windows drive past him two times before the shooting. He saw the car drive into the alley, and he saw someone get out and approach Alexis and York. The person then jogged toward him and Smith and fired at them five or six times. Christian ran inside the house. The shooter was white and wore a black hat, a gray hoodie, and some jeans. Christian could not identify him.

Smith noticed the car driving by one time. He saw the man get out and approach Alexis and York. When the man shot at Smith and Christian, Smith went to the ground and then ran to the back of the building. Smith believed he had attended San Pedro High with the shooter, and he told police he believed the shooter's name was Dylan. Smith identified a photograph of defendant from the yearbook. Smith identified defendant in court.

On February 24, 2010, Officer Jeromy Paciorkowski went to a bar called The Spot that defendant reportedly frequented. It was located a block and a half from the shooting scene. Defendant was inside playing darts. He wore a black cap and had a gray hoodie with him. He had a mustache and slight goatee.

Defendant's girlfriend, Vivian Aguilera, testified that she and defendant were cruising around on the evening of the shooting. They rode around for about two hours beginning at approximately 4:00 p.m. Afterwards, they went to a friend's house to "kick

back." They stayed until 8:00 p.m. They then went to Harold's Bar. A fight broke out there, and defendant was involved. Aguilera and defendant left and went to the home of one of defendant's friends, who lives in Beverly Hills. Defendant was with Aguilera the entire time. Defendant never carried a gun.

Defendant took the stand and asserted that, on the evening of the shooting, he was with Aguilera just as she had described. His version of events corresponded to Aguilera's. He did not shoot at anyone on that evening. He did not tell Aguilera what to say.

DISCUSSION

I. Photographic Lineups

To determine whether the admission of identification evidence violates a defendant's rights 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." (*People v. Kennedy* (2005) 36 Cal.4th 595, 608, disapproved on another point in *People v. Williams* (2010) 49 Cal.4th 405, 459; see also *Manson v. Brathwaite* (1977) 432 U.S. 98, 114.)

A pretrial identification procedure is unfair only if it suggests in advance the identity of the person the police suspect of the crime. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) "The question is whether anything caused defendant to 'stand out' from the others in a way that would suggest the witness should select him." (*People v. Carpenter* (1997) 15 Cal.4th 312, 367.) The defendant bears the burden of demonstrating that the identification procedure was unreliable. (*People v. Cunningham*

(2001) 25 Cal.4th 926, 989.) Defendant must show "unfairness as a demonstrable reality, not just speculation." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.)

Our examination of the six-pack exhibits finds the six-packs are not suggestive. Although only one of the suspects in Alexis's six-pack wore a white T-shirt, such a T-shirt is by no means unique, and there is no indication that the white T-shirt made defendant stand out to the degree that it invalidated his identification. York said that there were three suspects in his six-pack with bumps, which indicates that defendant was not made to stand out. The record shows that the six-packs contained black and white photographs. Detective Walter McMahon testified that he did this deliberately so as to obtain more consistency in the complexions and backgrounds of the suspects, which further counteracts any claim that the lineups were suggestive. All of the eyewitnesses were read the admonition telling them that the suspect may or may not be among the photographs. (See *People v. Cunningham, supra,* 25 Cal.4th at p. 990.)

Moreover, any potential for misidentification because of the use of a particular identification procedure is substantially lessened by cross-examination that reveals to the jury the method's potential for error. (*Simmons v. United States* (1968) 390 U.S. 377, 384.) In the instant case, defense counsel cross-examined carefully each witness who identified defendant in a six-pack. Alexis, whose description of the shooter included the fact that he wore a white T-shirt and a mustache, acknowledged that three of the photographs showed a suspect with a mustache. One was wearing a white T-shirt. York, who testified that he thought the shooter had acne or bumps on his cheeks, acknowledged that three of the suspects in the lineup had bumps on their faces. Smith, who selected defendant's photograph from a group of yearbook photos, acknowledged that the photograph he selected bore the name Dylan, and it was the only photograph that bore that name. Thus, the jury was made aware of any potential for suggestiveness in the six-packs.

