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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. BRYAN HARRIS, Defendant and Appellant.	B285260 (Los Angeles County Super. Ct. No. BA436057)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger T. Ito, Judge. Affirmed with directions.

Emily Lowther Brough, 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, Scott A. Taryle and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Bryan Harris of, among other things, second degree robbery with true findings on gun and gang allegations. Harris moved for a new trial on the ground his counsel provided ineffective assistance. The trial court denied the motion. Harris appeals, raising the same issue. We reject that issue but remand the matter so that the trial court can exercise its sentencing discretion under newly enacted legislation.

BACKGROUND

On April 19, 2015, Isiah Mack was working at a medical marijuana dispensary as an armed security guard. Before letting customers enter, Mack verified they had identification and a doctor's recommendation. That evening, Harris went to the dispensary by himself and, as he had the appropriate documentation, Mack let him in.

Less than an hour later, Harris returned with Dharmen Prasad. Having just seen Harris's documentation, Mack again let him in. But when Mack asked Prasad for his documents, Prasad pointed a gun at Mack and asked, "What are you doing in the hood with a Blood and burner?" Prasad took Mack's gun from its holster and threatened to shoot him. For his part, Harris patted Mack down but also convinced Prasad not to shoot Mack. Prasad left with Mack's gun while Harris looked on. When Mack assured Harris that he had no ill will towards him, Harris agreed and left. A few days later, Harris called Mack and told him that if he did not testify he would get his gun back.[1]

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[1] Mack used the word testify even though no proceeding had yet been initiated.

The People's gang expert testified that Harris and Prasad are Rolling 20's gang members, and the dispensary is in the gang's territory. Based on a hypothetical modeled on the facts of the case, the expert opined that such a robbery would be committed for the benefit of and in association with a gang and such an attempt to dissuade a witness would also benefit the gang.

Based on this evidence, a jury found Harris guilty of second degree robbery with a true finding that a principal used a firearm (Pen. Code,[2] §§ 211, 12022.53, subds. (b), (e)(1);[3] count 1) and of attempting to dissuade a witness (§ 136.1, subd. (a)(2); count 2). The jury found true gang allegations as to both counts (§ 186.22, subd. (b)(1)(C)). On September 20, 2017, the trial court sentenced Harris to five years on count 1, doubled to 10 years based on a prior strike, and to a consecutive two years, doubled to four years on count 2. The trial court also imposed a consecutive 10 years (§ 186.22, subd. (b)(1)(C)) and five years (§ 667, subd. (a)(1)).

After the jury reached its verdict, Harris, now represented by new counsel, moved for a new trial on the ground his trial counsel provided ineffective representation. A theme of Harris's motion (as well as his appeal) was that his attorney at trial was unprepared, having only substituted in as counsel on the day jury

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[2] All further statutory references are to the Penal Code.

[3] The jury found that a principal personally used a firearm, but the verdict form mistakenly cited only subdivision (b), and did not also cite subdivision (e)(1).

selection began.[4] At the hearing on the motion, the defense's appointed gang expert testified about what she perceived to be trial counsel's deficient performance. Trial counsel also testified and explained the tactical reasons for his decisions. The trial court denied the motion, finding that trial counsel did not fall below an objective standard of care and, even assuming he did, Harris still would not have had a more favorable result.

DISCUSSION

I. Ineffective assistance of counsel

Harris contends that the trial court should have granted his new trial motion, because his trial counsel provided ineffective representation. We review the trial court's denial of a motion for a new trial for abuse of discretion. (*People v. Knoller* (2007) 41 Cal.4th 139, 156.) An abuse of discretion arises if the trial court based its decision on impermissible factors or on an incorrect legal standard. (*Ibid.*)

To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and (2) counsel's deficient performance was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.) We defer to trial counsel's reasonable tactical decisions, and there is a strong presumption that counsel's conduct falls within the wide range of reasonable assistance. (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) Put simply, we will not second-

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[4] Although trial counsel substituted in just as trial began, he had been standby counsel for Harris, who had been representing himself.

guess a trial counsel's strategy, as there are countless ways effective assistance may be provided in any given case. (*Strickland*, at p. 689.)

