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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.

APOLINAR LOPEZ,

Defendant and Appellant.

2d Crim. No. B270123
(Super. Ct. No. 2013035673)
(Ventura County)

Apolinar Lopez appeals his conviction by jury of two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))¹ with great bodily injury findings (§ 12022.7, subd. (a)). The trial court sentenced appellant to 11 years state prison. Appellant contends that his conviction is not supported by substantial evidence and that trial counsel was ineffective in not presenting expert testimony on the reliability of eyewitness identification. We affirm.

¹ All statutory references are to the Penal Code.

Facts

On October 26, 2013, Aaron Banuelos and Aaron Landeros were stabbed outside Dargan's Irish Pub & Restaurant (Dargans) in downtown Ventura at closing time. Minutes before the stabbing, Landeros' friend, Vincent Godinez got into an argument with Martin Robles and Felipe De Los Reyes who were dressed in business suits. As people left the bar, a fight started with two or three groups of people exchanging harsh words. Landeros pushed De Los Reyes away from Godinez and felt something hit his back. Landeros realized that he had been stabbed, turned around, and saw his assailant run off and stab Banuelos multiple times.

Michael Garcia, an off-duty security guard, saw appellant swing his arm in an aggressive manner at Landeros' back. Garcia described the stabber as Hispanic, about 5' 7", mid 30s, heavy set with long, thick black hair, and wearing a gray sweater with black sleeves and a black hoodie.

Dargans security guard James Lopez Jr. (no relation to appellant) saw appellant make a swiping motion at Landeros and heard someone say, "He has a knife." Lopez then saw appellant run up behind Banuelos and stab Banuelos multiple times with a sharp object. Banuelos suffered seven stab wounds to the back, arm, and neck.

Carlos Ortiz was seated in his cab outside Dargans and saw appellant walk quickly away from the fight, hiding something in his pants. Appellant and a man with a striped shirt walked west on Main Street past a credit union ATM. The ATM surveillance video captured appellant lifting his sweatshirt and putting something in his pants.

California Highway Patrol Officers James McKay and Christopher Byrd saw a large crowd of people pushing and shoving one another in front of Dargans. Someone shouted that a patron had just been stabbed. Garcia, the off-duty security guard, stopped the officers and pointed appellant out as the stabber, as appellant quickly walked away. Garcia gave the officers a description of appellant's clothing, height, physical appearance, and hair color.

Officers McKay and Byrd followed appellant up Main Street to the Bank of America. Appellant initially refused to stop despite orders to do so. He was detained. He smelled of alcohol and was belligerent. The man in the striped shirt warned appellant not to say anything. Appellant said that he had been at the bar up the street when a big fight broke out. Officer McKay patted appellant down for weapons and, finding none, released him.

Edgar Guzman saw appellant and the man with the striped shirt leave the fight and walk up to the Bank of America. Guzman reported that one of the men tossed something in the bushes in front of the bank. The Bank of America ATM surveillance video captured appellant walk over to the bushes just before he was stopped by the CHP officers. Off-duty security guard Garcia looked at the ATM surveillance video, picked out appellant, and said he was the same man who stabbed Landeros.

Ventura Police Officer Arthur Gonzales interviewed the taxi driver (Carlos Ortiz) and followed a trail of blood drops up to the Bank of America. The officer looked in the bushes at the front of the bank and found a partially-open pocket knife covered with wet blood.

Expert testimony was received that appellant's, Banuelos', and Landeros' DNA was on the knife. It was a DNA "mixture" but identifiable. The DNA tests showed that Banuelos was a possible major DNA contributor and that appellant and Landeros were possible DNA contributors. Martin Robles and Felipe De Los Reyes were excluded as possible contributors. The DNA expert opined that the statistical likelihood of an unrelated Hispanic individual (i.e., appellant) being a possible DNA contributor was 1 in 13.