In addition, during closing argument, defense counsel vigorously argued that the identifications in the six-packs were worthless. He first attacked Smith's identification

by pointing out that it was dark at the time of the shootings, and Christian, who was by Smith's side, was unable to identify the shooter. Defense counsel argued that Smith had seen defendant only at the bar that he frequented. Counsel pointed out that Smith had a conviction for a robbery or grand theft person. Counsel also continually alluded to Smith's apparent knowledge of "this gang thing," and that he seemed to personally wish to put defendant "in this mix."

Defense counsel did not call Alexis a liar, but he pointed out that defendant and Alexis both lived in San Pedro, which is a tiny town. She was shown a black and white six-pack with only one guy wearing a white T-shirt. Counsel argued that Alex's identification and York's were based on "familiarity." He pointed out that York testified that it was daylight at 6:40 p.m., and "if they can get that wrong, do you think it is reasonable that they can get the identification wrong? Do you think it is reasonable they can pick the guy they seen in the neighborhood? Yes. That is what happened." Counsel also pointed to the cross-racial nature of the identification, the stress of seeing a gun, and the absurdity of in-court identifications. He criticized the fact that the photographs were in black and white. Given the cross-examination and argument by defense counsel, the jury had sufficient information to weigh the photographic identifications and the subsequent trial identifications.

Furthermore, the jury was instructed CALJIC No. 2.92 on the factors it should consider in assessing the eyewitness identification testimony. These factors weighed in favor of the accuracy of the six-pack identifications. Alexis and York had a good opportunity to see defendant at close range, they provided consistent descriptions of defendant and his clothing, and they made their identifications the following day. Smith recognized defendant from his school. All of the witnesses were certain of their identifications and the identifications were the product of their own recollections. In addition, the jury members had the opportunity to view the photographic lineups and make their own determination as to the suggestiveness of the lineups. (See *People v. Kennedy, supra,* 36 Cal.4th 595, 608 [naming factors similar to those in CALJIC No.

2.92].) As stated in *Manson v. Brathwaite*, *supra*, 432 U.S. at page 116, "we cannot say that under all the circumstances of this case there is 'a very substantial likelihood of irreparable misidentification.' [Citation.] Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature."

We conclude that the six-pack identifications were not unduly suggestive. Even if we had concluded otherwise, based on the totality of the circumstances, "defendant has failed to establish the procedure was unfair [citation], and his claim that the confrontation infringed due process protections must be rejected." (*People v. Hunt* (1977) 19 Cal.3d 888, 894; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

II. Ineffective Assistance of Counsel Claims

A. Failure to Investigate Evidence as to Whether Crime Actually Occurred and Failure to Call a Witness

Defendant argues that his counsel was derelict for failing to investigate whether there were bullets, bullet holes, or property damage due to the discharge of slugs from a firearm. He argues that finding bullet shells at the scene did not prove the discharge of lethal slugs.

Defendant also argues that he gave his attorney the full name of Jeffrey Scott Eastridge, who is the bouncer at Harold's Bar, where defendant was being jumped at the time of the shooting. Mr. Eastridge was proof of defendant's actual whereabouts and potentially could have provided the names of coworkers who witnessed the fight. This would have given credence to the defense and might have won his trial.

The burden is on defendant to establish ineffective assistance by a preponderance of the evidence. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.) There are two elements to an ineffective assistance claim. "[A] defendant seeking relief on the basis of ineffective assistance must show both that trial counsel failed to act in a manner to be

expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Cudjo* (1993) 6 Cal.4th 585, 623, citing *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*).) A reviewing court "'need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.'" (*People v. Cox* (1991) 53 Cal.3d 618, 656 [citing *Strickland*, *supra*, 466 U.S. 668, 697].)

Assuming, but not deciding, that trial counsel's performance was deficient for not investigating for property damage and not calling the bouncer at Harold's Bar, we disagree with defendant and conclude that he suffered no prejudice from these alleged failures. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . [¶] . . . [¶] The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, *supra*, 466 U.S. at pp. 693-694; see *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.) In order to establish ineffective assistance based on an alleged failure to investigate, a defendant "must prove that counsel failed to make particular investigations and that the omissions resulted in the denial of or inadequate presentation of a potentially meritorious defense." (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.)