Here, Harris's ineffective assistance of counsel claim rests on his trial counsel's alleged failures to investigate the robbery and to call witnesses; to object to biased jurors; and to object to prosecutorial misconduct. We address each claim in turn.

A. *Failure to investigate*

Defense counsel have an obligation to investigate defenses and the factual bases for them. (*People v. Maguire* (1998) 67 Cal.App.4th 1022, 1028.) Where the record shows that counsel failed to investigate the facts diligently and conscientiously, the defendant has been deprived of adequate assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425–426.) Here, Harris faults his trial counsel for allegedly failing to follow three lines of investigation supposedly relevant to his intent and knowledge to aid and abet the robbery.

First, trial counsel failed to talk to the dispensary's store manager and to call him to testify. That testimony was important, Harris asserts, because the manager did not believe Harris helped Prasad rob Mack. However, a decision not to call a witness is peculiarly a matter of trial tactics, unless the decision results from an unreasonable failure to investigate, which is not the case here. (See *People v. Bolin* (1998) 18 Cal.4th 297, 334.) Although trial counsel did not personally speak to the manager, his investigator spoke to him. Also, the manager only witnessed the incident on security cameras. As he explained at the hearing, trial counsel decided not to have the manager testify because the manager's subjective belief about Harris's knowledge and intent were irrelevant. Trial counsel had an additional reason not to

call the manager: he would testify that Harris returned to the dispensary five minutes after the robbery. Trial counsel did not want the jury to wonder why Harris did not wait for the police when he returned to the dispensary. The tactical decision not to have the manager testify therefore was more than reasonable, given that his testimony had, in the trial court's words, "dubious value" and undermined the defense theory of the case. Finally, to the extent Harris complains that trial counsel failed to attack the notion he aided and abetted the robbery, trial counsel elicited testimony relevant to that theory from Mack.

Second, Harris argues that trial counsel prohibited the defense gang expert from testifying at trial. Had trial counsel allowed her to testify, she would have said that Harris and Prasad are from different Rolling 20's cliques, and that Black gangs are independent, in that they do not work in concert and can commit crimes individually. Also, according to the gang expert, trial counsel was unprepared and did not review pertinent evidence, including Mack's 911 call in which Mack referred only to Prasad as the robber and did not mention Harris.

Trial counsel responded to these allegations, asserting that he was prepared and did review the 911 call, video surveillance, and other pertinent evidence. He also said that he conferred with the gang expert, and they *agreed* she should not testify, in part because she could not dispute that Harris was a gang member. The record supports trial counsel's version of events, because at the close of the prosecution's case, defense counsel told the trial court he was meeting with the gang expert to determine whether she should testify in rebuttal. Later that afternoon, trial counsel represented that he had conferred with the expert and decided that the defense would rest without calling her. In any event, we

have reviewed the People's gang expert's testimony, including trial counsel's cross-examination. Instead of trying to dispute that Harris was a gang member, trial counsel's strategy was to show that his client did not aid and abet Prasad. Trial counsel thus asked if gang members often intervene to protect victims. The People's gang expert responded, "Not that I'm aware of." This was effective in that it undermined the People's theory that Harris knew Prasad was going to rob Mack or that he had the specific intent to aid and abet the robbery.

Finally, Harris argues that trial counsel failed to investigate Prasad, whose mental instability could have shown that Prasad acted on his own. The record, however, does not show that Prasad was, as Harris asserts, in and out of mental hospitals or that Prasad suffered from a condition that would bear on Harris's guilt as an aider and abettor. But even if he was, such evidence does not speak to Harris's intent and knowledge.