Appellant defended on the theory of misidentification. Four days after the stabbing, Landeros made a photo ID of Felipe De Los Reyes and said that De Los Reyes "is the guy that definitely stabbed me." At trial, Landeros admitted that he was mistaken and never saw "[t]he person that stabbed me."

After the jury returned guilty verdicts, appellant moved for a new trial on the ground that the eyewitness identifications were inconclusive. The trial court denied the motion and sentenced appellant to 11 years state prison.

Substantial Evidence

Appellant argues that the eyewitness identifications were unreliable and do not support the convictions. As in every sufficiency-of-the-evidence case, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. . . . The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

Although Landeros and Banuelos did not identify appellant, the other witnesses positively identified appellant as the stabber. James Lopez Jr., the Dargans' security guard, identified appellant in a photo lineup and said that photo "[n]o. 4 [appellant's photo] looks more like the person who did the stabbing." Appellant argues that it was a "tepid" identification and too vague to convict. Lopez, however, gave the police a physical description that closely matched appellant. Lopez said the stabber wore a dark sweater with a hoodie, was 5' 5" to 5' 7", and stocky with black hair. After the man stabbed Banuelos, he ran towards the Bank of America, holding a knife in his right hand.

Michael Garcia, the off-duty security guard, gave the police a similar description and said the stabber was a heavy set Hispanic man, early 30s, had a full head of shoulder-length hair, and wore a gray sweater with black sleeves and a hoodie. Surveillance videos at the credit union and Bank of America ATMs showed appellant wearing the same outfit and walking west on Main Street. Garcia testified that the man in the surveillance video was the same man who stabbed Landeros. When asked if he was sure, Garcia responded, "Absolutely, absolutely."

Edgar Guzman also made a photo ID of appellant and reported that appellant left the area when the police arrived. Appellant was wearing a gray, white, and black sweater and quickly walked away with another man toward the Bank of America where one of them tossed something in the bushes.

Appellant claims that the eyewitness identifications were contradictory and insufficient to convict. The same argument was rejected by the jury and by the trial court at the

motion for new trial. It is true that, four days after the stabbing, Landeros identified Felipe De Los Reyes as the stabber. Landeros, however, had his back to the stabber. After Landeros was stabbed, he turned and saw the stabber charge and stab Banuelos.² At trial, Landeros confirmed that De Los Reyes was not the stabber.

The jury was instructed that two people may witness the same event yet see or hear it differently (CALCRIM No. 226) and that the testimony of any one witness can prove any fact (CALCRIM No. 301). Here, two security guards witnessed the stabbings and provided a physical description of appellant that was corroborated by the other witnesses who saw appellant leave and ditch the knife. Appellant argues that the DNA evidence was inconclusive (a 1 in 13 statistic probability that appellant was a DNA contributor) but the DNA tests excluded Martin Robles and Felipe De Los Reyes as possible DNA contributors.

Citing *People v. Hall* (1964) 62 Cal.2d 104, a sufficiency-of-the-evidence case, appellant argues that the guilty verdicts are based on contradictory and unreliable eyewitness testimony. The fact that Landeros and Banuelos could not identify the assailant comes as no surprise. Both were stabbed in the back and never saw the assailant's face. The two security guards who did see the stabbings gave similar descriptions of the assailant and made positive photo identifications. Those identifications were corroborated by other witnesses, the ATM surveillance videos, the knife in the bush, and the DNA tests.

² Banuelos was “bull rushed” from behind and did not see the stabber. Banuelos did manage to push the stabber off his back and was sure it was not Felipe De Los Reyes or Martin Robles. “They were more off to the side of me.”

Stripped of its gloss, appellant asks us to reweigh the evidence. Appellant's arguments go to the weight of the evidence, not its substantiality or its sufficiency. On review, we do not substitute our judgment for that of the jury, reweigh the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Substantial evidence supports the jury finding that appellant stabbed Landeros and Banuelos outside the bar.