Officer Oscar Medina testified that he found three spent casings on the sidewalk at the shooting scene. They were from a .380-caliber semiautomatic handgun and were within two or three feet of each other. The casings were found approximately 12 to 15 feet from the alley. Officer Medina testified that casings are spent to the right of the gun but can fly in different directions. Merely because bullet holes may or may not have been found in a building does not necessarily signify that it is reasonably probable a different verdict would have been obtained had testimony to this effect been admitted at trial. Furthermore, counsel pointed out during argument that no gun was found, there was no evidence of where the bullets landed, and there were no bullet holes in the car where

Smith hid, the stucco, or anywhere near there. He also argued that not enough slugs were found.

Likewise, even if Mr. Eastridge took the stand and testified that defendant was in the fight at Harold's Bar, it is not reasonably probable the testimony, like that of defendant and his girlfriend, would have overcome that of the victim witnesses, which were deemed credible by the jury. When examining prejudice in the context of ineffective assistance of counsel claims based on a duty to investigate, we also look to the strength of the evidence. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." (*Strickland*, *supra*, 466 U.S. at p. 696.) The identification evidence in this case was strong, despite defendant's claims to the contrary. The jury heard four witnesses give consistent accounts of what occurred that evening. It also heard consistent identifications from three of those witnesses, one of whom recognized defendant. York testified that, "for those couple of minutes he was in my face." On the other hand, Aguilera's and defendant's testimony was not credible. Notably, neither one of them knew the surname of any of the friends they purportedly spent time with that evening. Although they testified to the same sequence of activities, Aguilera testified that she had a really bad memory, casting doubt on whether she genuinely remembered the events of almost a year earlier or whether she had recently fabricated her testimony. Finally, the shootings occurred at 6:40 p.m., and according to Aguilar's timeline, she and defendant did not go to Harold's Bar until 8:00 p.m.

Given the totality of the circumstances in this case, we reject defendant's contention that his counsel was ineffective for failing to investigate.

B. Defense Counsel's Lack of Preparation and Opening the Door to Mention of Defendant's Juvenile Priors

Defendant contends that defense counsel rushed him to trial even though he had not properly prepared a defense. Trial occurred within 11 months, and defense counsel was not even defendant's attorney during all of these 11 months. Defendant also

contends that trial counsel opened the door to questioning and mentioning his juvenile priors even though it had been agreed not to do so.

The record contains no indication that defense counsel was not prepared for trial. Defendant's case was a fairly straightforward one with no gang allegation despite the gang overtones of the crime. There was not a formidable number of witnesses. Defense counsel displayed a clear strategy of attacking the heart of the prosecution's case—the eyewitness identifications—and then arguing that the offenses were no more than assaults with a deadly weapon should the jury give credence to the identifications. We conclude defendant was not prejudiced by any lack of preparation by defense counsel. (*Strickland*, *supra*, 466 U.S. at p. 697.)

With respect to the prior convictions, when defendant indicated he might testify, the prosecutor told the court that she wished to address the issue of impeaching him with his priors. She stated that defendant had a robbery conviction from 2005 and an assault with a firearm conviction from 2008. The trial court rejected the prosecution's case law and ruled defendant could not be impeached with his juvenile priors.

The prosecution later told the court that she had drafted a stipulation regarding defendant's priors for count 9, since the priors formed part of the prosecution's case. Count 9 charged defendant with a violation of section 12021, subdivision (e), possession of a firearm by a person prohibited to do so due to a conviction. As the jury was instructed, in order to find defendant guilty of that crime, the prosecution had to prove, inter alia, that the defendant had previously been convicted of a felony. (CALCRIM No. 2511.) A stipulation was contained within the instruction, which read, "The defendant and the People have stipulated, or agreed, that the defendant was previously convicted of two felonies, namely Penal Code Section 245(a)(2)—Assault with a Firearm on 2/26/08 and Penal Code Section 211—Robbery on 4/29/05. This stipulation means that you must accept this fact as proved." The trial court agreed with the prosecution that both priors could be included in the stipulation, since both were charged in the information.