B. *Voir dire*

Next, Harris faults his trial counsel for failing to adequately question prospective jurors during voir dire. Although voir dire is critical to ensure a defendant's Sixth Amendment right to an impartial jury (*Rosales–Lopez v. United States* (1981) 451 U.S. 182, 189), a counsel's failure to question an individual juror or jurors is not necessarily indicative of ineffective voir dire (*People v. Kipp* (1998) 18 Cal.4th 349, 368). For any number of reasons, asking no questions may be the best tactic. (*People v. Freeman* (1994) 8 Cal.4th 450, 485.)

Here, Harris contends that his trial counsel did not adequately question several prospective jurors. One said she would be "consciously" fair but maybe "unconsciously" she would

not be fair. A second juror had been robbed at gunpoint but would try to set aside his memories and feelings and decide the case on the facts before him. Another juror's residence had been burgled. And another said she might be a little biased "but overall [she] would do [her] best." Trial counsel did not individually question these jurors. But he did question the panel as a whole to confirm that no juror had a problem with the reasonable doubt standard of proof, with defendant electing not to testify, and the presumption of innocence. He did question some prospective jurors, if not those whom Harris thinks he should have. In sum, we have reviewed the record and find no fault with defense counsel's performance during voir dire.

In addition to faulting trial counsel for inadequately questioning prospective jurors, Harris claims that trial counsel failed to object to the trial court's misstatements. The trial court, when reading the charges to prospective jurors, incorrectly said the information alleged that Harris used a gun and was out on bail or on his own recognizance. Trial counsel explained why he did not object. He said, "Let the jury hear [Harris] had a gun." Then "when I get to the evidence, he doesn't have a gun. I think that helps me a lot." We defer to this reasonable, tactical decision.

C. *Prosecutorial misconduct*

Harris contends that his trial counsel failed to object to the prosecutor's misstatements of fact and law in his opening statement and closing argument. First, the prosecutor said that Harris, rather than Prasad, pointed a gun at Mack and took

Mack's gun.[5] It is misconduct for a prosecutor to mischaracterize the evidence or to refer to facts not in evidence. (*People v. Thomas* (2011) 51 Cal.4th 449, 494.) Even so, the record suggests a reason why trial counsel did not object to this misstatement. Trial counsel did not object to a similar misstatement by the trial court, because he thought it was good for the jury to hear allegations that would easily be disproven. Thus, trial counsel may have applied a similar rationale in deciding not to object to the prosecutor's isolated misstatement.

Second, Harris contends that the prosecutor misstated the law when he repeatedly argued that aiders and abettors and direct perpetrators are "equally guilty." It is not a misstatement of law to say an aider and abettor and direct perpetrator are equally guilty, although it may be an incomplete one. That is, an aider and abettor may be equally guilty or may have a mental state giving rise to a greater or lesser degree of culpability than the direct perpetrator. (*People v. Nero* (2010) 181 Cal.App.4th 504, 518–519; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164–1165.) The prosecutor's statements and argument, in context, state these general principles. Indeed, in addition to saying that the parties are equally guilty, the prosecutor also explained that a person aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and intended to and did promote it. Accordingly, trial counsel was not ineffective for failing to object to accurate statements of law.

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[5] Harris asserts that the prosecutor made a similar misstatement in closing argument that Harris, rather than Prasad, took Mack's gun. However, the argument Harris cites, placed in context, shows that the prosecutor clearly argued that Prasad was the direct perpetrator.

II. Five-year prior

Harris's sentence included a five-year term for a prior serious felony under section 667 subdivision (a)(1). When he was sentenced in 2017, the trial court had no discretion to strike the enhancement. After he was sentenced, Senate Bill No. 1393 went into effect on January 1, 2019. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.).) That bill amended sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike or to dismiss a serious felony prior for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) Senate Bill No. 1393 applies retroactively to all cases, such as this one, not final when the bill took effect. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Remand is necessary for the trial court to exercise its discretion.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.