Ineffective Assistance of Counsel

Appellant argues that he was denied effective assistance of counsel because his trial attorney failed to present expert testimony on the reliability of eyewitness identification. To prevail on the claim appellant must show both deficient performance and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Weaver* (2001) 26 Cal.4th 876, 961.) "A defendant must prove prejudice that is a "demonstrable reality," not simply speculation.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) Reviewing courts will reverse on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his or her act or omission. (*People v. Vines* (2011) 51 Cal.4th 830, 875-876.)

Here the defense theory was mistaken identity. Trial counsel presented the defense in opening statement, vigorously cross-examined the victims and witnesses, and argued misidentification in closing argument. After the jury was instructed on the factors to consider in evaluating eyewitness identifications (CALCRIM No. 315)³, trial counsel utilized many

³ The jury was instructed that in evaluating eyewitness identification testimony, it should consider: whether the witness

of those factors in arguing misidentification. Although an attorney may present expert testimony to assist the jury, there is “no support for the claim that expert testimony must be presented by a defense attorney in *every* case” where the prosecution relies on an eyewitness identification. (*People v. Datt* (2010) 185 Cal.App.4th 942, 952 [jury instruction on evaluating witness identification factors can be used as substitute for expert testimony].) “The decision whether to call certain witnesses is a ‘matter[] of trial tactics and strategy which a reviewing court generally may not second-guess.’ [Citation.]” (*People v. Carrasco* (2014) 59 Cal.4th 924, 989.)

Appellant argues that an expert could have testified about the psychological factors that make eyewitness identifications unreliable and that it would assist the jury in evaluating the “tepid” photo ID by James Lopez Jr. Lopez’s identification, however, was corroborated by his statements to the CHP officers, by the off-duty security guard (Michael Garcia), by the taxi driver (Carlos Ortiz), by Edgar Guzman who saw

saw the perpetrator; light conditions, obstructions, distance, and the duration of the observation; how closely the witness was paying attention; whether the witness was under stress; how closely the witness’s description compares to the defendant; how much time passed between the event and time when the witness identified the defendant; whether the witness ever failed to identify the defendant; whether the witness changed his or her mind about the identification; how certain the witness was when he or she made the identification; whether the witness and the defendant are of different races; whether the witness was able to identify the participants in the crime; whether the witness identified defendant in a photographic or physical lineup; and any other circumstances affecting the witness’s ability to make an accurate identification. (CALCRIM No. 315.)

appellant toss an object in the bushes, by the ATM surveillance videos, and by the DNA on the knife. As a matter of trial tactics, counsel may have decided not to call an expert to avoid the risk that, on cross-examination, the expert would testify that eyewitness identifications by experienced security guards are more reliable than the average citizen.

Lopez and Garcia were trained security guards who were taught to watch bar patrons, identify aggressive patrons, and break up fights. Before the stabbing, appellant approached Lopez and Lopez put his hands out to “keep space and . . . so that . . . I [didn’t] get in harm’s way.” Lopez saw appellant stab Banuelos in the back. The second security guard, Michael Garcia, also saw the stabbings and was questioned by an officer about his identification. Garcia was adamant: “I knew exactly what I saw, which person, [and] what the person was wearing that did it.” Defense counsel, for tactical reasons, may have believed that calling an expert on eyewitness identifications would strengthen the prosecution’s case and undermine the defense theory of misidentification.

Appellant has failed to show that trial counsel was deficient and that there is a reasonable probability that, but for counsel’s unprofessional errors, a determination more favorable to appellant would have resulted. (*People v. Holt* (1997) 15 Cal.4th 619, 703; *People v. Datt, supra*, 185 Cal.App.4th at p. 953.) “Speculation about what an expert could have said is not enough to establish prejudice.” (*Grisby v. Blodgett* (9th Cir. 1997) 130 F.3d 365, 373.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Ryan J. Wright, Judge

Superior Court County of Ventura

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