The record thus shows that defense counsel did not open any door to questioning or mention of defendant's juvenile priors, as defendant claims. The priors formed part of the prosecution's case against defendant in count 9, and nothing defense counsel did could prevent the prosecution from seeking to prove these convictions. Defense counsel did argue unsuccessfully that only one of the priors should form part of the stipulation.

Defendant's arguments regarding counsel's lack of preparation and opening the door to damaging evidence are without merit.

C. Counsel's Failure to Properly Give Reasons Why Consecutive Sentences Should Not Be Imposed

Defendant contends that trial counsel should have explained their side of the sentencing more efficiently. Defendant points out that his priors are juvenile offenses, and he should not be condemned for childish immature misbehavior. Defendant characterizes his sentence as "ridiculous" and "outrageous," and argues that counsel should have noted that defendant has absolutely nothing left in his young life to look forward to other than his death.

We first observe that the trial court stated clearly for the record that defendant's priors, although alleged as strikes, did not figure into his sentence. The court stated that "the strike was not used in this case."

Before sentence was imposed, defense counsel argued that defendant was a young man. He asked the trial court to run all the sentences concurrently. Counsel pointed out that, although the crimes were serious, no one was hurt during the shootings. We believe that, although the argument was not lengthy, there was nothing more defense counsel could say to defendant's advantage. As it was, the trial court gave this argument very short shrift.

The trial court stated before imposing sentence, "I intend so any appellate court is quite clear to sentence the defendant to the highest term possible. He is a very dangerous individual, who according to the short time he has been here, tends to continue having a criminal existence, which is very violent and the facts of this case are so disturbing. He

drives by, staked out these people all of whom were Black and drove around and came back, exited with a gun and walked up and shot these people for no reason. I find that to be extremely horrible, dangerous, behavior."

A trial court is vested with wide discretion in sentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 349.) A trial court's sentence is to be upheld absent a clear showing of abuse of discretion. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) "[T]he term judicial discretion 'implies absence of arbitrary determination, capricious disposition or whimsical thinking.'" (*Ibid*.)

The trial court gave adequate reasons for imposing a consecutive sentence for each of the four attempted murder counts. The trial court named a separate aggravating factor for each count. We conclude there was no abuse of discretion, and counsel was not ineffective in arguing defendant's cause at sentencing.

III. Defendant's Convictions and Reasonable Doubt

Defendant argues that his convictions were based on less than proof beyond a reasonable doubt of each and every element of the charged crimes. He states that the only reason he was even suspected of being the perpetrator was because of the three identifications. He argues that his girlfriend provided credence to defendant's actual whereabouts and actions on the night of the shooting, and his word and his girlfriend's word are no less than that of the victims. He asserts that the evidence of the clothing defendant wore was different than the descriptions of what the shooter wore, and there was nothing that actually proved defendant's guilt beyond a reasonable doubt.

Given this court's limited role on appeal, defendant bears an enormous burden in claiming there was insufficient evidence to sustain the verdict. If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Reversal for insufficiency of the evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

We disagree with defendant. All of the factors he cites were before the jury. Alexis and York saw defendant at close range, and defendant spoke to them for a brief time. Both witnesses selected defendant's photograph from six-packs that we do not believe were suggestive. Defendant was found with a black cap and a gray hoodie or sweatshirt, just as the witnesses described. The fact that the witnesses did not recall any lettering on the cap, whereas Aguilera produced a cap with the letter "P" on it as defendant's only cap, was a factor for the jury to weigh. Smith recognized defendant from high school and gave the police defendant's first name. The testimony of one witness, if believed by the trier of fact, is sufficient to sustain a verdict. (Evid. Code, § 411; *In re Andrew I.* (1991) 230 Cal.App.3d 572, 578.) Defendant and Aguilera had the opportunity to tell the jury their version of events. The jury was given standard guidelines in assessing the credibility of witnesses in CALJIC No. 2.20. It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Alcala* (1984) 36 Cal.3d 604, 623.) The jury clearly believed the four witnesses to the shootings and disbelieved defendant's version of events. In the instant case, there is ample substantial evidence to sustain the verdict.

We have examined the entire record and we are satisfied that defendant's attorney has fully complied with his responsibilities and that no arguable issues exist. (*People v. Wende* (1979) 25 Cal.3d 436, 441.)

The judgment is affirmed.

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